Chapter Four

Public Policy as a Ground for Setting Aside International Arbitral Awards

In this chapter, various questions need to be answered. The first concerns the finality of international arbitral awards: whether an arbitral award should be considered to be a final decision on the dispute and therefore beyond the control of the courts in the country of origin, or that it must be subject to courts' control in that country. The second question concerns the extent of control that can be exercised by the courts in the country of origin over international arbitral awards and whether or not invoking public policy would lead to widening the grounds for control. This requires firstly examination of the conflict between the finality of arbitral awards and the courts' control.[1] Then one must determine the extent of applying public policy as a ground of setting the award aside. The latter requires consideration of the distinction between domestic and international arbitral awards, and whether or not arbitral awards should be treated similarly under the concept of public policy regardless of which of the two categories they fall under. Finally, it is important to examine the effect of setting aside an international arbitral award for considerations of public policy in the country of origin, when enforcement is to take place in other countries. This is important because setting the award aside in the country of origin is one of the grounds for refusing enforcement in foreign countries under Article V (1)(e) of the New York Convention.

1. See W. Michael Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair, Duke University Press, (1992) pp. 1-10. He explains this tension by stating that: "The interest of finality means that an arbitrary limit for control systems must be established. The interest of justice means simply that justice must be done no matter what the cost nor how long it takes"; David L. Shapiro (Directing Editor), International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes, (1997) The Foundation Press, INC, p. 965.

Finality of the Award and Court's Control

After making the final arbitral award the arbitral tribunal's mission comes to an end. Then, the question of how the award will be enforced will depend on the losing party's conduct. He may either submit to the award by executing it voluntarily, or he may resist the award by raising an action to set the award aside.[2] The latter contradicts the modern trend, which calls for considering the award to be final and binding on the parties from the day when it is decreed.[3] This is mainly due to the nature of the arbitration agreement, in that it is founded as a result of the parties' autonomous consent and therefore parties are obliged by their agreement to consider the resulting award as binding on them.[4] Moreover, most of modern national arbitration laws and rules of international arbitration institutions consider arbitral awards to be final and binding on the parties once it is issued. For example, Section 58 (1) of the English Act of 1996 [5]; Article 55 of the Egyptian law of 1994 [6]; Article 35 (1) of the Model Law[7]; Article 26 (9) of the LCIA Rules[8]; Article 28 (6) of the ICC Rules; Article 32 (2) of the Cairo Regional Centre for International Commercial Arbitration (CRCICA).[9]

However, in spite of such provisions, most national arbitration laws impose some measure of control on the arbitral award, exercisable by state courts at the seat of arbitration. Accordingly, a party who is not satisfied with an award can protest against the award before the court of the seat of arbitration, where he may use whatever legal

2. See above, Chapter One, p. 29.

3. Henry P. De Vries, op. cit., p. 47.

4. Clive M Schmittoff, "Finality of arbitral awards and judicial review," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 230.

5. Section 58 (1) of the English Act of 1996 states that: "Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them." See, Gbangbola v Smith and Sherriff Ltd [1998] 3 All ER 730, at 738; Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd, [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111; [1998] C.L.C. 409.

6. Article 55 of the Egyptian Law No. 27 of 1994 provides that: "Arbitral award rendered in accordance with the provisions of this law shall have the authority of res judicata and shall be enforceable in conformity with the provision of the present law"; See Ahmed S. El-Kosheri, "EGYPT," op. cit., p. 41.

7. Article 35 (1) of the Model Law: "An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."

8. Article 26 (9) of the LCIA Rules: "All awards shall be final and binding on the parties."

9. Article 32 (2) of the (CRCICA) states that: "The award shall be made in writing and shall be final and binding to the parties. The parties undertake to carry out the award without delay."

grounds are available including public policy, in order to disrupt the finality of the award and delay its enforcement.

The conflict between finality of the award and the court's control

The conflict between the finality of arbitral awards and the control exercised by state courts can be demonstrated by analysing two conflicting schools of thought. On the one hand some scholars argue that international arbitration is 'delocalised'[10] from the country of origin and an arbitral award constitutes a definitive ruling on the dispute, which does not require to be dealt with by another forum.[11] On the other hand many scholars believe that international commercial arbitration must be controlled by national legal systems.[12]

The advocates of the first trend base their argument on the purpose of resorting to arbitration. Parties engaged in international commerce resort to arbitration because they want a binding decision of the kind that would be given by a court. By going to arbitration they expect to settle their dispute with a minimum court control.[13] Therefore, adding layers of control imposed by the courts of the seat will increase time and costs, which do not serve the interests of the parties. Reisman explains this by stating that,[14] "a delayed victory may deprive the winner of substantial economic value." Moreover, the cost generated by control systems is imposed not only on the parties but also on the community that funds the control system. Reisman reached the conclusion that, "…national courts would impose costs on the functioning of international commercial arbitration that could price it out of business." This is also the view of Jan Paulsson[15],

10. To delocalised an arbitral award means "to remove the power of the courts at the place of arbitration to make an internationally effective declaration of the award's nullity". See Jan Paulsson, "The Extent of Independence…", Julian Lew ed., op. cit., p. 141.

11. Jan Paulsson, "Delocalisation of International Commercial Arbitration: When and Why It Matters," 32 INT>L & COMP. L. Q. 53 (1983); W. Michael Reisman, op. cit., pp. 1-10.

12. Bruno Laurent, "Reflection on the International Effectiveness of Arbitration Awards," 12:3 Arb.Int., (1996), p. 269-285; Hong-Lin Yu, "Defective Awards must be Challenged in the Courts of the Seat of the Arbitration – A Step Further than Localisation?," 65:3 The Journal of the Chartered Institute of Arbitrators (1999), p. 195 at 202; Jonathan Hill, op. cit., p. 640; also see, Japan Line Ltd v Aggeliki [1980] 1 Lloyd's Rep 288. Lord Denning stated, "… the court has, as well as its statutory powers, an inherent jurisdiction to supervise the conduct of an arbitral tribunal."; Minmetals Germany GmbH v. Ferco Steel Ltd, [1999] 1 All E.R. 315.

13. Henry P. De Vries, op. cit., p. 47.

14. W. Michael Reisman, op. cit., p. 3.

15. Jan Paulsson, "Delocalisation of international Commercial Arbitration…", op. cit., p. 53.

who states that, "If the international currency of awards depended ineluctably on their treatment in the hands of local magistrates in their countries of origin, the hopes for a more open and more universal system of international arbitration would be disappointed". In his reply to the opponents of 'delocalised arbitration' he affirms that although delocalised awards are independent of the legal order of their country of origin, they are not independent of all legal order, since they are still subject to the control of the court in the country of enforcement.[16] Therefore, he prefers to leave the control over the award in the hands of the courts of the country in which enforcement is sought, and he considers this a sufficient control for international commercial arbitration.

Contrary to this trend, many scholars believe that international arbitration requires control by the national legal systems of the country in which arbitration takes place, as this reduces the possibility of having any effect on the public interest of the country of origin.[17] The defenders of this trend argue that finality of the award is based on the assessment of what would be in the interests of the winning party.[18] However, it is more important to consider the interest of the losing party and the public, respect for their interests and justice calls for some measure of court control. Therefore, it would be unjust to pursue the goals of speed and finality sought by winners at the expense of procedural justice.[19] However, the defenders of this opinion do not undermine the binding effect of arbitral awards on the parties, since they are obliged by their agreement to consider the resulting award as binding. But they argue that such an award is not binding for the state and the public since they were not party to that agreement. Therefore, an arbitral award must be subject to measures of control in order to protect the interests of members of the public who are not in dispute.

16. Ibid., p. 54; also in, Jan Paulsson, "Arbitration Unbounded …" op. cit., p.375. He argues that the control function of international arbitration has been shifted from the place of arbitration to the place of enforcement; also see Klaus Peter Berger, op. cit., p. 712.

17. Michael Kerr, "Arbitration and the Courts: The UNCITRAL Model Law," 34 Int'l & Comp. L.Q. 1 (1985). He states that: "there is virtually no body, tribunal, authority or individual in England whose acts or decisions give rise to binding legal consequences for others, but who are altogether immune from judicial review"; Jonathan Hill, International Commercial Disputes, 2ed, London: LLP, 1998, p. 640.

18. It is not in the interests of the winning party to have an award reviewed by the court as this merely adds delay and expense.

19. William W. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration," 63 TUL. L. REV., (1989), p. 647, 684 -689.

Also, one should consider that eliminating all examination of awards at the seat of arbitration may lead to unacceptable results. Firstly, if an award is not challenged in the country of origin, the loser will not be able to challenge errors or defects made by the arbitral tribunal[20], for instance, where the minimum standards of procedural fairness are violated or a power is exercised ultra vires. If the loser cannot challenge these defects in the country of origin then the only hope for him is to challenge the defective award at a later time in any country in which enforcement may take place. Secondly, if the loser was the claimant in an international arbitration, then he may lose his right to recourse against the arbitral award for the simple reason that the other party (the defendant in an arbitration dispute) may not have any interest to enforce the award in other countries. This runs the risk of depriving arbitration of its reliability and would discourage parties from going to arbitration.

In addition to that, one can argue that entrusting the court of the seat of the arbitration with equitable control over international arbitral awards has several advantages. A control mechanism serves to ensure that all aspects of the case have been fairly considered. This is also required to keep arbitration on the right track in order to prevent any possible corruption of the arbitral tribunal, such as the denial of a fair hearing or the violation of public policy.[21] After all, a state court cannot be expected to lend assistance to arbitration held within its territorial jurisdiction, whenever its assistance is required[22], without imposing measures of control over the resulting award, for instance, ensuring that the award was not obtained by fraud.[23]

Finally, some scholars consider supervision of the arbitral award by the courts of the seat of arbitration as a requirement under the New York Convention, because the Convention is founded on a system of

20. This may deprive the losing party from the possibility of having his case reviewed in proper new proceedings. See, Van den Berg, "The Efficacy of Award in International Commercial Arbitration," 58 The Journal of the Chartered Institute of Arbitrators (1992), 267 at 272.

21. See Georges R. Delaume, op. cit., p. 18. He states that: "Acceptance of a reasonable amount of control may have both a preventive and a curative effect … it may make the arbitrators alert to the fact that their behaviour and their decisions cannot altogether escape judicial scrutiny."

22. Courts assist arbitration proceedings by compelling arbitration, by appointing arbitrators, by their revoking or replacing arbitrators, by compelling the attendance of witnesses; by taking evidence and by ordering conservatory measures by way of attachment of assets.

23. V. V. Veeder, op. cit., p. 59; Henry P. De Vries, op. cit., p. 47; Jacques Werner, "Application of Competition Laws by Arbitrators," 12 J.Int.Arb., (1995), p. 21 at 26. He states that: "… international commercial arbitration, whose existence is dependent on the assistance it receives from the legislative and judicial state authorities, can expect their support only to the extent it is perceived as not undermining or weakening the existing legal order."

dual state control, firstly at the place of arbitration and secondly at the place of enforcement of the award.[24] Also, when a state allows an arbitral award to be made within its territory, it gives the award an international currency or a nationality that facilitates the enforcement of the arbitral award against assets in jurisdictions that adhere to the New York Convention.[25]

One may reach the conclusion that the meaning of finality in the context of arbitral awards as it is used in the various provisions of national arbitration laws and rules of international institutions, implies that the courts of most countries of the world should be prepared to recognise and enforce the award as constituting a final decision on the dispute. The most important effect of finality is that neither party can unilaterally withdraw from the resulting award, as it is annexed to the binding effect of the arbitration agreement. This gives the award a res judicata effect, so that the losing party cannot bring a court action against the other in relation to the subject matter of the arbitration based on the same cause of action.[26] Therefore, the concept of finality should lead the court to dismiss the action on the grounds that the disputed issue had been conclusively disposed of and the resulting award was res judicata.[27]

Accordingly, a control system exercised by the courts in the country of origin of the international arbitral award is necessary in order to guarantee the integrity of international arbitration, although to ensure respect for the finality of arbitral awards the courts' control must be limited to a finite number of grounds. Therefore, the real question should concern the extent of judicial control over the award.

24. Eric A. Schwartz, "A Comment on Chromalloy: Hilmarton a l'Americaine," 14 J.Int.Arb. 2, 1997, p. 128.

25. Klaus Peter Berger, op. cit., p. 656. He states that, "… almost all forms of review are derived from a sense of national responsibility to control the integrity of a process that receives state support. A nation that gives the arbitrator power to bring about legal consequences takes upon itself an obligation to ensure respect for the limits imposed on the arbitrator's authority and for fundamental procedural rights. The winner's interest in finality, privacy and economy must be weighed against the loser's concern for fair proceedings."

26. For example, Article 55 of the Egyptian Law of 1994 provides that: "Arbitral awards rendered in accordance with the provisions of this the present Law shall have the authority of the res judicata and shall be enforceable in conformity with the provisions of this Law." Egyptian doctrines consider that the award becomes res judicata as of the day on which it is signed. The Egyptian court of Cassation, 14 March 1957 have held that awards became res judicata when they are made. See Abdul Hamid El Ahdab, "The New Egyptian Act…," op. cit., p. 89.

27. Redfern and Hunter, 2nd ed., op. cit., 396; Robert D. A. Knutson, "The Interpretation of Arbitral Awards When is a Final Award not Final?," 11 J.Int.Arb. (1994), p. 99 at 100. He states that: "… in the context of international arbitration res judicata means that you cannot (or should not) have two bites at the cherry."

Courts control over arbitral awards

Legal systems may either have various grounds upon which a party can challenge the arbitral award or may limit these grounds to certain points. Generally, there are two ways in which the court may exert control: there can be a full review on the legal merits including procedural and substantive grounds, or a limited review of conformity to fundamental procedural fairness.[28] The latter may include, for example, the right to be heard, arbitrator fraud and excess of authority.

One should take into consideration a very important point here, that in practice the degree of control ultimately rests upon the approach of the national courts. This can be demonstrated by considering that the limits of control may differ between state A and state B, even if they have adopted the same arbitration rules, such as, the Model Law Rules. The degree of control may still differ between the two countries according to the courts' approach in each country.[29] As a result, the extent of the judicial control will then depend on where the arbitration happens to be held. For example, courts in state A may have a more liberal approach towards the concept of parties' autonomy and respect to the finality of arbitral awards. Such an approach may aim to attract international arbitration to their country. In this regard, it has been reported that in England, "One of the reasons advanced for the Arbitration Act [1979] by its supporters was that interference by the courts over arbitrations held in England was so great that parties to disputes avoided holding arbitrations in England and thereby the country was losing a valuable invisible export (i.e., lawyers' fees) which had somehow been quantified at £[500] million a year, according to the Commercial Court Committee".[30]

28. Klaus Peter Berger, op. cit., p. 654. According to his view "… the striving for finality of international arbitral awards has shifted the emphasis of court control almost exclusively to the procedural side."

29. Some countries may have a relaxed attitude towards arbitration on their territory, others may be more hostile to arbitration.

30. Michael Kerr, op. cit., p. 161; William W. Park, "Judicial Supervision of Transnational Commercial Arbitration," 21 Harv.Int.L.J., (1980), p. 87. He states that, "… In 1979 England abolished the "case stated" procedure by which courts exercised control over the arbitrator's decision on the merits of the dispute. The background of the Act is enlightening with respect to the perceived economic advantages of subjecting international arbitration to less rather than more guidance at the place of the proceedings"; also see, Georges R. Delaume, op. cit., p. 8. By referring to the liberal approach of French arbitration law, he suggests that, "… This positive attitude, clearly geared to ensuring the finality of international awards, should contribute to making France an attractive venue for international arbitration."

On the other hand, if we consider in the example above the approach of the courts in state B, which adopted the same arbitration rules, we see that it may have a more conservative approach towards international arbitration. This may be due to several factors, such as, the political or economic policy of the state and how familiar the courts of that state are with international commercial arbitration.[31]

Clearly, adopting a well-developed arbitration law that consists of an exclusive list of limited grounds does not by itself guarantee limited control by the courts. In deciding on an attack against the validity of the award, courts that do not recognise the particular character of international commercial arbitration, particularly in countries which do not frequently host international arbitrations, may extend their control beyond the limited grounds which their national law includes. In contrast, a court that is aware of the international character of arbitration will keep the award within acceptable limits. It will be expected to maintain the delicate balance between recognising the finality of the arbitrators' decision and its duty as a guarantor of arbitral integrity.[32] However, keeping reviews within acceptable limits is not easy in practice, particularly as courts may find in the concept of public policy a loop-hole whereby they may extend their supervision of the arbitral award.[33]

The Extent of Public Policy as a Ground on which to attack the Award

A party who is reluctant to honour the award may challenge the award in the country of origin in order to set it aside or at least to postpone its enforcement.[34] In order to achieve this goal he would seek to scrutinise the national law of that country searching for possible grounds upon which he can set the award aside. To this end, he may attempt to establish

31. See Ahmed S. El-Kosheri, "Public Policy Under Egyptian Law," International Council for Commercial Arbitration (ICCA) New York Arbitration Congress, (1986), p. 322. He states that in Egypt there are two doctrines. The first tendency favours a restrictive interpretation of the concept of public policy, the second favours avoiding international commercial arbitration as much as possible. He goes on to explain the negative effect of the latter approach as it leads to a wide interpretation of the concept of public policy which includes all matters falling normally under the exclusive jurisdiction of the Egyptian courts.

32. In Arab African Energy Corp. Ltd. v. Olieprodukten Nederland B.V., 2 Lloyd's Law Report [1984], 419, 423. Leggat j. states, "True it is that formerly the court was careful to maintain its supervisory jurisdiction over arbitrators and awards. But this aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may said to have been overtaken by commercial expediency."

33. William W. Park, "National Law and Commercial Justice…", op. cit., p. 687. He states that: "Terms such as 'public policy' and 'ordre public' are malleable, and represent ill-defined concepts that risk lending themselves to court scrutiny on the merits of the award."

34. "Experience shows that parties dissatisfied with the award usually 'leave no stone unturned' to have the award set aside by the competent court at the seat of the arbitration, irrespective of their prospects in such proceedings." See, Klaus Peter Berger, op. cit., p. 648.

his challenge on any discrepancy between the mandatory rules of the law of the seat and the law the tribunal applied to the dispute.[35] The latter may concern the substance of the dispute or involve non-compliance with the mandatory procedural rules that are applicable in the country of origin. One here must address the question of how a national court would decide on such claims and according to which legal system? The answer to this depends on considering the distinction between the public policy rules which apply to domestic arbitral awards and international arbitral awards respectively.[36]

The public policy rules applicable to domestic arbitral awards

Traditionally, a court in the country of origin has legitimate authority over purely domestic arbitral awards, and parties are bound by all the mandatory rules applicable in that state.[37] This is mainly due to the function of the national courts, as their duty is to consider the consequences of enforcing the award in their own territory, and because they are the guardians of their national law they will ordinarily be expected to invoke the national public policy rules.[38] Accordingly, a domestic arbitral award may be set aside if it infringes a national rule that is considered mandatory in that state. The only exception would be the possible application of foreign public policy rules to purely domestic arbitral awards, if for example, the award infringes a vital public interest of a foreign country[39], where this concerns the 'duty of comity owed by one state to another'.[40]

35. Several writers recognise this potential attitude; see, Steven C. Nelson, "Alternatives to Litigation of International Disputes," (1989) Int.Law., l87, pp.192-193. He states that: "Sometimes the process of the courts may be abused by the recalcitrant party seeking to have the arbitration agreement found not enforceable on the ground that the arbitration offends public policy."

36. The importance of this distinction has been highlighted by Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 261. He states that: "… one should carefully avoid the automatic assimilation or the confusion between those two kinds of 'public policy.' The confusion is particularly dangerous, and frequent, with regard to the procedural public policy of the state where the award has been rendered if such a sate, or rather its legislation or case law, has not become fully conscious yet of the specificity of international arbitration by contrast to domestic arbitration and therefore applies to international arbitration, without adaptation nor exception, mandatory rules enacted and conceived for domestic arbitration."

37. See above, Chapter Two at p. 73.

38. See, Klaus Peter Berger, op. cit., p. 673. He considers national courts as ".. guardians of the public policy of its lex fori"; Okezie Chukwumerije, op. cit., p. 182. He considers that the court will have no choice as to whether or not to apply the mandatory rule of its national law because, "… as a creature of the national legal system, its jurisdiction and powers are regulated by national law: it is constrained to apply the imperative laws of its forum."

39. For example, smuggling in breach of foreign revenue laws; trading with the enemy or preparing a revolution to be instigated abroad. See De Wutz v. Hendricks (1824) 2 Bing. 314; Foster v. Driscoll [1929] 1 K.B. 470.

40. See Dennis Lloyd, Public policy: a Comparative Study in English and French Law, London: Athlone Press, (1953), p. 26; Dicey, Conflict of Laws, 6th ed., Stevens and Sons Ltd., p. 615; A. J. E. Jaffey, op. cit., p. 56; Regazonni v. KC Sethia Ltd., 1958 A.C. 301; [1957] 3 All E.R. 286.

The applicable public policy rules to international arbitral awards

One should bear in mind here that parties may agree to hold arbitration in a particular country without having any connection whatsoever with that country, merely because it provides a neutral and convenient place, and provides a good location for the parties or the arbitrators to hold their meetings. The question here would be: do national courts recognise the specific character of such international arbitration when they are asked to set aside the resulting award for considerations of public policy?

There are two possibilities in this regard. First, a national court may consider its jurisdiction as being complete and thus the court may treat the award in exactly the same way as it would in a domestic arbitral award or at least courts may be tempted to turn toward national standards of public policy for guidelines. This may lead the court to apply national public policy rules to international arbitration. The second prospect generally relies upon applying a narrower doctrine of public policy.

The first possibility leads to an improper conclusion that includes treating an international arbitral award on the same footing as a purely domestic arbitral award, despite the difference between the two types.[41] Dealing with international arbitral awards under national law conditions ignores the fact that the dispute may not involve any national interest for the state of origin, since the economic or social impact of the award will take place outside the borders of that country. Therefore, one should consider here that several elements connect the award to other legal systems which would even be more concerned with the validity and impact of the resulting award. Thus, it would be more rational to consider that the validity of the award hinges upon the degree of its connection with one or more of the relevant foreign legal systems by using the relativity of public policy criterion. Pierre Lalive illustrates this criterion as:[42]

"… such conditions of application of public policy can be summed up by the formula of the 'relativity' of public policy, from three points of view: it must be appreciated in concreto, in relation to the circumstances of the concrete case and not (unless in extreme and particularly shocking cases) in relation to the abstract contents of a foreign rule; public policy is also relative in space (in the absence

41. See, Chapter One at p. 23.

42. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 262-263.

of a sufficient connection with the legal order of the forum, it will not come into play or will only have an indirect effect (effet attenue). Finally, public policy is relative in time (the exception will only intervene against a present attack against the fundamental rules of the forum."

Deciding the applicable public policy rules according to the relevant connections between the dispute and the infringed public policy rule can be illustrated by using the following hypothetical example.
Presume firstly, that an action to set aside an international arbitral award for considerations of infringement of public policy was applied for in the country of origin where the latter was chosen for convenience reasons. Presume secondly, that the applicable law to the arbitration procedures and to the substance of the dispute was foreign to that country and finally that enforcement of the award was intended to take place in a foreign country.

To determine the validity of the award in the above example, courts should first consider the applicable law that governs the disputed issue, by considering whether or not that law has been chosen on the basis of being the most closely connected to the dispute. If there is strong evidence of that connection, such as, it is the law of the country in which the contract will be performed and it is the place where the award would most probably will be enforced, then determining the validity of the award should be based on what that law states. The award then must be set aside if it tends to damage the public interest which the annulling rule of that law is designed to protect.[43] Attention should also be paid to the ultimate purpose of the foreign mandatory rule, by examining whether or not it aims to protect a vital interest of that state.[44]

However, one should consider that it may not be easy to determine the validity of an award made under the public policy rules of a foreign legal system. This is because a court in the country of origin cannot determine to what extent public policy has been violated. For example, a court using a western legal system may not be able to understand the subtleties of application and the exact extent of

43. See A. J. Jaffy, op. cit., p. 43.

44. Cheshire, Private International law, 7th ed, p. I43. He gives guide-lines as to what should be considered foreign law in such situations. A court in the country of origin when ascertaining whether "[the public policy rule of the foreign law] is all-pervading or merely local, must consider it in the light of its history, the purpose of its adoption, the object to be accomplished by it, and the local conditions"; also see, Dennis Lloyd, op. cit., p. 92.

a public policy rule deriving from the 'Shari'a' rules whereas a court in Saudi Arabia which is more familiarised with the precise nature and texture of such rules would. A similar problematic could occur the other way around. Also a court in the country of origin cannot decide what a foreign rule is particularly designed to prevent or how an international arbitral award would be treated under the legal system of that country. Moreover, according to the above hypothetical example, enforcement of the award will take place in a foreign country, therefore one should consider the possibility that the courts in such a foreign country may consider the award valid.

The situation would be different if in relation to the preceding example, the award was challenged for being contrary to the public policy of the country of origin although valid according to its proper law. One should consider that courts in the country of origin are not necessarily precluded from setting aside an award merely because it was governed by a foreign legal system, or because it was intended to be enforced abroad. In some cases, an award, whilst valid by the proper law or according to the law of the country where it is intended to be enforced, may nevertheless be considered null in the state of origin for considerations of national public policy.[45] However, the public policy of the state of origin should be invoked only in exceptional cases, particularly when the court of origin recognises that there is likely to be a possible connection between the award and the country of origin and when a vital national public interest might be at stake. Consideration of national public policy may also be based upon moral principles if the principles involved are so weighty as to lead the court of origin to set an international arbitral award aside. This is so irrespective of which country enforcement will take place in or of the attitude of the courts in that country.[46] Courts may also invoke national public policy rules in order to make sure that certain requirements of justice have been respected. This includes substantial

45. See A. J. E. Jaffy, op. cit., p. 43. He provides examples of this kind, stating that: "the public interest may be injuriously effected even by an act performed abroad, as with laws designed to protect national security, or exchange control or anti-trust legislation"; Dennis Lloyd, op. cit., p. 85, states that: "It is recognised however that the 'ordre public' of the forum may be applied where the lex fori regards the provision of the foreign law as unacceptable"; Dennis Lloyd, op. cit., p. 93; Okezie Chukwumerije, op. cit., p. 181; also see, Kaufman v. Gerson [1904] 1 K.B. 941.

46. Dennis Lloyd, op. cit., p. 84 states that: "the court may still reserve to itself the right to refuse to lend its aid to a foreign transaction, though completely unconnected with the country of that court, where it is of a type which shocks the conscience or is utterly contrary to its notions of civilised standards." He also gave examples of "contracts which involve gross sexual immorality, or personal slavery and transactions which are regarded as fundamentally inadmissible". Also see, Santos v. Illidge (1860) 8 C.B. (N.S.) 861; Foster v. Driscoll [1929] 1 K.B. 470; Lemenda Ltd. v. African Middle East Co. (1988) Q.B.D., p. 461.

and procedural irregularities, such as unequal treatment of the parties, fair notice of both the appointment of arbitrators and the conduct of proceedings and the existence of a fair opportunity to present the case.[47] However, applying these grounds to procedural requirements should be giving careful consideration to the distinction between procedural requirements in national arbitration and the requirements of equity and justice in international arbitration.[48] For example, an award should not be annulled if arbitrators have failed to comply with procedural requirements of the local law, which are merely designed for reasons of formality, such as, examining a witness or an expert or setting out the names of the parties and the arbitrators.[49]

If the infringement involves procedural irregularities, then examining the award should be based upon the law that governs the arbitration procedures.[50] Consideration must also be given to the parties' expectations.[51] This is because when parties choose a particular law to govern the arbitration procedures their intention is to comply with the mandatory rules of that law, not to the procedural rules of the place where they held the arbitration proceedings, if these two were different.

The conclusion that can be drawn thus far is that examining the validity of international arbitral awards should be based on taking into consideration several elements. The first consideration should be the connection between the award and the legal system with which the award is most closely connected. Unless in exceptional circumstances as outlined above, there will be no rational reason

47. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 299. He considers these requirements as "general principles of international due process"; Articles 19(3) and 24(3) of "UNCITRAL" Model Law; Rubino - Sammartano. M., op. cit., p. 303 to 313; Aktham A. El Kholy, The Enforcement of International Arbitral Awards. Al- Tahkim Al- Arabi, Vol. 2, January 2000, p. 20.

48. The importance of this distinction has been recognised in many cases. See for example, International Tank v Kuwait Fuelling 1975, Court of Appeal. (Q.B.), p. 224; Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd. [1970] A.C. 583; see also Dicey and Morris, The Conflict of Laws, 8th ed. Stevens and Sons Ltd., (1967), p. 1048; Redfern and Hunter, 2nd ed., op. cit., p.445. The writers state that: "The differences between the domestic public policy requirements of states means that there is a risk that one state may set aside for reasons of public policy an award which other states would regard as unimpeachable."

49. Aktham A. EL Kholy, op. cit., p. 13. In this regard he states that: "Even if the position of the Egyptian Court of Cassation may have some justification for domestic awards, it appears to have no valid basis for international awards issued under different procedural rules such as those of the ICC."

50. See Dalmia Cement v. Nat Bank of Pakistan 1975, Q.B. p 8; Stephen M. Scluuebel and Susan G. Lahne, op. cit., p. 207; Michael John Mustill, Transnational Arbitration and English Law. Current Legal Problems, (1984), p.134.

51. Compagnie Tunisienne de Navigation SA v. Compagnie d>Armement Maritime SA, [1971]A.C.576; [1970] 3 W.L.R. 389. In this case it was provided that: "Subject to public policy the English court must give effect to the intention of the parties expressed in their contract and demonstrated by the surrounding circumstances"; also see, Bank Mellat v. Helliniki Techniki SA [1984] Q.B. 291. 301.

for the court of origin to set the award aside for considerations of national public policy, particularly if the award is considered valid according to the applicable law and enforcement of the award is to take place in a foreign country.

A reasonable approach would be to apply the concept of international public policy, which includes examining the validity of the award according to its conformity with the mutual principles of justice and morality that are common to the majority of countries.[52] This alleviates the problem of a court of the country of origin attempting to apply the public policy of a foreign legal system with which it is not familiar, as in the given example concerning the application of 'Shari'a' rules. By applying international public policy rules the court of the country of origin thereby leaves the determination of the exact extent of public policy to the courts of enforcement, which may increase the chances of enforcing the award in other jurisdictions. This may also preserve the integrity of the court's decisions when the award has been presented before the courts of another jurisdiction as a foreign arbitral award. As will be demonstrated in the following topic, an arbitral award that has been set aside in the country of origin may still be enforced in other countries if the court of enforcement considers that the nullification order of the court in the country of origin was based on unreasonable grounds.

The Consequences of Setting an Arbitral Award Aside in the Country of Origin

Generally, a successful challenge may deprive the award of its binding effect, not only in the country of origin but also in other countries.[53] This is due to the effect of Article V (1)(e) of the New York Convention, which provides that recognition and enforcement of an award will be refused if, "…the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which or under the law of which, that award was made."
In practice an award may be set aside by a court in the country of origin on the basis of national public policy rules where the same issue does not constitute a violation of public policy in the country in which enforcement takes place. This situation raises the following

52. Redfern and Hunter, 2nd ed., op. cit., p. 445.

53. Georges R. Delaume, op. cit., p. 18. He describes this situation as, "… success at the seat of arbitration may turn to be a pyrrhic victory if it is followed by defeat in that country."

question: is it possible to enforce a foreign arbitral award where it has been set aside by the courts of origin for considerations of national public policy? In order to answer this question it will be necessary to review Article V (1)(e) of the New York Convention, and to scrutinise the recent international trends in this regard, particularly those which call for narrowing the application of Article V (1)(e).

The concept of binding arbitral award under article V (1)(e)

Albert Van den Berg explains the reasons for formulating Article V (1)(e) of the New York Convention in this way.[54] He states that this mainly aimed to avoid the requirement of "double exequatur", a requirement which has been introduced in Article 4 (2) of the Geneva Convention of 1927. The Geneva Convention requires the arbitral award to be "final".[55] Such a requirement has created difficulties for the practitioners of international commercial arbitration. According to Article 4 (2) of the Geneva Convention the winning party is obliged to prove to the court whose task is to enforce the arbitral award that no objection has been taken to the award or that its enforcement has not been suspended by a competent authority in the state of origin.[56] This can be done either by arguing that the time limit for challenge has been exceeded[57], or that the court has rejected such a plea.[58] Otherwise the party seeking enforcement of the award will be obliged to obtain a leave for enforcement from the court of origin in order to confirm its finality, together with another request to the court of enforcement which leads to what is known as the "double exequatur".[59]

54. Van den Berg, op. cit., p. 332.

55. Article 4 (2) of the Geneva Convention provides that: "The party relying upon an award or claiming its enforcement must supply, in particular: (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made."

56. The same requirement can be found under Article 37 of the Riyadh Arab Convention on Judicial Cooperation of 1983. Signed 6 April 1983; in force October 1985. Intr. Arab Countries: Annex I – 1. January (I990).

57. Determining the time limit will depend on the applicable law as this varies from country to country. In this respect many countries limit this procedure to a very short space of time following publication, or in some cases the granting of the award. For example, the Model Law requires that an action for the annulment of an award must be brought within three months of notification of the final award to the party wishing to make the challenge; under Article 54(1) of the Egyptian law 1994 the action for annulment of the arbitral award must be brought within ninety days of the date of the notification of the arbitral award to the party against whom it was made; and according to the English 1996 Act, a party may lose the right to object (see Section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

58. One should bear in mind that this may provide the losing party with an effective technique to be used for in order to delay matters since the award does not become "final" until the end of the challenging procedures.

59. As a result of applying article 4(2) of the Geneva Convention many countries require that a foreign award should be confirmed by the court of its origin before it can be enforced in its territory. see W. Michael Reisman, op. cit., p. 972.

To avoid such confusion, the word "final" in the Geneva Convention has been replaced with the word "binding" in the New York Convention which provides a clear indication that Article V (1)(e) does not require an enforcement order to be issued by the court of origin.[60] This was intended to provide a solution or a compromise between legal systems which require an enforcement order to be issued by a competent authority in the state of origin, and other legal systems which accept the enforcement of foreign awards without this requirement.[61] The problem that persists is how to determine at what point an arbitral award becomes binding according to the meaning of Article V (1)(e) of the New York Convention?

Van den Burg illustrates the meaning of the word binding thus:[62]
"The award can be considered to have become "binding" for the purposes of Article V (1)(e) at the moment on which it is no longer open to a genuine appeal on the merits to a second arbitral instance or court in those cases where such means of recourse are available."

The general trend is to decide the question of when an arbitral award becomes binding by referring to the national law of the country of origin.[63] Article V (1)(e) of the New York Convention refers to the law of the country in which, or under the law of which, that award was made. Therefore, an award becomes binding within the meaning of Article V (1)(e) at the moment when it becomes ready for enforcement under the law governing the award. [64] This general and simple definition of the term 'binding' may not be sufficient since there are various legal systems the consequence of which would lead to various interpretations of this term. However, the

60. See Van den Berg, op. cit., p. 332. He refers to the International Chamber of Commerce, Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention, ICC Brochure no. 174 (Paris 1935) p. 11, (reproduced in UN DOC E/C.2/373), in which it was reported that: "The International Chamber of Commerce left the word 'final' out in its Draft Convention of 1953. It reasoned that it has appeared advisable to consider the problem from a more practical angle and to envisage only the case of awards effectively set aside."

61. Article V (1)(e) of the New York Convention was drafted by Working Party No. 3. See UN Doc E/CONF. 26/ SR.17; Van den Berg, op. cit., p. 335.

62. Ibid., p.357.

63. In England the past situation according to Section 38(1)(b) of the 1950 Act, requires from the party who seeks to enforce a foreign award in England, proof that the award has become "final" in the country of origin. See Union Nationale des Co-opratives Agricoles de Cereales v Robert Catterall and Co. Ltd [1959] 2 QB 44; Andrew and Keren, op. cit., p. 303.

64. Van den Berg, op. cit., p. 339. He states that, "… several courts appear to search under the applicable law for the moment at which the award can be considered to be inchoate for enforcement in the country of origin. Others attempt to find an equivalent of the term 'binding' under the arbitration law of the country of origin." However, for some countries this would be after proving that the award becomes final in the sense of becoming definitively valid. For other states the meaning of 'binding' is when it is ready for enforcement and not when it has already been enforced; Ibid., p. 340, referring to the Swiss Conseil Federal.

modern trend is to move away from the requirement of obtaining leave for enforcement or proving that the award is final where the term binding may be narrowly defined to reduce court control at the enforcement stage.[65]

Enforcing nullified arbitral awards

It has been argued that even where an award is set-aside by a court in the country of origin, it can still be upheld in the place of enforcement. There are two trends in this respect. The first trend refuses to enforce arbitral awards that have been set aside by a court in the country of origin. The second trend upholds enforcement of such awards if reasonable circumstances exist, for example, where justice and fairness are at issue.

The first trend is founded on the mandatory status of Article V ([1])(e), as the annulment of the award in the country of origin generally leads to depriving the award of its legal effects which makes the award become non-existent in that country. Van den Berg advocates this trend by stating that:[66]

"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."

65. The concept of binding international arbitral awards is now recognised world-wide. See, ILA Report, London Conference (2000), op. cit., p. 15. The report provides that: "… courts in a number of countries have referred to a policy in favour of giving effect as far as possible to the finality of international arbitral awards and discouraging the relitigation of issues already determined. This reflects the 'gener¬al pro-enforcement bias' of the New York Convention."; Gerold Herrman, op. cit., p. 236; see the Egyptian court of Cassation decision in 1944 (decision no. 521/1944, Collection of Cassation's Decisions, year 29, p. 472). The Court held that an arbitral award is binding from the moment when it has been rendered, therefore the wining party can proceed to enforce it directly, since the binding affect of the award is different from the requirement of having an order to enforce it.

66. Van den Berg, "Annulment of Awards in International Arbitration," in R. Lillich and C. Brower (eds.), International Arbitration in the 21st Century: towards "Judicialization" and Uniformity? Transnational Publishers Inc., Irvington, New York., (1992), 133, 161; Gray H Sampliner, "Enforcement of Nullified Arbitral Awards," J.Int.Arb, p. 145; also, Van den Berg, op. cit., p. 355. He provides that enforcing an annulled award may lead to an uncertain results that can only be prevented by refusing to enforce such awards, "…a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants the enforcement. A claimant would obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States."

Professor Pieter Sanders also supported this conclusion by emphasising that, once an award has been set aside by the courts of the country of origin "…the courts of the enforcing countries will...refuse the enforcement as there no longer exists an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement".[67] This has also been expressly emphasised by the United Nations Commission on International Trade Law on International Commercial Arbitration, which provides that:[68]

"The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of Article V (1)(e) of the New York Convention and Article 36 (1)(a)(v) of the Model Law."

The second trend expresses the desire to reduce the ability of the court of origin to obstruct the enforcement of the award in other states.[69] This trend has emerged after the issuance of two famous decisions: one in the United States in the Chromalloy Aeroservices v. The Arab Republic of Egypt case[70] and the other in France in the Hilmarton v. OTV case. [71] Both the Hilmarton and Chromallory cases demonstrated that some courts are willing to enforce awards annulled by the competent authorities of the countries in which or under the laws of which those awards were made.

The first observation that should be made here relates to the background of these two decisions as they were made by the French and United States' courts. Both countries have widely differing legal traditions, and this demonstrates a growing international trend in

67. Pieter Sanders, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 6 Netherlands Int'l L.R. 43, 55 (1955); William W. Park, "The Lex Loci Arbitri …", op. cit., p. 23.

68. Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, U.N.Doc. A/40/17 (United Nations ed., 1994), at 7 (b)(24).

69. Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment" (1998) 9 (1) ICC Bulletin 14; Gray H Sampliner, "Enforcement of Foreign Arbitral Awards after Annulment in their Country of Origin," 11 Mealey's int'l Arb Rep. (September 1996); also Gray H Sampliner, "Enforcement of Nullified Arbitral Awards," J.Int.Arb, p. 141, at 151. He states that: "… the success of our global system of enforcement of arbitral awards has reached the point where informed parties should expect that nullification of an award in the rendering country will not necessarily prevent enforcement elsewhere."; H. G. Gharavi, "The Legal Inconsistencies of Chromalloy", 12 Int>l Arb. Rep. 21 (May 1997); Eric A. Schwartz, op. cit., p. 131. He provides that: "… enforcing an annulled award assumes from the outset that, despite its annulment, there still remain[s] in existence an award capable of enforcement."

70. Chromalloy AeroServices and the Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996); 11 Mealey's Int'l Arb. Rep. (august 1996) at C-54.

71. OTV v. Hilmarton, Cour de Cassation, June 10, in JDI, 1997, no. 4.

favour of the enforcement of an arbitral award that has been set aside by a court of origin.[72]

The conclusion to which these two cases have come, is mainly based on an interpretation of Article V (1). The phrase "may refuse" in this Article indicates that the grounds included are discretionary and not mandatory. In addition to this, the result is built upon consideration of Article VII of the Convention, which states that no provisions of the Convention "…deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

In the Chromalloy case the US District Court granted enforcement of Chromalloy's award, in spite of its nullification by the Egyptian Court of Appeal. This case concerned a military procurement contract signed in 1988 between an American corporation "Chromalloy AeroServices Inc." and "Air Force of the Arab Republic of Egypt". In 1991, Egypt terminated the contract and Chromalloy directly started arbitration proceedings in Egypt under Egyptian law. On 24 August 1994, the Arbitral Tribunal issued its final award, based on the facts presented and upon the Egyptian Civil Law. The decision held that Egypt had not properly terminated the contract, and therefore was ordered to pay the amount of US$ 16.2 million plus interest. Thereafter, Chromalloy sought enforcement in the United States, by requesting the US District Court to enforce the award. As a response the losing party, the government of Egypt, filed a court action before the Egyptian Court of Appeal seeking to nullify the award, on the grounds that the award failed to apply the "administrative law" of Egypt.

In December 5, 1995, the Cairo Court of Appeal issued a final decision in favour of the Egyptian government, ruling that the arbitrator had erred in law and nullified the final award. The Egyptian government then raised an action in the United States with a view to dismissing the petition, arguing that the District Court is obliged to repudiate the award under Article V (1)(e) of the New York Convention. In addition to that, the District Court is obliged to recognise and give effect to the ruling of the Egyptian court, a duty imposed under the notion of judicial comity in respect of foreign judgements.

72. This could be considered as establishing a judicial precedent in the practice of international commercial arbitration.

Despite the Egyptian court's decision on July 31 1996, the US District Court granted Chromalloy's petition to recognise and enforce the arbitral award. The court recognised that there was consensus between the parties to the contract that made their arbitral award final and binding and not "subject to any appeal or other recourse". The Court also found that there existed a strong US public policy in favour of the judicial enforcement of this clause. Accordingly it held, pursuant to the long-established public policy exception to judicial comity in respect of foreign judgements, that a decision to recognise the Egyptian court decision would violate this clear US public policy.[73] Moreover, the court recognised that Article V (1)(e) of the New York Convention provided a discretionary standard for refusing to enforce an award, by reference to the phrase "recognition and enforcement may be refused"[74], and that Article VII of the Convention required courts to grant parties all the rights they could have under the domestic law of the country where enforcement was sought.[75]

The court, however, found that enforcement of the Egyptian judgement would violate public policy in the United States regarding arbitration, and refused to recognise it, rejecting thus the argument raised by the Egyptian party that the judgement of the Egyptian court had to be recognised under the principles of international comity.

Six months later, the Court of Appeal in Paris upheld a lower court order made in France making an arbitral award in favour of Chromalloy, that it was to be enforceable in France, under Article VII and French law, despite the annulment of the award by Egypt's Court of Appeal.[76]

The other important decision in this regard is the decision of the French Court of Cassation in Hilmarton v. OTV.[77] The award relates to a dispute regarding the payment of a substantial payment of fees

73. Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," op. cit., p. 144.

74. The language of Article V (2)(b) is permissive, that is, the court may deny enforcement but is not obliged to do so. See, Christopher B. Kuner, op. cit., p. 73; Van den Berg, op. cit., p. 265; however, some scholars refuse to interpret Article V (1) as giving the court discretion to enforce the award. Gerold Herrman, op. cit., p. 235. He suspects that the drafters never intended to give room for discretion.

75. The US district court concluded that Section 10 of the Federal Arbitration Act provided Chromalloy with a claim to enforcement of the award because the basis on which the Egyptian court annulled the award (an error in law) was not in their view a valid ground for setting aside an award under Section 10. Chromalloy, 939 F. Supp. At 910-911.

76. La Republique Arabe d'Egypte v. Chromalloy AeroServices Inc., Paris App., First Chamber, Section C, published in 12 Mealey's Int'l Arb. Rep. (April 1997) at B-1. Cited in Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," op. cit., p. 142.

77. OTV v. Hilmarton, Cour de Cassation, June 10, in JDI, 1997, no. 4.

from OTV to Hilmarton. On August 19th 1988, the arbitral tribunal rendered a decision against the claimant "Hilmarton", on the grounds that the contract violated Algerian public law, and specifically Algerian rules forbidding the use of intermediaries. On April 17th 1990 the Swiss Federal Tribunal[78] annulled the arbitral award, on the grounds that the arbitrator could only base his decision on the law chosen by the parties or on the genuine rules of international public policy but could not rely solely on the rules of any given legal system. In spite of this, OTV sought recognition and enforcement of the arbitral award in France where the Paris Court of Appeal held on December 19th 1991, that the award was enforceable in France. This decision became final on March 23rd 1994, when the Court of Cassation rejected the appeal.[79] While the French enforcement proceedings were pending, Hilmarton, obtained a judgement from a different French court recognising the Swiss courts' annulment of the award and started a new and a second arbitral process which gave its decision in Geneva on April 10th 1992. This second arbitral award ordered the defendant, OTV, to pay Hilmarton the commission provided for in the contract. The Swiss courts confirmed the second arbitral award. Following this, the Court of Appeal of Versailles granted enforcement of this award and confirmed the recognition of the Swiss judgement that had nullified the first award. In June [1997] the French Court of Cassation, reversing the lower court's decision held that the recognition in France of the first arbitral award by a final decision relating to the same controversy between the same parties, was res judicata, thereby creating an obstacle to any recognition of court decisions or arbitral awards that were subsequently found to be incompatible.[80]

Based upon these two cases[81], there is now a growing tendency towards recognising and enforcing arbitral awards that have been

78. Judgement of 17 April 1990 (Hilmarton v. OTV), Tribunal Federal Suisse, 1993 Rev. Arb. 315, 322, translated in XIX ICCA Yearbook 220 (1994).

79. Judgement of 23 March 1994 (Hilmarton v. OTV), Cass. Civ. L'ere, 1994 Rev. Arb., at 327-28, translated in XX ICCA Yearbook 663, 664-65 (1990).

80. Judgement of 10 June 1997 (Hilmarton v. OTV), excerpt translated in XXII ICCA Yearbook (France No. 27), 1997.

81. One should mention here that there are several other cases which concern the same issue, for example, Sonatrach v. Ford, Bacon and Davis, Inc., Trib. Pr. Inst. De Bruxelles, 6 December 1988, excerpted translation in XV ICCA Yearbook 370 (1990). Cited in Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," op. cit., p. 156, footnote 60; Baker Marine v. Chevron and Chevron Corp, 288. United State Court of Appeals, Second Circuit, 12 August 1999, Nos. 97-9615, 97-9617, Yearbook Comm. Arb'n XXIV (1999).

set aside by a court in the country of origin.[82] This approach has increased the possibility of actually enforcing international arbitral awards.

The question that has not been settled yet is under which circumstances can a court recognise and enforce a foreign award that has been set aside by the court of origin?

As has been dealt with above, in the Chromalloy and Hilmarton cases, Article V (1)(e) was considered as providing a discretionary ground since the formulation of Article V (1) of the Convention "Recognition and enforcement of the award may be refused" indicates that the court is not compelled to refuse the enforcement. A court, thus, is empowered with discretion which can allow enforcement to "be refused" if the court considered it right and proper. In addition to that, Article VII of the Convention confers the parties to all the favourable rights that they could obtain under the domestic law of the country where enforcement is sought.

However, this approach should not lead to disregarding the importance of the rule that Article V (1)(e) is designed to protect. The importance of controlling the award by the courts in the country of origin cannot be overstated. In order to strike a balance between the requirement of respecting the decision of the court of origin and that of enforcing annulled awards, one may say that, enforcing a nullified arbitral award should only be confined to exceptional cases. For example, when the court of enforcement finds that the nullification order by the court of origin has been obtained by fraud[83] or that the nullification was based on unreasonable grounds[84] as when considerations of national public policy in the state of origin conflict with neither international public policy nor the public policy rules of the country of enforcement. Consideration should be given in these

82. See, Emmanuel Gaillard, op. cit., p. 3. He states that: "…these two decisions, and the growing international consensus which they exemplify, can only be lauded"; Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," op. cit., p. 142, stating that, "I supported the U.S. decision, noting that it was, a major victory for supporters of binding international arbitration"; Jan Paulsson, "Enforcing Arbitral Awards ...", op. cit., p. 27.

83. This may occur, for example, in cases where the annulment of the arbitral award was based on corruption, bias, or the impartiality of the court which set the award aside. For example, if the courts in the country of origin were biased, because one of the parties was the state of origin itself, and accordingly did not afford the winning party any procedural right to present a case in favour of enforcing the award. See Andrew and Keren, op. cit., p. 295; William W. Park, "The Lex Loci Arbitri…", op. cit., p. 23. He states that: "post-annulment recognition of awards would be appropriate either where permitted by an international treaty, such as under the European Convention, or when the local judiciary in the country of origin is "corrupt or biased"; Redfern and Hunter, 2nd ed., op. cit., p. 431.

84. Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," op. cit., p. 162.

circumstances to the connection between the arbitral award and the country of origin. Thus, if the award has no connection to that country other than that it was chosen for convenience as a neutral forum then the decision to set the award aside because it violates purely national public policy rules may not be recognised in other countries. One might add here that enforcing an annulled arbitral award should not be considered as a mark of disrespect directed at the court of origin. If it were, then the same criticism could be made when the court of enforcement refuses to enforce an award that has been deemed enforceable by the court of origin[85]; for example, where an award is made that is contrary to the public policy of the state in which it is to be enforced.

Finally, it is open to question why enforcement of an arbitral award that was annulled in the country of origin is not possible, especially if there are grounds on which the enforcement could be justified. For example, if the court of origin had set the award aside due to merely formal requirements of the national procedural law such as where an arbitrator refused to sign the arbitral award, this not being required according to the applicable procedural law. Why does this necessarily lead to a refusal to enforce the award in a foreign country? Could the country of enforcement recognise the award simply by maintaining that under its law the result of the arbitration is perfectly valid and the reason for annulment in the country of origin is peculiar and deemed to be limited to that country?

85. The New York Convention and the Model Law principle impact is, "…that recognition (exequatur) in the country where an arbitral award is rendered is not necessary for it to be recognised and enforced elsewhere." See Jan Paulsson, "Arbitration Unbound…" op. cit., p. 366.