INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?

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ANNULMENT OF AWARDS IN INTERNATIONAL ARBITRATION

Albert Jan van den Berg

1. INTRODUCTION

Any consideration of the annulment of arbitral awards quickly makes two matters apparent. First, while there seems to be an increase in attempts to have an award resulting from an international arbitration annulled, these attempts seldom succeed in most countries. Second, it is generally considered self-evident that an action seeking such annulment is available and has a cross-border effect. However, whether this is in fact self-evident may require reassessment in international arbitration in view of recent developments in legislation and case law in some countries, such as Belgium, France, Sweden and Switzerland, to the effect that annulment is no longer sacrosanct. It is the object of this presentation to pursue this reassessment.

The presentation is divided into three parts. First, the legal regime concerning annulment of arbitral awards as it still prevails today is restated. Second, recent developments are reviewed. And third, the question of whether, and if so to what extent, the annulment of arbitral awards should be retained in international arbitration is discussed.

At the outset, it should be made clear what the context is in which the annulment of awards in international arbitration is examined in this presentation. Any references to international arbitrations in fact refer to international commercial arbitration. This type of arbitration comprises both arbitrations between private parties and arbitrations between private parties and State entities.

The international element is either a difference in nationality of the parties or the cross-border nature of the transaction involved or both.

This presentation also assumes that international arbitration as defined above is legally rooted in the arbitration law of a given country. The arbitration law in question will normally be the arbitration law of the place of arbitration (which can be referred to as "the country of origin" or "home country").[1]

The presentation does not deal with arbitral awards resulting from the so-called "de-nationalized arbitration." In international commercial arbitration, such arbitrations are rather exceptional in practice. Failing an appropriate international treaty giving a legal basis to "de-nationalized arbitration," this type of arbitration in my opinion at present only exists in academic dreamland anyway.[2]

2. PREVAILING LEGAL REGIME GOVERNING ANNULMENT

A. Terminology

Annulment of an award refers, in principle, to a decision by a court in the country of origin to the effect that a document, which purports to be an arbitral award within the meaning of the arbitration law of that country, has no legal force and effect as an arbitral award. Terminology differs from one country to the next. Thus, one finds terms such as "setting aside," "vacatur," and "declaration of nullity." For the sake of not confusing the present question, it is assumed that the different descriptions refer to the same type of action, which will be referred to as "annulment" hereinafter.

[1] This presentation will not consider the rather theoretical situation where the parties agree that the arbitration is governed by an arbitration law of a country other than the place of arbitration. *See generally* for this question, van den Berg, *Non-Domestic Arbitral Awards under the 1958 New York Convention*, 2 ARB. INT'L 191 (1986).

[2] An exception should be made for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159. This Treaty provides for a self-sufficient system of truly international arbitration in the field of investment disputes. In view of the specific nature of the Washington Convention, actions for annulment of an award provided in Article 52 of the Convention will not be examined.

B. Proceedings and Grounds for Annulment

Almost all national arbitration laws provide in one way or another for the annulment of an award. It is beyond the scope of this presentation to deal with the many differences in these proceedings. The laws of some countries provide clearly for a single type of action for annulling an award. Others have a more complex procedural framework, partly provided for in the arbitration law itself and partly developed by case law.

There are also differences among arbitration laws with respect to the grounds upon which an arbitral award can be annulled. Broadly speaking, the grounds can be divided into the following categories:

1. Lack of a valid arbitration agreement;
2. Violation of the principles of due process;
3. Violation of the scope of authority (*infra*, *extra* or *ultra petita*);
4. Failure to follow rules on appointment of the arbitrators and the arbitral proceedings;
5. Formal invalidity of the award (including lack of signatures and, if applicable, reasons); and
6. Violation of public policy (including non-arbitrability).

For some countries, such as England, a seventh category can be added:

7. Error in law.[3]

However, in most countries it is a basic principle that the merits of an arbitral award cannot be reviewed by a court.

While the categories are to a certain extent the same, the major differences appear to be the cases brought under these categories by the legislations and courts in the various countries. Again, it would be beyond the scope of this presentation to deal with these differences.

[3] *See* Steyn & Veeder, *National Report: England*, in THE INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 35 (Suppl. 9, Sept. 1988).

C. Court Having Jurisdiction to Annul

As far as the question of which country's judicial authority has jurisdiction over the annulment of the award is concerned, it appears to be a generally accepted principle that this authority is the court in the country of origin of the award. In other words, it is the court in the country under whose arbitration law the arbitration was conducted and the award was made. As mentioned above, in the vast majority of cases that country is the country in which the place of arbitration is located.

This principle seems so well accepted that there is very little case law on it. The question did come up in a recent case decided by the U.S. District Court for the Southern District of New York, *International Standard Electric Corporation v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial.*[4] This case merits attention since it puts the above principle within the proper perspective under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958[5] ("the New York Convention"). The case concerned an arbitral award rendered under the auspices of the International Chamber of Commerce ("ICC") in Mexico City, which was the place of arbitration agreed upon by the parties. The contract in question provided that it would be "governed by and construed under and in accordance with the laws of the State of New York." Standard Electric then filed a petition in the United States District Court in New York to vacate (*i.e.*, annul) the award. Bridas cross-petitioned for dismissal of Standard Electric's petition to vacate on the grounds that the District Court lacked subject matter jurisdiction to grant such relief under the New York Convention, and requested enforcement of the award pursuant to the Convention.

Standard Electric relied for its annulment request on the text of Article V(1)(e) of the New York Convention, which is one of the grounds for refusal of enforcement, according to which an application for the setting aside or suspension of the award can be made only to the courts "of the country in which, or *under the law of which*, that award was made." Standard Electric argued that "the court of the country . . . under the law of which [the] award was made" refers to the country the substantive law of which, as opposed to the procedural law of which, was applied by the arbitrators. Hence, Standard Electric insisted that since the arbitrators in Mexico applied substantive New York law, the U.S. District Court in New York had jurisdiction to annul the award. The District Court dismissed Standard Electric's petition for annulment. The Court rightly held that the phrase in question does not refer to substantive law but rather to procedural (*i.e.*, arbitration) law:

> [T]he contested language in Article V(1)(e) of the Convention, ". . . the competent authority of the country under the law of which [the] award was made" refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract which was applied in the case.
>
> In this case, the parties subjected themselves to the procedural law of Mexico. Hence, since the situs, or forum of the arbitration is Mexico, and the governing procedural law is that of Mexico, only the courts of Mexico have jurisdiction under the Convention to vacate the award.[6]

D. Extraterritorial Effect of Annulment

Since the courts in the country of origin have exclusive jurisdiction over an action for annulment of an award, the question arises of what the legal effect is of a decision in the country of origin that annuls an award made in that country. There can be no doubt that once an award has been annulled, it becomes devoid of legal force and effect in the country of origin. But the lack of legal force and effect is also extended beyond the boundaries of the country of origin. That is the case if enforcement of the award is sought in other countries under the New York Convention. The aforementioned Article V(1)(e) of the Convention specifically provides that enforcement may be refused if the award has been set aside in the country of origin. This means that an annulment in the country of origin in principle has an extra-territorial effect under the New York Convention. However, as we will see later, this *erga omnes* effect abroad is not self-evident in some countries, such as France,

[4] International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, 745 F. Supp. 172 (S.D.N.Y. 1990), *reprinted in* 17 Y. B. COMM. ARB. 639 (1992).

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

[6] International Standard Electric Corp., *supra* note 4, at 178. The words "under the law of which" refer to an arbitration which is conducted by agreement of the parties under the arbitration law of a country other than the place of arbitration. *See*, for this rather theoretical possibility, van den Berg, *supra* note 1.

if enforcement is sought on a basis other than the New York Convention. This—in my opinion questionable—view by the courts in these countries will be discussed in sub-section 3.B.(1), below.

E. Annulment and Enforcement

An action for annulling an award should, of course, be distinguished from an action for enforcing an award. While an action for annulment as a rule is instituted by the party that has lost an arbitration, an action for enforcement is resorted to by the party that has prevailed in the arbitration and is faced with an award that is not honored by the losing party.

In most countries, enforcement of an award can take place only after a court has given permission to execute the award by public force. This permission is deemed required in view of the fact that an arbitral award is not rendered by judges designated by the State but by private individuals appointed by the parties. Some countries, however, allow enforcement even without the official blessing of a court, but these countries are few. The procedures and the extent of the control exercised by the courts over awards in enforcement proceedings differ from one country to the next.

Nevertheless, it seems justified to distinguish between enforcement of an award in the country of origin and enforcement abroad under the New York Convention. In most countries, the enforcement of an award made in the country where enforcement is sought consists of relatively quick, summary proceedings in which the control exercised by the courts over the arbitral award is very limited (usually violation of public policy only). In contrast, enforcement abroad under the New York Convention provides for more extensive control on the grounds of refusal for enforcement listed in Article V of the Convention.

What is interesting for the question of reassessing the annulment of awards in international arbitration is that the grounds for refusal of enforcement under the New York Convention come close to the grounds on which an award can be annulled in an increasing number of countries. As will be discussed later, this may have the effect that judicial control over the award can effectively be exercised in two fora on more or less the same

grounds (*i.e.*, in the country of origin in annulment proceedings and in the foreign country where enforcement is sought).

If enforcement of an arbitral award has been refused in the country of origin, the arbitral award can, in theory, still be capable of enforcement under the New York Convention in a foreign country. This is because the New York Convention does not list as one of the grounds for refusal of enforcement the case where enforcement of the award has been refused in the country of origin. This is a marked difference between refusal of enforcement and annulment in the country of origin. While annulment in the country of origin has an effect of *erga omnes* under the New York Convention, a refusal of enforcement legally lacks this force and effect. However, in practice, a refusal of enforcement in the country of origin may constitute persuasive authority in a foreign country where enforcement is sought.

3. RECENT DEVELOPMENTS

In the preceding section, the prevailing legal regime governing annulment of awards in the international context has been reviewed. Recent developments in legislation and case law in a number of countries raise the question of whether the prevailing regime should be revisited.

We must distinguish between developments regarding the country of origin (*see* 3.A., below) and those concerning the foreign country in which enforcement of the award is sought (*see* 3.B., below). Each category shows two developments.

In the country of origin, an action for annulling an award rendered in international arbitration is excluded by law in Belgium (*see* 3.A.(1), below), and may be excluded by agreement in Switzerland and Sweden (*see* 3.A.(2), below).

In a foreign country, the question of annulment of an award by a court in the country of origin comes up within the framework of enforcement of the award. Here it appears that the annulment of an award by a court in the country of origin need not be given effect at all by the courts in France if the New York Convention does not apply to the enforcement (*see* 3.B.(1), below), and may be given effect in a limited number of circumstances only by the courts in countries which have adhered to the European Conven-

tion on International Commercial Arbitration, Geneva, April 21, 1961[7] ("European Convention of 1961") (*see* 3.B.(2), below).

A. Country of Origin

(1) Exclusion of Annulment by Law

In 1972, Belgium adopted the Uniform Law set forth in the European Convention providing a Uniform Law on Arbitration, Strasbourg, Jan. 20, 1966.[8] By the Law of Mar. 27, 1985, entitled "Relating to the Setting Aside of Arbitral Awards," a fourth paragraph was added to Article 1717 of the Judicial Code, providing:

> The Belgian courts can take cognizance of an application to set aside only if at least one of the parties to the dispute decided in the arbitral award is either a physical person having Belgian nationality or residing in Belgium, or a legal person formed in Belgium or having a branch (*succursale*) or some seat of operation (*une siège quelquonque d'opération*) there.

In other words, when both parties to an arbitration are non-Belgian, annulment of an arbitral award by the Belgian courts is excluded altogether.

The legislative history of this amendment, which is unprecedented worldwide,[9] has been subject to little discussion. The amendment was first introduced in the Belgian Senate in 1981.[10]

[7] European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364. Although the European Convention is not so recent in comparison with the developments in Belgium, France, Sweden, and Switzerland, this Convention is included in this review as it also contains a system which deviates from the generally prevailing regime concerning annulment of awards in international arbitration. The following countries have adhered to the European Convention (as of Dec. 1992): Austria, Belarus, Belgium, Bulgaria, Burkina Faso, Cuba, Czechoslovakia, Denmark, France, Germany, Hungary, Italy, Luxembourg, Poland, Romania, Russian Federation, Slovania, Spain, Turkey, Ukrainian SSR, (former) USSR, Yugoslavia.

[8] European Convention Providing a Uniform Law on Arbitration, Jan. 20, 1966, Europ. T.S. No. 56. This Convention has not entered into force. Austria and Belgium signed the Convention. Austria has not implemented the Strasbourg Uniform Law. The Belgian implementing law dated July 4, 1972 is published in Moniteur Belge of Aug. 8, 1972. The law is set forth in Articles 1676 through 1723 of the Belgian Judicial Code. *See generally* Matray, *National Report: Belgium*, in THE INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Suppl. 8, Dec. 1987).

[9] With the exception of the former USSR where arbitral awards rendered under the auspices of the Foreign Trade Arbitration Commission could not be subject to a setting aside before the Soviet courts, see S. Lebedev, *National Report: USSR*, in THE INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 19.

[10] *See* for the history of the amendment H. van Houtte, *La loi belge du 27 Mars 1985 sur l'arbitrage international*, 1986 REVUE DE L'ARBITRAGE 29 (1986).

The reasons for the amendment can be summarized as follows. Because of its location and the ample language skills of its nationals, Belgium is an important center for international arbitration. The attractiveness of Belgium as a place of arbitration can be enhanced by excluding annulment of arbitral decisions "with which Belgium has nothing to do." The action for annulment "appears today often to be used purely for delaying procedures." Furthermore, actions for annulment "are unnecessarily burdensome for the Belgian judge" and "considering that everyone is complaining about the fact that the courts are overburdened" their task will be facilitated by excluding these proceedings from the Belgian courts.[11]

The scope of the amendment is *ratione personae* rather limited. None of the parties may have any Belgian contact. A more generous definition of international arbitration is offered by the UNCITRAL Model Law of 1985[12] and the French Decree on international arbitration of 1981.[13]

The Belgian amendment is extreme. No annulment whatsoever is possible. It is not even possible for the parties to agree that the Belgian courts will have jurisdiction to annul the award in international arbitration (a so-called "opting-in").

It is said that the exclusion of annulment by operation of law may create a trap for foreign parties who may not be aware of such an extraordinary statutory provision, which is virtually unknown in any other country of the world. This observation does not sound entirely convincing, since parties nowadays have all means available to acquaint themselves with the law and practice of

[11] Parliamentary Documents Senate (1982-1983) no. 513-1, page 1 and no. 513-2, page 2; Parliamentary Documents Chamber (1984-1985) no. 1037-2, page 2; quoted in van Houtte, *supra* note 10, at 30. The other arguments are discussed in Part 4 *infra*. It should also be noted that one of the amendment's promoters (M. Storme) stated that if the amendment were adopted, it would have the result that "our law would thus align itself with the 4 July 1979 Reform of English Law (Arbitration Act 1979) which provides *inter alia* that the right to appeal before the High Court may not be exercised against international awards." Parliamentary Documents Senate (1980-1981) no. 582. J. Paulsson, *Arbitration unbound in Belgium*, 2 ARB. INT'L 68, 68 n.5 (1986) rightly expresses his astonishment about this statement. The Arbitration Act 1979 merely limited appeals on the merits in English courts to questions of law (a review which, as a matter of principle, is excluded in almost all other countries) but in no way excluded or even limited the annulment of awards in England.

[12] *See* Article 1(3) of the UNCITRAL Model Law on International Arbitration, adopted June 21, 1985, UN Doc. A/40/17, Annex 1 (1985), *reprinted in* 11 Y.B. COMM. ARB. 380 (1986).

[13] "An arbitration is international if it implicates international commercial interests." Code de procédure civile [C. pr. civ.] art. 1492 (Fr.).

arbitration in many countries, including Belgium. However, it may raise the question of whether an arbitral institution may designate Belgium as the place of arbitration without the consent of the parties. For example, Article 12 of the ICC Arbitration Rules provides that if the parties have not agreed on the place of arbitration, the ICC International Court of Arbitration may designate the place. Considering the serious nature of the exclusion of an annulment, which is a remedy that is considered by a number of parties to be a fundamental right, one may wonder whether the ICC International Court of Arbitration is entitled to curtail this right by designating Belgium as the place of arbitration.[14]

The amendment does not have the effect that arbitrations in Belgium between non-Belgians are so-called "denationalized" or "floating" arbitrations. Thus, in this type of arbitration in Belgium, the Belgian courts remain competent to appoint an arbitrator in cases where the tribunal cannot be constituted for some reason and to decide on a challenge to an arbitrator. The Belgian courts can order the appearance of witnesses, the examination of books, or the production of documents. They can also impose a period within which the arbitral award is to be made. It is also said that in this type of arbitration, the arbitrators must comply with Belgian public policy.[15]

The effect of the amendment is that it concentrates judicial control over the international arbitration process on the enforcement court.

For enforcement of Belgian awards between non-Belgians *in foreign countries*, there does not seem to be a problem. In most cases, enforcement abroad will be governed by the New York Convention. Some have questioned whether the New York Convention can apply to the type of Belgian awards under discussion.[16] Since Belgian awards between non-Belgians remain governed by Belgian arbitration law, as amended, there seems little room to argue that the New York Convention does not apply.[17] The

[14] It is the author's understanding that the ICC International Court of Arbitration will honor an objection by a party to a designation by the Court of Belgium as place of arbitration.

[15] van Houtte, *supra* note 10, at 36.

[16] van Houtte, *Internationale Arbitrage in België, in* L'ARBITRAGE/HET SCHEIDSGERECHT 89, 107 (1983). It remains, however, puzzling that, being Party to the New York Convention, a State can render inoperative a ground for refusal of enforcement provided in the Convention, *i.e.*, Article V(1)(e), by a unilateral legislative enactment.

[17] *See*, for the question whether the New York Convention applies to the so-called "delocalized arbitration," van den Berg, *Recent Enforcement Problems under the New York and ICSID Conventions*, 5 ARB. INT'L 2, 5 (1989).

amendment has the effect that one of the grounds for refusal of enforcement under the Convention is not available, *i.e.* the ground set forth in Article V(1)(e) according to which enforcement may be refused if the award "has been set aside . . . by competent authority of the country in which, or under the law of which, that award was made." The other grounds for refusal of enforcement under the New York Convention are sufficiently comprehensive to provide an adequate judicial control over the arbitral process.

In particular, compliance with the mandatory rules of Belgian law with respect to the appointment of the arbitrators and the arbitral proceedings are safeguarded through Article V(1)(d) of the New York Convention. Although the text of this ground for refusal refers in the first place to the agreement of the parties on the constitution of the arbitral tribunal and the arbitral proceedings and only in the absence of such agreement to the law of the place of arbitration, it can be assumed that if the parties have agreed on these matters the mandatory rules of the arbitration law of the place of arbitration prevail.[18]

But what about enforcement *in Belgium* of an arbitral award made in that country between non-Belgians? Here, the extent of control seems to be more limited than the control offered by the New York Convention in enforcement proceedings of the same award abroad. Article 1710(3) of the Belgian Judicial Code provides: "The President [of the Court of First Instance] shall refuse the application [for annulment] if the award or its enforcement is contrary to *ordre public* or if the dispute was not capable of settlement by arbitration." These two grounds for refusal of enforcement correspond to Article V(2)(a) and (b) of the New York Convention. It would seem to leave uncovered all grounds for refusal of enforcement listed in the first paragraph of Article V of the Convention. Even under the most generous interpretation of *ordre public* in Belgium,[19] there seems to be an unbalanced treatment of enforcement of an award made in Belgium between non-Belgians, depending on whether enforcement is sought in Belgium (in which case article 1710(3) of the Belgian Judicial Code

[18] *See id.* at 8.

[19] Matray, *supra* note 8, at 20, states that the examination by the President of the Court of First Instance "has merely a cursory nature." van Houtte, on the other hand, states that *ordre public* covers a wide range of grounds: "arbitrability of the dispute, observance of due process, irregular arbitral proceedings, impartiality of the arbitrators, acceptable reasons and decision," TYDSCHRIFT VOOR ARBITRAGE 1, 3 (1986).

applies) or in a foreign country (in which case as a rule the New York Convention applies). As we will see later, the Swiss legislator has catered for this divergence by providing that in the event annulment has been excluded by agreement of the parties in an international arbitration in Switzerland, enforcement in Switzerland of an award resulting from such arbitration is subject to an analogous application of the provisions of the New York Convention.

A proponent of the Belgian amendment described it as a "paradise for international arbitration."[20] Yet, it does not seem to have increased the number of international arbitrations in Belgium. Some even say that the number has decreased, as parties appear to be reluctant to give up the right to challenge an award in the courts.

(2) Exclusion of Annulment by Agreement

On August 27, 1969, the Swiss Federal Government approved an intercantonal agreement unifying the laws on arbitration (the "Concordat"). Out of the twenty-six cantons, twenty-five have now adopted the Concordat.[21] The only dissenter is Lucerne, which is in the process of joining the Concordat. The Concordat was, however, considered too parochial, and, on December 18, 1987, the Swiss Parliament enacted the Swiss Private International Law Act, which contains a Chapter XII (Articles 176-194) that governs "international arbitration."[22] By doing so, the Swiss introduced on a federal level a specific act for international arbitration in Switzerland. Article 192 of the Act provides:

1. Where none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds [for annulment] listed in Article 190(2).
2. Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards shall apply by analogy.

[20] Storme, *Belgium: A Paradise for International Commercial Arbitration*, 14 INT'L BUS. LAW 294 (1986).

[21] *See generally* Briner, *National Report: Switzerland, in* THE INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Suppl. 12, Jan. 1991).

[22] AS 1987, 1779-1831 SR 291 (Switz.).

Consequently, the parties to an international arbitration in Switzerland may exclude the possibility of annulment before the Swiss courts by agreement. The agreement is subject to two conditions:

(1) None of the parties may have their domicile, habitual residence, or business establishment in Switzerland, and

(2) The exclusion must result from an express statement in the arbitration agreement or in a subsequent written agreement.[23]

The exclusion of annulment of an award in international arbitration is less far-reaching than in Belgium, since it is not achieved by statute in all cases, but requires a specific agreement of the parties (the so-called "opting-in"). Furthermore, the discrepancy between enforcement in the country of origin and enforcement abroad which appears to exist in Belgium does not exist in Switzerland, as the above-quoted article 192(2) provides that enforcement of the award shall take place on the basis of an analogous application of the New York Convention.

In fact, the existence of the New York Convention appears to be one of the main reasons for the possibility of excluding annulment of the award in international arbitration in Switzerland. The Swiss legislator considers double judicial control over the arbitral process redundant, *i.e.*, judicial control over the same arbitral award in annulment proceedings in Switzerland and—possibly similar—control exercised by a foreign court in enforcement proceedings under the New York Convention.[24]

Nevertheless, while initially conceived as an all-encompassing solution and one of the most prominent justifications of the regulation of international arbitration on the federal level, it is now believed that the possibility of excluding annulment will not in practice be used frequently in Switzerland. This limited use is thought to be due not only to the aforementioned two conditions, but also to "the prudence of the parties, who are more concerned about certainty than about rapidity and economy, at least when significant interests are at stake."[25] Furthermore, as an author

[23] This formal requirement means that an indirect exclusion, for example, an exclusion set forth in arbitration rules, is not sufficient. *See* Blessing, *The New International Arbitration Law in Switzerland. A Significant Step to Liberalism*, 5 J. INT'L ARB. 9, 75 (June 1988); A. BUCHER AND P.-Y. TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND 145 (1989).

[24] Message of the Federal Council concerning a Swiss Private International Law Act of 10 November 1982, 197 ch. 21.01.27.

[25] Poudret, *Les voies de recours en matière d'arbitrage international en Suisse selon le Concordat et la nouvelle loi fédérale*, REVUE DE L'ARBITRAGE 595, 616 (1988).

observes, the risk of litigation after the award is not totally excluded, since parties disappointed by an arbitral award will undoubtedly attempt to question in court the extent and effects of the exclusion agreement itself.[26]

The observations concerning limited use must also be seen in light of the provision in the new Swiss International Act that the highest Swiss court (*Tribunal Fédéral*) is the sole competent authority for entertaining actions for annulment of arbitral awards rendered in international arbitration in Switzerland. If there is only one available instance for recourse, considerations of delay apply less forcefully. Here again, there is a marked difference with Belgium, where annulment proceedings in arbitrations not covered by the statutory exclusion can be pursued through three different judicial instances.

Similarly, Sweden would appear to allow the exclusion by agreement of annulment of an arbitral award rendered in international arbitration in Sweden. According to a decision of the Swedish Supreme Court, dated April 18, 1989, *Solel Boneh International Limited and Water Resources Development (International) Limited v. The Republic of Uganda and the National Housing and Construction Corporation of Uganda*,[27] if the parties do not have any contact with Sweden (which was the case, as the nationalities involved were Israeli and Ugandan):

> Such parties must be considered entitled to agree—even before any dispute arises between them—to limit their right to challenge the award in a Swedish court on account of formal deficiencies.

The Supreme Court, however, considered that no such agreement had been made in the present case. The observation of the Swedish Supreme Court is *obiter dictum*. It is unclear under what conditions the exclusion agreement may be made and what the extent of the exclusion agreement is, in view of the Supreme Court's reference to "formal deficiencies."

[26] Paulsson, *infra* note 27, at 597 n.16.

[27] Solel Boneh Int'l Ltd. & Water Resources Dev. Ltd. v. Republic of Uganda, Supreme Court, April 18, 1989, no. Sö 203, reported in English in 16 Y.B. Comm. Arb. 606 (1991); and in French by Paulsson, *Arbitrage international et voies de recours: La Cour suprème de Suède dans le sillage les solutions belge et helvétique*, 117 J. de Droit Int'l 589, 598 (1990).

B. Foreign Enforcement Country

In the preceding sub-section 3.A., the question of annulment was discussed from the perspective of the country of origin. We now turn our attention abroad and consider the question of if and to what extent the annulment of an award by a court in the country of origin will be given effect by the foreign courts before which enforcement of the award is sought, as a foreign award. This question comes up in cases of enforcement of foreign awards outside the New York Convention. If the New York Convention applies, annulment of the award by a court in the country of origin constitutes a ground for refusal of enforcement pursuant to Article V(1)(e) of the Convention. The New York Convention, however, allows one to rely on more favorable domestic law concerning the enforcement of foreign arbitral awards (Article VII(1) of the Convention). Some countries, including France, do indeed have domestic law on enforcement of foreign arbitral awards which appears to be more favorable than the New York Convention.

(1) No Effect to Annulment

France is one of the few countries that have two separate statutes for arbitration taking place in France. One statute, enacted by a Decree in 1980, applies to domestic arbitration. Another, enacted by a Decree in 1981, applies to international arbitration.[28] Both decrees are incorporated into a new Book IV in the New French Code of Civil Procedure. Titles I to IV (Articles 1442 to 1491) deal with domestic arbitration, and Titles V and VI (Articles 1492 to 1507) concern international arbitration. Title V applies to international arbitration in general. Title VI of the Decree of 1981 carries as caption: "Recognition and enforcement of, and means of recourse against, arbitral awards rendered abroad or in international arbitration."

Title VI is somewhat complicated with respect to the enforcement of arbitral awards. It deals at the same time with awards rendered abroad and awards rendered in international arbitration in France. In the same context, it draws a distinction between

[28] *See generally* Derains, *National Report: France*, in The International Handbook on Commercial Arbitration (1984).

grounds for refusal of enforcement that can be invoked before the President of the Court of First Instance and those which can be invoked on appeal.

The procedure is that if enforcement of an arbitral award rendered abroad or in international arbitration in France is sought, the request for enforcement is to be brought before the President of the Court of First Instance. This procedure is unilateral (*ex parte*). The petitioner must submit the original of the arbitral award and the arbitration agreement or copies of these documents accompanied by proof of their authenticity. The President of the Court of First Instance may refuse enforcement only if it would be "manifestly contrary to international public policy (*ordre public*)." If enforcement is granted by the Court of First Instance, the respondent may appeal to the Court of Appeal. In these proceedings, the following grounds for refusal of enforcement may be considered, pursuant to Article 1502:

> An appeal against a decision granting recognition or enforcement may be brought only in the following cases:
>
> 1. If the arbitrator decided in the absence of an arbitration agreement on the basis of a void or expired agreement;
> 2. If the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;
> 3. If the arbitrator decided in a manner incompatible with the mission conferred upon him;
> 4. Whenever due process has not been respected;
> 5. If the recognition or enforcement is contrary to international public policy (*ordre public*).

Contrary to Article V(1)(e) of the New York Convention, the grounds listed in Article 1502 of the French New Code of Civil Procedure do not include as a ground for refusal of enforcement the annulment of the award by a court in the country of origin.

The decision of the Court of Appeal of Paris (First Chamber) dated December 19, 1991, *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation (OTV)*, is one of the few cases where the new law is applied in relation to the annulment of an award by a court in the country of origin.[29] The case concerned a contract dated December 12, 1980 between the French Company OTV and the

[29] Judgment of Dec. 19, 1991 (Hilmarton Ltd. v. Omnium de Traitement et de Valorisation), Cass. civ. 1re, no. 90-16 778 (Fr.).

English company Hilmarton. Under the contract, Hilmarton was, in exchange for payment of fees, to give advice on legal and tax matters, and to coordinate administrative matters with respect to the procurement and performance by OTV of an important public project in Algeria. When the project was awarded to OTV, a dispute arose over the balance of the fees. The contract between Hilmarton and OTV provided for ICC arbitration in Geneva. By an arbitral award dated August 19, 1988, the sole arbitrator rejected Hilmarton's claim for payment of the balance of the fees, considering that the contract was null and void since it has as its object the payment of bribes.

On February 27, 1990, OTV obtained a leave for enforcement on the award from the President of the Court of First Instance in Paris. In the meantime, Hilmarton obtained the annulment of the award in Switzerland before the Court of First Instance in Geneva on November 21, 1989, which judgment was confirmed by the highest Swiss court (*Tribunal Fédéral*) on November 17, 1990. The Court of Appeal of Paris in turn affirmed on December 19, 1991 the leave of enforcement granted by the Court of First Instance of Paris. The Court reasoned that, according to Article VII(1) of the New York Convention, the provisions of the Convention do not deprive a party of the right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. Under these circumstances, the Court observed, OTV was entitled to rely on French law concerning the enforcement of awards made abroad. The Court pointed out that unlike Article V(1)(e) of the New York Convention providing for refusal of enforcement in the case of annulment of the award in the country of origin, French law on enforcement of awards made abroad does not contain such a ground for refusal of enforcement:

> Considering that French law on international arbitration does not oblige a French judge to take into account an annulment decision on the award given within the framework of the foreign internal order (*dans l'ordre interne étranger*), and that, hence, the incorporation in the French legal order of an award which was rendered in international arbitration and which was annulled abroad on the basis of local law, is not contrary to international public policy (*ordre public*) within the meaning of Article 1502(5) of the New Code of Civil Procedure.

It is interesting to note that in 1990, as allowed by Swiss law, Hilmarton requested the ICC to reopen the case due to the setting aside by the Swiss courts of the award rendered on August 19,

1988. Another sole arbitrator was appointed and, unlike his colleague in the first arbitration, he decided in an award made on April 10, 1992 that the contract was valid and awarded Hilmarton's claim for payment of the balance of the fees. One wonders whether Hilmarton will be able to enforce the second award against OTV in France now that the French courts have already granted enforcement on the first award rendered between the same parties on the same subject matter, since the awards flatly contradict each other.

The French view that no effect need be given to an annulment decision by a court in the country of origin was already expounded by the highest French court (*Cour de Cassation*) in the famous case of *Pabalk v. Norsolor*.[30] The case involved an arbitral award made in Vienna on October 26, 1979 between the French Company Norsolor and the Turkish Company Pabalk. In the award, the arbitrators held—probably much to the surprise of the parties—that, in the absence of a choice of law in the contract, "it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*." Norsolor, having lost the arbitration, sought the annulment of the award before the Austrian courts, arguing that by relying on the *lex mercatoria* the arbitrators had acted beyond the scope of the arbitration agreement. On June 29, 1981, the Commercial Court of First Instance in Vienna dismissed the action for annulment. In the meantime, Pabalk had obtained a leave for enforcement from the President of the Court of First Instance of Paris on February 4, 1980. On January 29, 1982, however, the Court of Appeal of Vienna partially annulled the arbitral award, reasoning that the arbitral tribunal had exceeded the scope of its authority by basing its decision on equity, referring to the *lex mercatoria* as a "world law of questionable validity." In France then, by a decision dated November 19, 1982, the Court of Appeal of Paris decided that the January 29, 1982 Vienna Court of Appeal decision annulling the award should lead to a partial refusal of enforcement of the award on the ground mentioned in Article V(1)(e) of the New York Convention ("enforcement may be refused . . . if the award . . . has been set aside . . . by a competent authority of the country in

[30] Judgment of Oct. 9, 1984, Cass. civ. 1re (Fr.); *reported in* 11 Y.B. COMM. ARB. 484 (1986).

which . . . the award was made."). By a decision dated October 9, 1984, the highest court of France (*Cour de Cassation*) censured the Court of Appeal of Paris for not having investigated whether French law would allow Pabalk to avail itself of the award. The Court of Cassation referred explicitly to the more favorable rights provision of Article VII(1) of the New York Convention. It should be noted that the case involved the application of French law existing prior to the Decree of 1981 which, however, would also seem to imply that it is not necessary for the French courts to give effect to an annulment of an arbitral award by a Court in the country of origin.[31]

The main reason for which no effect need be given in France to an annulment of an award by a court in the country of origin seems to be the view that in international arbitration an arbitral award is not incorporated in the legal order of the country where the award is merely located geographically.[32] One of the leading French arbitration experts, Me. Yves Derains, Paris, explained the French position as follows. The French system for the recognition and enforcement of arbitral awards made in another country is a so-called unilateral system (as opposed to the bilateral system, a well-known topic of discussion in the field of international private law). The incorporation of the arbitral award into the French legal order is defined by French law only. These rules are territorial in nature. As is characteristic of the unilateral approach, these rules are not concerned with the incorporation of an award in a foreign legal order, even if the latter is the place where the award has been made. The question of whether the arbitral award is incorporated in another legal system does not play any role. The rationale of

[31] The case has a long procedural history. An overview of the proceedings with references can be found in the reporting of this case in 11 Y.B. COMM. ARB. 484 (1986). For case comments, see references in Yearbook Key 1990, 263-64, accompanying 15 Y.B. COMM. ARB. 263 (1990).

[32] Goldman, *Une bataille judiciaire autour de la lex mercatoria: l'affaire Norsolor*, REVUE DE L'ARBITRAGE 379, at n.12 (1983). The French Decree of 1981 concerning international arbitration refers in the caption of Title VI to "recognition and enforcement of . . . arbitral awards rendered abroad or in international arbitration." The same reference to awards rendered abroad "or in international arbitration" can be found in the captions of Chapters I and II which comprise Title VI. Arbitral awards rendered abroad, however, are not necessarily limited to international transactions. Thus, two French companies may arbitrate in Switzerland with respect to a transaction which is entirely located in France. Nevertheless, authors argue that the rule of not giving effect to foreign annulment decisions is limited to awards rendered abroad in international arbitration. *Id.* This view appears to be confirmed by the Court of Appeal of Paris in *Hilmarton*, quoted above, which refers to "an award rendered *in international arbitration* which was annulled abroad by application of local law." Hilmarton, *supra* note 29 (emphasis added).

this sytem is that an arbitral award which is acceptable to a French judge should not be refused force and effect because a foreign judge has different ideas about its acceptability. Furthermore, in France, the notion of the nationality of an award does not exist. There are awards rendered abroad or awards rendered in France in international matters. English, German, Italian, etc. awards do not exist.

It is submitted that the French unilateral theory leads to an unbalanced situation, as is demonstrated by the *Hilmarton* case, discussed above. The first award in that case, which had been annulled by the Swiss courts, could be enforced in France only but not in other countries under the New York Convention. In contrast, the second award can probably not be enforced in France in view of the leave for enforcement given on the first award, but it can be enforced in other countries under the New York Convention. Moreover, while no effect is given to the annulment of an award in the country of origin, such effect *is* given if the award is made in France and annulled there. Article 1504(1) of the Decree of 1981 provides that: "an arbitral award rendered in France in international arbitral proceedings is subject to an action to annul on the grounds set forth in Article 1502." Such an annulment leads in turn to a refusal of enforcement in France (and abroad under the New York Convention). On a more general level, one wonders why arbitral awards made abroad are, according to the French view, not subject to the arbitration law of the place of arbitration, while awards made in France are legally rooted in French (international) arbitration law. The Decree of 1981 clearly gives a legal basis for international arbitration taking place in France. Thus, Article 1493 provides for the assistance of the French courts "with respect to an arbitration taking place in France, or to one for which the parties have agreed that French procedural law should apply" in the event the constitution of the arbitral tribunal runs into difficulties. (See also Article 1504(1) quoted above.) Why then would this legal concept be different for arbitral awards rendered in another country in international arbitration?

(2) Limited Effect to Annulment

The European Convention on International Commercial Arbitration of 1961[33] does not exclude the giving of effect by a foreign

[33] *See supra* note 7, which also lists the Contracting States.

enforcement court to an annulment of an award by a court in the country of origin, but rather limits that effect. Before discussing this specific feature of the European Convention, some general observations should be made about this Convention.

The European Convention of 1961 must be seen in its historical context. In October 1954, the United Nations Economic Commission for Europe concerned itself for the first time with problems of international arbitration of private disputes and decided to set up a special working party to examine the steps which could be taken on a European scale. The preparatory work by the government representatives was extremely arduous and took a considerable amount of time.[34]

The object of the European Convention is, according to its preamble, to promote "development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries." Although the text of the Convention avoids using the term "Eastern and Western European countries," its main purpose is, or rather nowadays was, arbitration in East-West trade. However, the Convention does not preclude its applicability to inter-Western and inter-Eastern European relations.

It should be noted, however, that the Convention's main purpose has not obtained the desired results in practice, as the Convention has virtually never been applied in East-West relations. This failure is not surprising in light of the complexity of the Convention's provisions, especially those concerning the constitution and functioning of the arbitral tribunal (Article IV of the Convention).

The European Convention contains extensive provisions on, *inter alia*, the constitution of the arbitral tribunal, pleas as to the arbitral jurisdiction, the jurisdiction of the courts in relation to arbitration, the law applicable to the substance of the dispute, and the reasons for the award. The European Convention does not provide for the enforcement of the award. Enforcement is to be dealt with on the basis of the New York Convention in conjunction with the European Convention, save that the European Convention in its Article IX limits ground (e) of Article V(1) of the

[34] *See* Pointet, *The Geneva Convention on International Commercial Arbitration*, in 3 INT'L COMM. ARB 263, 265 (P. Sanders ed., 1965). *See also* Benjamin, *The European Convention on International Commercial Arbitration*, 37 BRIT. Y.B. INT'L L. 478 (1961).

New York Convention, which limitation will be discussed presently. For the rest, the European Convention merely complements the New York Convention in those cases where the arbitration agreement and arbitral award fall under both Conventions.[35]

Article IX, headed "Setting Aside of the Arbitral Award," provides:

> 1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:
>
> (a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
>
> (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
>
> (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.
>
> 2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

Originally, the drafters of the European Convention had the intent of making uniform among the Contracting States the various grounds for which an award may be set aside with international effects in other jurisdictions. Such a unification of arbitration laws,

[35] *See* for the European Convention of 1961 in general, including its application by the courts and arbitral tribunals, Hascher, *Commentary: European Convention on International Commercial Arbitration of 1961*, 17 Y.B. COMM. ARB. 711 (1992).

however, was deemed too far-reaching and, consequently, it was decided to change the scope of Article IX of the European Convention into a system whereby only the effects of annulment of an award in a Contracting State are limited in respect to enforcement of that award in another Contracting State.[36]

Article IX requires three conditions for the annulment of an award in the country of origin to constitute a refusal of enforcement in another Contracting State:

(1) The award must be "covered by [the] Convention." Consequently, it must be an award which results from an arbitration falling under the Convention's field of application as defined in Article I.[37]

(2) The annulment must have taken place in a Contracting State, which is either the State where the award was made or (a theoretical possibility)[38] under the law of which it was made.

(3) The award must have been annulled on one of the four grounds enumerated in Article IX(1)(a)-(d). These grounds are virtually identical to the grounds for which an award may be refused enforcement under Article V(1)(a)-(d) of the New York Convention.[39]

Paragraph 2 of Article IX of the European Convention specifies how the first paragraph of this Article is to be applied in those cases in which enforcement is sought under the New York Convention. In cases of concurrent applicability of the European and

[36] This change in object of Article IX has not been fully realized, as the title of Article IX ("Setting Aside of the Arbitral Award") shows. Article IX does not deal with annulment but rather with the effects of annulment in foreign enforcement proceedings. A similar trace of the original object of Article IX can be found in ground (c) of paragraph 1, which provides that if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration "need not be set aside." Since Article IX, according to its final object, is to be applied by an enforcement judge, these words should have read "may be recognized and enforced," as is stated in the corresponding ground for refusal of enforcement of Article V(1)(c) of the New York Convention. *See* Hascher, *supra* note 35, at 741.

[37] The Convention applies to arbitration and awards resulting from "arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States" (art. I(1)(a)).

[38] *See supra* note 1.

[39] With the exception of ground (c), see *supra* note 36, and ground (d) *in fine*.

New York Conventions, a court dealing with a request for enforcement of a foreign arbitral award under the New York Convention may refuse enforcement of such award on the ground that it has been annulled in the country of origin (*i.e.*, Article V(1)(e)) only if such annulment has taken place on one of the grounds listed in Article IX(1)(a)-(d) of the European Convention. It should be emphasized that the second paragraph of Article IX of the European Convention does not affect the other grounds for refusal of enforcement set out in Article V of the New York Convention.

The drafters of the European Convention thought it to be excessive to give the authority of international *res judicata* to any annulment decision in the country of origin because the grounds on which awards can be annulled vary greatly from country to country. In particular, the grounds listed in paragraph 1 of Article IX of the European Convention do not comprise annulment for reasons of public policy, which includes non-arbitrability of the subject matter. The drafters of the European Convention were unwilling to allow a foreign enforcement court to give effect to an annulment in the country of origin for reasons of public policy pertaining to the country of origin only. This may lead to the somewhat incongruous situation in which arbitrators who have not observed the public policy of the place of arbitration render an award that is annulled by the court at the place of arbitration, but capable of enforcement in other countries under the European Convention.

It should be mentioned that no case has been reported in which the European Convention is relied upon for granting enforcement of an award that has been annulled in the country of origin on grounds other than those listed in Article IX(1) of the European Convention.

4. SHOULD THE ACTION FOR ANNULMENT OF ARBITRAL AWARDS BE RETAINED IN INTERNATIONAL ARBITRATION?

Having reviewed in the foregoing part recent developments concerning the annulment of the award, I propose in this part first to assess the motives for the above developments, second to summarize the disadvantages these developments may cause, and

third, to conclude whether or not the annulment of arbitral awards should be retained in international arbitration.

A. Assessment of Motives for Above Developments

Roughly speaking, the motives given for the above developments fall into three categories: international arbitration should not be impeded by local arbitration laws (*see* 4.A.(1), below); annulment proceedings cause unnecessary delay (*see* 4.A.(2), below); and annulment proceedings amount to double judicial control (*see* 4.A.(3), below).

(1) International Arbitration Should Not Be Impeded by Local Arbitration Laws

The arguments for this conclusion are twofold. The first argument is that excessive court interference in international arbitral awards should be avoided and, in any case, not exported. Thus, annulment of arbitral awards on the basis of some local particularities or parochial views concerning public policy should have no effect in international arbitration.

This argument does not apply in the country of origin, since the control which is considered excessive abroad is exercised anyway, either in annulment proceedings or, if they are not available, in enforcement proceedings in that country. As far as enforcement abroad is concerned, it is to be noted that this argument had force some twenty years ago, but that nowadays court interference in the country of origin is less excessive in many countries as a result of the increasingly favorable attitude towards arbitration.

The second argument is that the choice of the place of arbitration in international arbitration is made for reasons of convenience only. Consequently, local arbitration laws should not interfere. Again, this argument was valid some twenty years ago. Nowadays, parties generally choose a place of arbitration that provides an adequate legal framework for their arbitration. Parties do inquire about this aspect and are well-informed about the law and practice in many countries by a number of readily accessible publications.

Furthermore, the second argument is in fact based on the so-called "delocalized" arbitration, *i.e.*, an arbitration without any

applicable arbitration law. Such arbitrations are not accepted in a vast majority of countries. Nor is doing away with annulment the proper mechanism for arriving at delocalized arbitration. In Belgium, for example, the exclusion of annulment does not mean that Belgian arbitration law is inapplicable to arbitration law in Belgium.[40] In France, international arbitrations taking place in that country are subject to French international arbitrations, including the possibility of annulment under that law. It is therefore curious that in France this argument is advanced with respect to the annulment of awards made abroad to which annulment the French courts do not give effect in cases in which enforcement is not based on the New York Convention.[41]

(2) Annulment Entails Unnecessary Delay

The argument is that annulment proceedings in the country of origin can cause considerable delays. This is indeed true for a number of countries. However, more modern arbitration laws limit the number of judicial instances before which the annulment of an award can be brought. For example, in Switzerland, annulment of international arbitral awards is limited to one instance, *i.e.*, the highest Swiss court (*Tribunal Fédéral*).

In addition, the commencement of annulment proceedings in the country of origin does not foreclose the possibility of seeking enforcement of the award in other countries under the New York Convention. According to Article VI, if the annulment of an award is requested in the country of origin, the foreign enforcement court may adjourn the decision on enforcement and may also, on the application of the petitioner, order the respondent to put up suitable security. The words "may adjourn" and "if it considers it proper" in Article VI indicate that the court has discretionary power to adjourn its decision on enforcement of the award and to order a respondent to provide security, pending the annulment proceedings in the country of origin. Article VI, therefore, offers a balanced solution between the application for annulment for reasons of delay only and the right of a bona fide party to contest the validity of the award in the country of origin.

As far as enforcement of the award in the country of origin is concerned, whether an action for annulment has adverse effects

[40] *See supra* note 15 and accompanying text.
[41] *See supra* sub-section 3.B.(1).

depends on the arbitration law of that country. For example, in France, the commencement of an action for annulment of an international award suspends by operation of law the enforcement of the award in that country.[42] On the other hand, in the Netherlands, the initiation of an action for annulment has no suspension effect on the enforcement proceedings; suspension of the enforcement must specifically be requested from the court, which may grant the suspension subject to suitable security by the party seeking annulment of the award.[43] The same applies in Switzerland.[44] Consequently, delays and adverse risks can be reduced by adequate legislation.

(3) Annulment Leads to Double Judicial Control

It is submitted that most of the arguments in support of the foregoing two categories of reasons are not compelling arguments for abolishing the annulment of awards in international arbitration. On the other hand, the third category carries more weight. This argument is that judicial control over the arbitral award is exercised twice, *i.e.*, in annulment proceedings in the country of origin and in enforcement proceedings in another country. Why should the same award be subject to double judicial checking?[45] From the theoretical point of view at least, it would seem an advantage for international arbitration to abolish the annulment of the award in the country of origin. But does this advantage outweigh the disadvantages?

B. Disadvantages of the Developments Concerning Annulment

During the review of the developments in part 3 of this presentation, a number of disadvantages were mentioned. These and others are summarized below. The summary below does not in-

[42] C. pr. civ. art. 1506 (Fr.).
[43] Code of Civil Procedure art. 1066 (Neth.).
[44] Concordat art. 38 (Switz.).
[45] The judicial double checking is carried to an extreme in the UNCITRAL Model Law, *supra* note 12. An arbitral award rendered in a Model Law country can in that country be subject to annulment proceedings and enforcement proceedings, but in both proceedings the same grounds (*i.e.*, for annulment and refusal of enforcement) apply. This can be considered one of the major defects of the Model Law. As explained in section 2.E., enforcement of an award made in the country where enforcement is sought is subject to summary control only.

clude criticism of the manner in which the annulment of an award is curtailed in a particular case. These particular aspects do not pertain to the disadvantages as such, but rather to the technical implementation of the concept of eschewing annulment.

(1) Country of Origin

The exclusion of the action for annulment in the country of origin, as is provided for in Belgium and Switzerland, carries three disadvantages.

First, a party whose claim has been rejected will be deprived of any remedy against the award. That party effectively has no remedy to challenge the award in the courts, as annulment has been excluded, even if the arbitration was conducted, for example, in violation of fundamental notions of due process. The aggrieved party, therefore, will have no opportunity to have the award annulled and to have its case adjudicated in proper (new) proceedings.

Second, the exclusion of annulment in the country of origin may lead to "enforcement shopping" or rather "enforcement chasing" abroad. As a losing party will not have the possibility of having the award annulled, which would mean that enforcement cannot be granted under Article V(1)(e) of the New York Convention, a winning party will attempt to enforce the award in as many countries as it can obtain jurisdiction in. This disadvantage applies especially to awards that are questionable.

Third, exclusion of annulment may create uncertainty about the status of an award for a long period of time. If an award is questionable, a party will not have the possibility of having the uncertainty adjudicated with finality in the courts. This may create a new breed of "ghost awards."

(2) Foreign Enforcement Country

The main disadvantage of the principle that no effect need be given by a foreign enforcement court to annulment by a court in the country of origin of an award rendered in international arbitration is that a discrepancy arises between enforcement in the country of origin and enforcement in a foreign country. Annulment in the country of origin has as a consequence that the award cannot be enforced in that country. In contrast, the same award, notwithstanding its annulment in the country of origin, can be enforced in a country such as France. The limited effect of annulment in the country of origin found in a document like the European Convention of 1961 has the same disadvantage, albeit less forcefully, since that Convention takes into account at least a number of grounds for annulment in the country of origin.

The disregard of annulment of the award also involves basic legal concepts. When an award has been annulled in the country of origin, it has become nonexistent in that country. The fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of origin. How then is it possible that courts in another country can consider the same award as still valid? Perhaps some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special legal status to an award notwithstanding its annulment in the country of origin. This can be deemed to have been done by the European Convention of 1961.

C. Conclusion

It is submitted that the action for annulment should be retained. During the last twenty years, notwithstanding the many different new arbitration enactments, creeping unification has occurred. The categories of grounds for annulment are now similar in many countries. This does not mean that all cases are treated alike by the courts in the various countries in annulment proceedings, but there is less divergence than there was twenty years ago. The harmonization has been prompted by the increasingly favorable attitude towards international arbitration developed by the courts and legislators in many countries in the course of the last two decades. One of the main reasons for this favorable development was undoubtedly the New York Convention.

The alleged redundancy of double judicial control is rather academic. In fact, if an action for annulment is commenced in the country of origin—which usually has to be started within a relatively short period of time—the foreign enforcement judge can, and indeed will, take appropriate measures within the framework of Article VI (adjournment of the enforcement decision and provision of suitable security). If the award has been annulled in the

country of origin, there will no longer be room for judicial control in the enforcement country since the annulment constitutes a ground for refusal of enforcement under Article V(1)(e) of the New York Convention. On the other hand, if the award has not been annulled in the country of origin, it is unlikely that the foreign court will refuse enforcement, having regard to the pro-enforcement bias demonstrated by most courts under the New York Convention. And if one looks to the more than 500 court decisions reported under the New York Convention, a relatively minor portion (*i.e.*, some thirty cases) involves the application of the ground for refusal of enforcement that the award has been annulled or is subject to annulment proceedings in the country of origin. The cases in which an award has effectively been annulled in the country of origin number only three. None of them concerned the public policy of the country of origin.

In conclusion, there does not seem to be any need to upset the well-established principle that an arbitral award can be subject to an action for annulment in the country of origin and that annulment in the country of origin constitutes a ground for refusal of enforcement abroad. In the final analysis, parties can avoid many of the problems identified in this presentation by choosing a country with an adequate arbitration law and courts that are favorable to international arbitration. And that number of countries is rapidly growing.

clude criticism of the manner in which the annulment of an award is curtailed in a particular case. These particular aspects do not pertain to the disadvantages as such, but rather to the technical implementation of the concept of eschewing annulment.

(1) Country of Origin

The exclusion of the action for annulment in the country of origin, as is provided for in Belgium and Switzerland, carries three disadvantages.

First, a party whose claim has been rejected will be deprived of any remedy against the award. That party effectively has no remedy to challenge the award in the courts, as annulment has been excluded, even if the arbitration was conducted, for example, in violation of fundamental notions of due process. The aggrieved party, therefore, will have no opportunity to have the award annulled and to have its case adjudicated in proper (new) proceedings.

Second, the exclusion of annulment in the country of origin may lead to "enforcement shopping" or rather "enforcement chasing" abroad. As a losing party will not have the possibility of having the award annulled, which would mean that enforcement cannot be granted under Article V(1)(e) of the New York Convention, a winning party will attempt to enforce the award in as many countries as it can obtain jurisdiction in. This disadvantage applies especially to awards that are questionable.

Third, exclusion of annulment may create uncertainty about the status of an award for a long period of time. If an award is questionable, a party will not have the possibility of having the uncertainty adjudicated with finality in the courts. This may create a new breed of "ghost awards."

(2) Foreign Enforcement Country

The main disadvantage of the principle that no effect need be given by a foreign enforcement court to annulment by a court in the country of origin of an award rendered in international arbitration is that a discrepancy arises between enforcement in the country of origin and enforcement in a foreign country. Annulment in the country of origin has as a consequence that the award cannot be enforced in that country. In contrast, the same award, notwithstanding its annulment in the country of origin, can be enforced in a country such as France. The limited effect of annulment in the country of origin found in a document like the European Convention of 1961 has the same disadvantage, albeit less forcefully, since that Convention takes into account at least a number of grounds for annulment in the country of origin.

The disregard of annulment of the award also involves basic legal concepts. When an award has been annulled in the country of origin, it has become nonexistent in that country. The fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of origin. How then is it possible that courts in another country can consider the same award as still valid? Perhaps some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special legal status to an award notwithstanding its annulment in the country of origin. This can be deemed to have been done by the European Convention of 1961.

C. Conclusion

It is submitted that the action for annulment should be retained. During the last twenty years, notwithstanding the many different new arbitration enactments, creeping unification has occurred. The categories of grounds for annulment are now similar in many countries. This does not mean that all cases are treated alike by the courts in the various countries in annulment proceedings, but there is less divergence than there was twenty years ago. The harmonization has been prompted by the increasingly favorable attitude towards international arbitration developed by the courts and legislators in many countries in the course of the last two decades. One of the main reasons for this favorable development was undoubtedly the New York Convention.

The alleged redundancy of double judicial control is rather academic. In fact, if an action for annulment is commenced in the country of origin—which usually has to be started within a relatively short period of time—the foreign enforcement judge can, and indeed will, take appropriate measures within the framework of Article VI (adjournment of the enforcement decision and provision of suitable security). If the award has been annulled in the

country of origin, there will no longer be room for judicial control in the enforcement country since the annulment constitutes a ground for refusal of enforcement under Article V(1)(e) of the New York Convention. On the other hand, if the award has not been annulled in the country of origin, it is unlikely that the foreign court will refuse enforcement, having regard to the pro-enforcement bias demonstrated by most courts under the New York Convention. And if one looks to the more than 500 court decisions reported under the New York Convention, a relatively minor portion (*i.e.*, some thirty cases) involves the application of the ground for refusal of enforcement that the award has been annulled or is subject to annulment proceedings in the country of origin. The cases in which an award has effectively been annulled in the country of origin number only three. None of them concerned the public policy of the country of origin.

In conclusion, there does not seem to be any need to upset the well-established principle that an arbitral award can be subject to an action for annulment in the country of origin and that annulment in the country of origin constitutes a ground for refusal of enforcement abroad. In the final analysis, parties can avoid many of the problems identified in this presentation by choosing a country with an adequate arbitration law and courts that are favorable to international arbitration. And that number of countries is rapidly growing.