THE DEFICIENCIES OF THE NEW YORK CONVENTION OF 1958 RELATING TO THE ENFORCEMENT REFUSAL GROUND V (1) (e) AND THEIR EFFECTS ON THE ENFORCEMENT OF ANNULLED FOREIGN ARBITRAL AWARDS

THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY AT THE UNIVERSITY OF LEICESTER

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OCTOBER 2007
To:

My Father, Mother, Brother and Sister,

Your help, support, cooperation and encouragement to get my PhD in Law are highly appreciated.

Thanks a lot.

With Regards,

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February 2008
Abstract

A number of deficiencies have emerged under the New York Convention of 1958 on the “Recognition and Enforcement of Foreign Arbitral Awards”. These deficiencies relate mainly to the non-enforcement ground V (1) (e) dealing exclusively with annulled foreign arbitral awards.

The first deficiency is found in the word “may” provided in Article V (1). This word is ambiguous and gives unlimited discretion to the national enforcement courts. Thus, recognition and enforcement of annulled foreign arbitral awards may be refused. Chapter One deals with this deficiency and clarifies in some depth its effect on the implementation of the non-enforcement ground V (1) (e).

The second deficiency is the absence of the grounds upon which resulting arbitral awards can be annulled. The annulment issue is left to national arbitration laws of the Contracting States. Due to the absence of the annulment grounds, inconsistency is found in the annulment grounds listed under the national laws. Chapter Two deals with this deficiency and clarifies that the attempts of the Contracting States by amending their national laws have not covered the deficiencies of the Convention.

The absence of the annulment grounds has led to further deficiencies. The annulment grounds are not mandatory under a number of laws and thus can be waived and expanded. As a result, waiver and expansion agreements have come into force and are now considered loopholes as they expand the national courts’ discretion. Such issues are clarified in Chapter Three.

The effects of the deficiencies and their loopholes have affected the non-enforcement ground V (1) (e). As a result, its application, as discussed in some depth in Chapter Four, is entirely governed by the courts’ discretion. In conclusion, annulled foreign arbitral awards can survive and be capable of being recognised and enforced when seeking enforcement outside the country of origin.
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**Introduction**

The New York Convention of 1958 on the "Recognition and Enforcement of Foreign Arbitral Awards" was the result of the international community's efforts, beginning with the Geneva Protocol of 1923 on "Arbitration Clauses" and continuing through the Geneva Convention of 1927 on the "Execution of Foreign Arbitral Awards". These efforts aimed to promote international commercial arbitration and, as a result, international trade. It should be noted that recognition of a rendered arbitral award in a state other than the state where it is made is essential for this purpose. Furthermore, the success of arbitration in essence depends entirely on the possibility of enforcing the rendered arbitral awards.  

Two of its articles are considered to be the vital pillars of the New York Convention; on the one hand, Article III obliges each contracting state to recognise the rendered arbitral awards and on the other, Article VII (1) ensures the parties' rights, since the Convention provisions shall not deprive any interested party of any right he may have. Therefore, the New York Convention is considered to be the vital pillar and cornerstone of international commercial arbitration. The importance of the 1958 Convention is due to its provisions for facilitating the recognition and enforcement of rendered arbitral awards, in particular, in a state other than the state in which they are rendered. In other words, the rendered arbitral awards are, by its means, easily recognised and enforced without restrictions in a state other than the state where they are rendered.

Moreover, it should be mentioned that Article V of the 1958 Convention is also essential, since it assumes the validity of the rendered arbitral awards. Yet it is considered as an exceptional Article; this is due to its providing a number of grounds

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1 Official Records ECOSOC, Comments received from governments regarding the draft convention on the enforcement of international arbitral awards, 21 January 1955, document E/AC. 42/1, p 3
upon which recognition and enforcement of a foreign arbitral award can be refused. These grounds give authority to national courts where recognition and enforcement of foreign arbitral award is sought to refuse to enforce foreign arbitral awards.

Notwithstanding that one of the purposes of adopting the 1958 Convention was to reform a number of deficiencies found under the Geneva treaties, which were early attempts, it should be mentioned that this purpose in adopting the 1958 Convention was not satisfied for very long. A number of deficiencies have emerged under the New York Convention, unfortunately. The deficiencies relate mainly to the implementation of the enforcement refusal grounds listed under Article V, in particular, the enforcement refusal ground (e) of Article V (1). Thus, the present work concentrates and examines in some depth the deficiencies of the 1958 Convention and their effects, relating mainly to the enforcement refusal ground V (1) (e) itself. This enforcement refusal ground is the subject of debate at the international level due to its dealing exclusively with annulled foreign arbitral awards.

National courts around the world demonstrate an increasing willingness to recognise and enforce foreign arbitral awards. This is undoubtedly because of the facilitation of the enforcement proceedings adopted by and provided under the New York Convention. But the willingness of the national courts is restricted in some countries, due to the ambiguous language of Article V (1). The opening paragraph of this Article has an ambiguity which is reflected in the word “may”, since annulled arbitral awards may be refused when seeking enforcement in a state other than the state where the arbitral award was made. As Paulsson says, the word “may” leaves discretion to the enforcement courts and does not require judges to refuse to enforce an annulled foreign arbitral award. Thus, the interpretation of the word “may” is likely to vary in different national enforcement courts and among academics. Such
ambiguous language constitutes the first deficiency of the New York Convention relating to the application of the enforcement refusal ground V (1) (e).

It is undeniable that one of the advantages of international commercial arbitration is that the rendered arbitral awards are final and binding on the parties once they are rendered. This finality exists unless the parties, in particular the losing one, makes an application to seek annulment of the rendered arbitral awards. But, unfortunately, the New York Convention does not list the grounds upon which a rendered arbitral award can be annulled. The absence of such annulment grounds has constituted the second deficiency found under the 1958 Convention, although a number of academics state that the scope of the Convention is in the enforcement stage and thus no grounds to annul rendered arbitral awards are needed. But, as Hill says, there is a tension between two goals: the goal of finality of the rendered arbitral awards and the goal of their legality. Accordingly, does the absence of the annulment grounds affect the goals of the finality of the arbitral award and its legality? In particular, Paulsson says that not all countries, or the Contracting States adhering to the 1958 Convention, are safe havens for international arbitration, due to the inconsistent level of judicial review among the national courts.

The question thus is to what extent the Contracting States have taken into consideration the deficiency of the absence of annulment grounds? The answer to such a question may depend on the effect of this deficiency on the implementation of the enforcement refusal ground V (1) (e). If so, finding the grounds upon which a rendered arbitral award can be annulled is essential. Moreover, it is necessary to find what the competent authorities are (if more than one) before which applications to seek annulment should be made. This is because finding out the competent authority
may lead to different annulment grounds being applied and thus inconsistent implementation of the enforcement refusal ground V (1) (e).

It cannot be gainsaid that arbitration is based on an arbitration agreement. In addition, it is undeniable that the parties’ will is considered to be the cornerstone of the arbitration agreement without which the arbitration proceedings are not valid. Moreover, in the absence of a clear and valid arbitration agreement there can be no arbitration; the national court will retain its normal jurisdiction. Furthermore, the parties have freedom to choose the law to be applied to their disputes and to the proceedings. But in cases where annulment grounds are absent to what extent do private parties have the power to affect the implementation of the enforcement refusal ground V (1) (e)? Can private parties waive this enforcement refusal ground by entering into agreements, either in advance or when a dispute arises, which determine the finality and binding effects of the resulting arbitral awards? In other words, do private parties to arbitration have the opportunity to determine that the resulting arbitral awards will be final, binding and with no other recourse? This question recalls Baizeau, who says that it is common for arbitration clauses to set specific terms or language with respect to the finality of the rendered arbitral awards. If so, this means that the annulment grounds listed under a great many national arbitration laws are not mandatory or non-statutory and thus can be waived. If so, moreover, taking waiver agreements into consideration means displacing national courts’ jurisdictions and depriving them from exercising their normal jurisdictions. But, if not, this means, as Gharavi states, that waiving the right to seek annulment of the rendered arbitral awards has not given rise to a highly controversial debate and thus the waiver issue is not common in practice.
It is also clear that arbitration depends on the parties’ will and thus it is a creature of the contract. Accordingly, the arbitration agreements are recognised and enforced as other contracts are. But due to the absence of the annulment grounds under the New York Convention, to what extent do such parties’ arbitration agreements affect the implementation of the enforcement refusal ground V (1) (e)? In the light of the absence of the annulment grounds, moreover, can parties enter into an agreement to determine the grounds upon which the resulting arbitral awards can be annulled? In other words, as Moses says, can the parties to arbitration tell and direct the courts what to do?\(^2\) If so, to what extent can such parties’ agreements be applied and taken into consideration? Thus, finding the legal effect of such parties’ agreements is necessary, in particular because it is said that such agreements will allow the parties back into the courts for a “second bite at the apple”.\(^3\) Moreover, taking into consideration parties’ agreements expanding the annulment grounds listed under the national arbitration laws of the countries of origin means that the national courts’ jurisdictions can be created by parties. In addition, such parties’ agreements may affect the finality and the legality of the rendered arbitral awards and their binding effect.

Although this work is not intended to be a comparative study, it will be essential to refer to a number of jurisdictions. Finding the annulment grounds listed under the national arbitration laws is important. In addition, finding how national arbitration laws deal with the freedom of parties to arbitration in contracting will give a clear approach in terms of the effects of this on the implementation of the enforcement refusal ground V (1) (e).


A number of national arbitration laws will be chosen on purpose and examined in this thesis. The Arbitration Act 1996\textsuperscript{4} will be discussed to concentrate on the comprehensive annulment grounds and find their mandatory effects. The U.S. Federal Arbitration Act 1925 will also be examined because it lacks comprehensive annulment grounds, although it was amended in 1970 to conform to the New York Convention and cover its deficiencies. Furthermore, the UNCITRAL Model Law 1985 as a piece of modern legislation will be examined. This Model Law has not achieved its aim since it was adopted to avoid or cover the deficiencies found under the New York Convention, but as van den Berg says it is a carbon copy of the 1958 Convention. Moreover, the German Arbitration Act 1998 will be discussed as an ideal law because it refers exclusively to the 1958 Convention and mirrors its provisions. Thus, it conforms to the 1958 Convention.

In addition, referring to a number of jurisdictions or other national arbitration laws is essential. The Swiss, Belgian and French laws will be discussed and analysed in this thesis as indications or examples. Inconsistency of the annulment grounds listed under the national arbitration laws is expected, due to the absence of such grounds under the 1958 Convention, but the inconsistency found under the Swiss, Belgian and French laws is unpredictable. The Mandatory effect of the annulment grounds under the Swiss and Belgian laws depends on the nationality of parties to arbitration. Non-Swiss and non-Belgian parties are entitled to waive the annulment grounds, but Swiss and Belgian parties are not entitled to do so. The French law also has made a distinction between national and international arbitral awards. The annulment grounds are divided into two sections and their applications depend on the scope of the arbitral proceedings. Even the French law is against the provisions of the

\textsuperscript{4} This Act applies to England, Wales and Northern Ireland
1958 Convention, particularly Article V (1) (e), because it precludes the French courts from exercising their normal jurisdiction to annul arbitral awards rendered outside France even if the French law is applied.

Thus, these laws are chosen on purpose to clarify the effect of the deficiencies of the 1958 Convention, particularly the absence of the annulment grounds, on the attempts of the Contracting States to cover the deficiencies of the 1958 Convention and as a result on the national arbitration laws. In addition, these laws will be discussed to demonstrate that the deficiencies of the New York Convention have led to further deficiencies or loopholes under the national arbitration laws, of the Contracting States, which undoubtedly affect the implementation of the enforcement refusal ground V (1) (e). These laws will be examined and analysed in Chapters Two and Three dealing with the annulment grounds listed under the national arbitration laws and their mandatory effects.

In the light of the deficiencies of the 1958 Convention moreover, it will have to discuss whether annulled foreign arbitral awards are still capable of being recognised and enforced. This work examines this inquiry in some depth as one of the topics of the legal agenda in recent years. On the one hand, this will lead it to concentrate on a number of international arbitration cases by which the effect of the deficiencies of the New York Convention on the non-enforcement ground V (1) (e) has been found. The Chromalloy case (1996) is the vital means of revealing the deficiencies of the New York Convention and their effects. In Chromalloy, the U.S. District Court, District of Columbia exercised unlimited discretion and determined to enforce an arbitral award in spite of its being annulled by the Egyptian court at Cairo. Baker Marine case will also be discussed to demonstrate the unlimited and explicit abuse of discretion exercised by the U.S court. The Hilmarton case, moreover, will be
examined to find the effect of the deficiencies of the New York Convention on the decisions of national courts before which applications to seek enforcement of annulled foreign arbitral awards have been made. Furthermore, this case is quite complex as it dealt with two different arbitral awards between the same parties and on the same subject matter. And thus, due to this complex, a short diagram is needed to clarify it.

On the other hand, the problem of enforcing annulled foreign arbitral awards is also the subject of debate among academics. There is no doubt that this debate will establish two different trends and viewpoints. It is said by some that annulled foreign arbitral awards should have no existence and thus there is nothing to be recognised and enforced. In contrast, it is said by others that the annulment decision has only national effect and thus can be enforced when seeking enforcement of an annulled arbitral award in a state other than the state where it was made. But the question, as van den Berg says, is “How then is it possible that courts in another country can consider the same award as still valid?”\footnote{Van den Berg Albert Jan, ‘Annulment of Awards in International Arbitration’ in Lillich Richard B and Brower Charles N (eds.), \textit{International Arbitration in the 21th Century: Towards "Judicialization" and uniformity?} (Transnational Publishers Inc., Irvington, New York 1992) 161} If national enforcement courts rely on the deficiencies of the 1958 Convention and their effects and apply their discretion, this will involve contradictions between their decisions. In addition, if the national enforcement courts apply or take into consideration other issues, such as politics, the extent of their discretion will be expanded and otherwise affected, depending, for example, on the nationalities of parties to arbitration.

This work is divided into four main chapters. Chapter One deals with the importance of the New York Convention and also clarifies its deficiencies reflected in the ambiguous language of Article V (1) and in failing to mention the grounds upon which rendered arbitral awards can be annulled. Chapter Two examines the attempts
of the Contracting States adhering to the 1958 Convention and the extent of such attempts to cover its deficiencies, in particular the absence of the annulment grounds. Chapter Three mainly examines the effect of the absence of the annulment grounds, under the Convention, on the Contracting States’ attempts, discussing, in particular, the grounds upon which the rendered arbitral awards can be annulled. In other words, this chapter examines whether the annulment grounds listed under the national arbitration laws are mandatory or have adequately covered the 1958 Convention’s deficiency and thus cannot be waived or expanded either by the provisions of national arbitration laws or parties’ agreements. Chapter Four concentrates on the academics and national courts’ approaches when recognition and enforcement of annulled foreign arbitral awards are sought. This determines the vital role of the deficiencies of the 1958 Convention and their effects on the national enforcement courts’ decisions and on the extent of the discretion which they should exercise.

This work will conclude by finding how the absence of the grounds upon which a rendered arbitral award can be annulled and the ambiguous language of Article V (1), as the deficiencies of the New York Convention, together with the effects of these things, have influenced the implementation of the enforcement refusal ground (e) of Article V (1). These effects will appear in the academic approaches and the national courts’ decisions, of the Contracting States adhering to the 1958 Convention, either where the arbitral award is rendered or where recognition and enforcement of the arbitral award are sought. As a result, this work will demonstrate that an arbitral award annulled in its country of origin can survive and be capable of being recognised and enforced when enforcement is sought in a state other than the state where the arbitral award is annulled.
Chapter One: The Importance of the New York Convention of 1958 and its Deficiencies

1.1. Introduction

International Commercial Arbitration has become one of the most important alternative methods by which international commercial disputes can be resolved without referring to traditional proceedings. With international commercial arbitration, parties have an opportunity to choose an impartial arbitrator, an expert in their field who has a binding authority to resolve their quarrel. In addition to this advantage, the speed and the confidentiality in the arbitration process have motivated the international community to devote all its efforts to paying consideration to arbitration. The first developments, therefore, in the aftermath of the First World War, were the Geneva Protocol of 1923 on "Arbitration Clauses" and the Geneva Convention of 1927 on the "Execution of Foreign Arbitral Awards". The Geneva Treaties are considered to be the first multilateral legal documents to grant arbitral awards more importance, by facilitating the enforcement process at either the national or the international level.

It should be noted that the success of arbitration depends entirely on the possibility of enforcing the arbitral award, but an arbitral award cannot be enforced without recognition of the award, particularly when enforcement is sought in a state other than the state where the arbitral award is rendered. When some deficiencies were acknowledged under the Geneva Treaties concerning the international recognition and enforcement of arbitral awards, the international community made further efforts. As a

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2 Official Records ECOSOC, Comments received from governments regarding the draft convention on the enforcement of international arbitral awards, 21 January 1955, document E/AC. 42/1, p 3
result, the New York Convention of 1958 on the “Recognition and Enforcement of Foreign Arbitral Awards” was adopted. This Convention is considered to be the vital pillar and cornerstone of international commercial arbitration.

This chapter deals, on the one hand, with the importance of the New York Convention of 1958. On the other, it deals with the deficiencies of the Convention which have affected the implementation of its provisions. In order to clarify these issues, this chapter is divided into five main sections. In section (1) I concentrate on the Geneva Treaties as early attempts to facilitate the enforcement of arbitral awards and show how they gave the arbitral awards the possibility of being enforced at either the national or international level. In section (2) I discuss the New York Convention: its birth and its international promotion of the issue of enforcement. Then, section (3) deals with the deficiencies of the New York Convention which have affected its international implementation. In addition, I focus on Article V, which lists a number of grounds to refuse the enforcement of foreign arbitral awards, particularly the ground in Article V (1) (e). What needs to be explored is the effect of discretionary powers of courts on the interpretation of the word “may”, as used in the opening paragraph of Article V (1). This leads to the question whether or not the spirit or the text of the Convention support such interpretation; its other provisions, such as Articles III and VII (1), which might affect the implementation of Article V, are also considered. In section (4), given the deficiencies of the Convention, I discuss the different approaches, in terms of dealing with annulled foreign arbitral awards, as a “topic that has moved to the top of the legal agenda in recent years”. Section (5) serves as an introduction seeking to clarify a number of issues, to be discussed and examined in the second chapter.

1.2. Historical Background

Several conventions or treaties at the international level include provisions for the enforcement of arbitral awards. The most important developments since the First World War have been the Geneva Protocol of 1923 on “Arbitration Clauses” and the Geneva Convention of 1927 on the “Execution of Foreign Arbitral Awards”. These developments attempted to establish a legal framework for international commercial arbitration.

1.2.1. The Geneva Protocol of 1923

The Geneva Protocol on “Arbitration Clauses” was drawn up by the International Chamber of Commerce (ICC) under the sponsorship of the League of Nations in 1923. On the 24th September 1923 the Protocol was adopted for signature in Geneva and came into force on the 28th July 1924.

The Protocol recognised the validity of the arbitration agreement by concerned parties to any jurisdiction of the signatory countries: “Each of the Contracting States recognises the validity of an agreement…” In addition, the Protocol confirmed that the force of arbitration procedure is the will of the parties. Article II provides that: “the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place…” In addition, the Protocol ensured the implementation of the Protocol by the authorities of the contracting states in accordance with the provisions of their national laws of arbitration, since it provides that: “Each Contracting State undertakes

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4 The Geneva Protocol on “Arbitration Clauses” signed at a meeting of the Assembly of the League of Nations held on 24th September 1923
5 Article I of the Geneva Protocol of 1923
6 Article II
to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles".7

The Protocol, therefore, is considered to be the first international legal document that facilitated the enforcement of arbitral awards, but it made a distinction between arbitration agreements and awards. Accordingly, it had two main objectives. The first was to ensure the enforceability of the arbitration clauses internationally; the second was to ensure the national enforcement of arbitral awards, that is, in the country of origin in which they were rendered.8 But this Protocol appeared unsatisfactory, since it was limited and affected the enforcement of arbitral awards only in the state where the award was made9; it did not allow the arbitral awards to be recognised and enforced internationally. Thus, another legal document was needed to satisfy the ambitions of the international community. As a result, it was replaced in 1927 by the Geneva Convention on the “Execution of Foreign Arbitral Awards”.

1.2.2. The Geneva Convention of 1927

The Geneva Convention on arbitral awards also began under the auspices of the League of Nations10 and was adopted in 1927. It was opened for signature in Geneva and came into force on 25th July 1929.11 It is noteworthy that the Geneva Convention of 1927 was the first multilateral convention covering the enforcement of foreign arbitral awards.12 In other words, applications to seek enforcement of rendered arbitral awards went beyond the borders of the country in which the arbitral award had been made.

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7 Article III
9 Ibid
11 Ibid, p 810
Thus, the purpose of this Convention was to expand the ability of the previous Geneva Protocol and to widen the scope of the enforcement of arbitral awards; it granted an important position to the courts as the place of origin or the seat of arbitration. However, the Convention laid down under Article (2) a number of grounds upon which the recognition and enforcement of arbitral awards should be refused. Hence, the important position of the country of origin appeared under this Article in its provision that “…recognition and enforcement of the award shall be refused if the court is satisfied that: (a) that the award has been annulled in the country in which it was made”. In addition, it required the party seeking enforcement to prove that the award had become “final” in the country in which it was made. This requirement was provided under Article 4 (2), which states 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 I (d), in the country in which it was made’”.

Accordingly, the main problems of the Geneva Convention, which restricted the possibility of enforcing the arbitral awards internationally, were the so-called “double exequatur” requirement and the burden of proof of the finality of the awards. First, it requested confirmation of the arbitral award in the country of origin where the award had been made before another country could possibly recognise and enforce it. In other words, the party seeking enforcement was required to obtain leave for enforcement from the country of origin. Secondly, obtaining this leave was also required in the country where enforcement was sought; this led to the so-called “double

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13 Article 2 (a) of the Geneva Convention of 1927
14 Article 4 (2)
15 Davis Kenneth R, p 45 (footnote 1 supra)
Therefore, its rules were not satisfactory or suitable for facilitating the enforcement of arbitral awards outside the Contracting States’ borders.

As a result, the application scope of the Geneva Treaties was limited, because the arbitral awards were linked to the territory of the Contracting States. The Geneva Protocol had granted the arbitral awards enforceability only at the national level, whereas the Geneva Convention granted the arbitral awards the opportunity of being recognised and enforced internationally, but with harsh requirements, such as the so-called “*double exequatur*”. Accordingly, when the matter of enforcement of foreign arbitral awards was raised by organisations representing business throughout the world, it showed the importance of the international enforcement of arbitral awards in order to support and promote international trade. The international community, thereafter, devoted all its efforts and held several conferences and meetings to promoting international commercial arbitration, in particular, its enforcement proceedings seeking to avoid the deficiencies of the Geneva Treaties as early attempts.

Two drafts were presented of a new convention to facilitate the enforcement proceedings and give the arbitral award more flexibility in being recognised and enforced internationally, in states other than the one where it was made. The first draft was presented by the International Chamber of Commerce in Paris; the second draft was produced by the United Nations Economic and Social Council. As a result, the New York Convention of 1958 on the “Recognition and Enforcement of Foreign Arbitral Awards” was born out of the Convention Drafts.

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17 Official Records ECOSOC, Committee on the enforcement of international arbitral awards, summary record of the first meeting, 23 March 1955, document F/AC.42/SR.1, p 3. The first meeting was held at the UN Headquarters, New York, on Tuesday 1 March 1955
1.3. The New York Convention of 1958

1.3.1. The Birth of the New York Convention

1.3.1.1. The International Chamber of Commerce Draft of 1953

At the 1951 Lisbon Congress of the International Chamber of Commerce (ICC), the business community criticised the Geneva Convention of 1927. It was said that the Geneva Convention no longer met “modern economic requirements”. In addition, the International Chamber of Commerce expressed the view that the system of the Geneva Convention no longer met the needs of international trade. Moreover, the main deficiency of the Geneva Convention, in the opinion of the ICC, was the condition that enforcement of an arbitral award must be “strictly in accordance with the rules of procedure laid down in the law of the country where arbitration took place”.

The ICC advocated the idea of an “international award” in order to meet the requirements of international trade and suggested that the arbitral awards should be based on the will of the parties and thus should be automatically enforced, but, in the absence of the parties’ agreement, the award must conform to the law of the country where the arbitration took place. Furthermore, in the view of the ICC, the time was approaching to make the arbitration of commercial disputes more general and more practical.

Thus, the ICC felt that adopting a convention would be a “constructive step towards facilitating international trade, and ultimately towards higher standards of

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18 Sultan Allen, p 812 (footnote 10 supra)
19 Official Record ECOSOC, Report of the committee on the enforcement of international arbitral awards, 21 March 1955, document E/AC.42/4, p 5
21 Ibid
22 Official Records ECOSOC, Committee on the enforcement of international arbitral awards, summary record of the first meeting, p 5 (footnote 17 supra)
living and so towards general peace and prosperity”. For this reason, the ICC appointed a committee on International Commercial Arbitration. This committee met on 13th March 1953 and later prepared a Preliminary Draft convention. This draft convention through the United Nations was submitted to member governments for their consideration, with the recommendation that:

"the adoption of such a convention would greatly increase the efficiency of international commercial arbitration, by insuring a rapid enforcement of arbitral awards rendered in accordance with the will of the parties".

It should be noted that the ICC produced a Draft Convention on the "Enforcement of International Arbitral Awards". Thus, the ICC Draft concentrated primarily on the enforcement and recognition of those arbitral awards that are rendered in international matters. In addition, Article IV of the ICC Draft Convention, the origin of Article V of the New York Convention of 1958, provided grounds for the refusal to recognise and enforce the awards in certain specific circumstances. The importance of such grounds was reflected in the reported statement of a representative of the ICC. He said that "to ensure that arbitration remained fair at all times, article IV of the draft provided for the refusal of recognition and enforcement of the award in certain circumstances". The ICC draft also focused on eliminating the finality requirement of the Geneva Convention by suggesting that "the arbitral awards be enforced as long as they have not been annulled".

The ICC Draft Convention was revolutionary in articulating the idea of "international awards" detached from the restrictions of national laws and enforceable

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23 Official Records ECOSOC, p 6 (footnote 17 supra)
24 Sultan Allen, p 812 (footnote 10 supra)
25 Ibid
26 Mayer Ulrich C, p 584 (footnote 3 supra)
27 Official Records ECOSOC, p 7 (footnote 17 supra)
28 Gharavi Hamid G, *The international effectiveness of the annulment of an arbitral award*, pp 49-50 (footnote 12 supra)
as long as they conformed to the parties’ agreement or the will of the parties. But although it was revolutionary, it has been adopted and taken into consideration by a great many states in order to promote the arbitration and facilitate the enforcement of arbitral awards. In addition, the United States Chamber of Commerce (CC) strongly advocated arbitration as an attractive and economical method of settling disputes in international trade and recognised the need for arbitration awards to be enforced in countries other than those in which they were made. The Chamber of Commerce also acknowledged the effort of the International Chamber of Commerce, in Paris and suggested that further efforts should be made in this direction “through bilateral and multilateral treaties and conventions to the greatest extent feasible”. With this, the ICC proposal of 1953 to regulate international commercial arbitration was accepted and taken into consideration by the United Nations Economic and Social Council.

1.3.1.2. The United Nations Economic and Social Council Draft of 1955

The United Nations Economic and Social Council (ECOSOC) resumed the work begun by the League of Nations which resulted in the Geneva Protocol and the Geneva Convention. According to informal reports received, a number of delegations had been paying particular attention to the enforcement of foreign arbitral awards. Furthermore, a sub-committee of the Economic Commission for Asia and the Far East

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29 Gharavi Hamid G, The international effectiveness of the annulment of an arbitral award, p 49 (footnote 12 supra)
30 See Official Record ECOSOC, Comments received from governments regarding the draft convention on the enforcement of international arbitral awards, (footnote 2 supra); a number of States adopted and supported the ICC. For example, the Netherlands Government was aware that “the Geneva Convention of 1927 no longer fully meets the needs of international trade in this field”, see Official Record ECOSOC, Comments received from governments on the draft convention on the recognition and enforcement of foreign arbitral awards, twenty-first session, item 8, 3 April 1956, document E/2822/Add.4, INNIX I, p 1
31 Official Records ECOSOC, Comments on the draft convention on the recognition and enforcement of foreign arbitral awards, twenty-first session, item 8, 23 March 1956, document E/2822/add.3, p 2
32 Ibid
33 Official Records ECOSOC, p 3 (footnote 17 supra)
had reviewed the arbitration facilities in its region and stated in its report that a new international convention to enforce arbitration awards would be a significant step forward.\(^{34}\)

On 6\(^{th}\) April 1954, the United Nations Economic and Social Council established an *ad hoc* committee to study the matter.\(^{35}\) The committee decided to use the ICC Preliminary Draft convention as a “working paper for its deliberations”.\(^{36}\) The Committee noted the view of the International Chamber of Commerce that “in the interest of developing international trade it is important to further means to obtain the enforcement in one country of arbitral awards rendered in another country in settlement of commercial disputes”.\(^{37}\) In its report to the Council, the committee concluded that “it would be desirable to establish a new convention which […would go] further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards”.\(^{38}\)

In 1955, the ECOSOC presented another Draft Convention on enforcement, but focusing this time on the “Enforcement of Foreign Arbitral Awards”. The *ad hoc* committee stated that the expression “International Arbitral Awards” used by the International Chamber of Commerce draft convention “normally referred to arbitration between States”.\(^{39}\) It also stated that “since this draft does not deal with arbitration between States, but deals with the recognition and enforcement in one country of arbitral awards made in another country”,\(^{40}\) the title “Draft Convention on the Recognition and Enforcement of *Foreign* Arbitral Awards’ reflects more accurately the

\(^{34}\) Official Records ECOSOC, p 3 (footnote 17 supra)

\(^{35}\) The committee on the enforcement of international arbitral awards was established by resolution 520 (VII) of the Economic and Social Council adopted on 6 April 1954 at the seventeenth session of the Council

\(^{36}\) Official Record ECOSOC, Report of the committee on the enforcement of international arbitral awards, p 5 (footnote 19 supra)

\(^{37}\) *Ibid*, p 4

\(^{38}\) Sultan Allen, p 813 (footnote 10 supra)


\(^{40}\) Official Record ECOSOC, p 5 (footnote 19 supra)
The ECOSOC draft convention also provided in Article III (b) that the arbitral award must become “final and operative”. The ad hoc committee stated that the terms “final and operative” were intended to “protect the rights of the losing party”. In addition, it stated that these terms were inserted “to mean that an award must be a definitive adjudication of all matters at issue, and must have full legal force and effect”.

1.3.2. Adoption of the New York Convention

Governments and non-governmental organisations offered comments and suggestions relating to the drafting of a convention on the recognition and enforcement of foreign arbitral awards. It should be mentioned that the terms “final and operative” suggested by the ECOSOC were close to the expression of the Geneva Convention, under which the award had to be “final” if it was to be recognised and enforced. Thus, several governments and organisations made comments and predicted practical difficulties in applying the provision of Article III (b) of the ECOSOC Draft Convention which required the party seeking enforcement of an arbitral award to show that the award had become “final and operative” in the country where it was made.

41 Official Record ECOSOC, p 5 (footnote 19 supra); concerning the title of the ECOSOC draft convention, the New Zealand delegation said that “the expression of ‘foreign’ arbitral awards is, it is considered, more appropriate than the term ‘international’ awards, the latter being likely to lead the confusion with awards rendered in inter-state arbitration”, see Official Record ECOSOC, Comments by governments on the draft convention on the recognition and enforcement of foreign arbitral awards, United Nations Conference on International Commercial Arbitration, 10 March 1958, document E/CONF. 26/3, p 2; in addition, in the first meeting of the Committee on the enforcement of international arbitral awards, held at the UN Headquarters, New York, on Tuesday 1 March 1955, the representative of Belgium, Mr. Nisot, suggested that “the purpose of the proposed convention would be made clearer if the title was amended to read: “convention concerning the recognition and enforcement of arbitral awards made abroad”, see Official Records ECOSOC, p 7 (footnote 17 supra).

42 Official Records ECOSOC, Recognition and enforcement of foreign arbitral awards, report by the Secretary-General, twenty-first session, item 8, 31 January 1956, document E/2822, ANNIXII, p 12

43 See Official Records ECOSOC, p 9 (footnote 39 supra)

44 For example, the United Kingdom made some comments about the words “final and operative”. It stated that “there are two dangers to be taken into account. One is that a foreign award might be in process of being enforced in one country at the very time that it was being set aside in the country in
was said that "it would be normally impossible for the party seeking enforcement to submit a negative proof that the enforcement of the award has not been suspended or that no appeal has been lodged against the award, and it seemed therefore illogical to impose the burden of such a proof on the person seeking enforcement".\textsuperscript{45} Moreover, it was indicated that, in practice, the determination by enforcement courts whether an arbitral award was final or not might demand an examination of the legal provisions of the foreign country under which actions for annulment might be taken.\textsuperscript{46} Furthermore, the possible wait until all possibilities for appeal had lapsed could be so long that it could in effect prevent any practical application of the enforcement mechanism under the convention.\textsuperscript{47} In addition, many governments objected that the word "operative" in conjunction with the word "final" could be construed by enforcement courts as requiring a prior exequatur for enforcement in the country of origin where the award had been rendered.\textsuperscript{48}

Further, a number of comments concentrated on the grounds upon which the recognition and enforcement of foreign arbitral awards might be refused. To begin with, one of the fundamental problems of the proposed convention is to define the grounds upon which the national courts of the country where the recognition and enforcement
enforcement of an arbitral award is sought *might refuse* to grant such an application.49

But the general tendency of the comments was to seek ways of limiting the grounds for refusing to recognise and enforce foreign arbitral awards.50

These comments and suggestions effectively formed a path to reconsidering some of the provisions or requirements of the draft convention so as to present a new convention on facilitating the recognition and enforcement of foreign arbitral awards. Thereafter, the United Nations Economic and Social Council decided to convene a conference to conclude a convention of this kind and to consider other possible measures to increase the importance of arbitration in resolving private law disputes.51

The Conference had before it two conflicting Reports and Drafts. The Report of the International Chamber of Commerce of 1953 and the Preliminary Draft Convention on the "Enforcement of International Arbitral Awards" suggested that the Geneva Convention's "final" requirement should be abolished and the arbitral awards should be enforced so long as they had not been annulled.52 In addition, the Report of the Committee on the "Enforcement of Foreign Arbitral Awards" of 1955 advocated the Geneva Convention's "double exequatur" requirement, by stating that the arbitral awards must become "final and operative" in the country of origin where the award was rendered.53

At the Conference, in response to the comments and suggestions received, a Working Party suggested using the word "binding" instead of "final and operative".54 The Chairman of the Working Party explained that "under that term an award would

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49 Official Records ECOSOC, Comments on the draft convention on the recognition and enforcement of foreign arbitral awards, note by the Secretary-General, p 5 (footnote 45 supra)
50 Ibid, pp 5-6
51 This conference was held at the Headquarters of the United Nations in New York from 20 May to 10 June 1958 with the participation of 45 States
52 Freyer Dana H and Gharavi Hamid G, p 103 (footnote 16 supra)
53 Ibid, pp 103-104
54 Contini Paolo, p 303 (footnote 20 supra)
not qualify for enforcement if it was still “subject to an appeal which had a suspensive
effect,” but it would be enforceable even if all the possible means of recourse had not
been exhausted”. He went on to say that the term “operative” had been avoided
because it could be construed as requiring that the arbitral award should meet all the
enforcement conditions of the country where it was made.

Concerning Article IV, which lists the refusal grounds and eventually became
Article V of the New York Convention, Sweden requested that an additional paragraph
should be included stating that the circumstances mentioned in that Article “shall not
bar the recognition or enforcement of an award unless the party against whom the
award is made refers to them or makes no objection based on them”. But the ad hoc
committee “did not adopt this proposal, deeming it preferable to leave it to the
competent authorities to refuse recognition and enforcement when they were ‘satisfied’
that any of the circumstances in Article IV warranted such refusal”. In addition, it
seemed generally agreed that courts should remain free to refuse the enforcement of a
foreign arbitral award if the refusal would protect the basic rights of the losing party or
if the award would impose obligations clearly contrary to the public policy of the
country where enforcement is sought. It was also wished to re-examine the terms of
Article III, concerning the expression “final and operative”, and Article IV of the draft
convention and look for possible alternatives. One of the alternatives was “to divide the

55 Contini Paolo, p 303 (footnote 20 supra)
56 Ibid.
57 Official Record ECOSOC, p 13 (footnote 19 supra); in addition, Greece made a comment on the
draft convention on the recognition and enforcement of foreign arbitral awards in terms of Article
IV, the origin of Article V of the New York Convention of 1958. Greece said that “with regard to the
clause in the same article providing that recognition of a foreign award may be refused if the award
has been annulled in the country in which it was made, the Greek Government considers that it might
be worded in such a way as to make it clear that a foreign award cannot be recognized unless it is
irrevocable and enforceable at the time of the application for recognition”, see Official Record
ECOSOC, Comments by governments on the draft convention on the recognition and enforcement of
foreign arbitral awards, twenty-first session, item 8, 14 March 1956, document E/2822/Add.2, p 2
58 Official Record ECOSOC, p 13 (footnote 19 supra)
59 Official Records ECOSOC, p 5 (footnote 45 supra)
judicial control between the authorities of the countries where the award was rendered and where it is being relied upon, by enumerating the grounds on which an award could be, respectively, annulled before the first forum or refused enforcement before the second forum”.

Thus, the issue of annulment was left to the national arbitration laws of the country of origin. In addition, the expression “may” was used in the opening paragraph of Article IV, the origin of Article V of the Convention. It should be noted that the enforcement refusal ground which deals exclusively with annulled foreign arbitral awards was influenced by the alternative which was adopted. But using the word “may” in the opening paragraph has constituted a deficiency, since this word is ambiguous and can be widely interpreted by the national courts where recognition and enforcement is sought. In addition, leaving the issue of annulment to the country of origin has constituted another deficiency, under the Convention, reflected in the absence of grounds upon which a rendered arbitral award can be annulled. Accordingly, the ambiguity admitted by the word “may” and the absence of the annulment grounds can be interpreted in favour of enforcing a rendered arbitral award annulled in its country of origin.

However, these reforms contributed to making the recognition and enforcement of foreign arbitral awards more flexible and guaranteed by the signatory countries. At the end of the Conference, the ECOSOC draft convention found favour with the Conference on International Commercial Arbitration. On 10th June 1958 the New York Convention on the “Recognition and Enforcement of Foreign Arbitral Awards” was adopted and opened for signature until 31st December 1958. As of 5th October 2007, the Convention is in force in 142 countries.

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60 Official Records ECOSOC, p 8 (footnote 45 supra)
1.3.3. The Importance of the New York Convention in Facilitating the Enforcement of Foreign Arbitral Awards

The New York Convention intended to facilitate the enforcement of an arbitral award in the courts of countries other than the state where it is rendered. The importance of the New York Convention was outlined by the President of the Conference at the close of the meeting. In Mr. Schurmann’s view,

“...it was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security”. 62

The issue of enforcement is central to the arbitral process, beginning with the insertion of the arbitration clause and ending with the rendering of the arbitral award. 63 Also, it is only by the enforcement of the arbitral award that the purpose of arbitration can be achieved.

It is likely that a winning party to an international arbitration will generally seek enforcement in one or more of the places where the losing party has assets. For a number of reasons, the winning party may seek to confirm the award in the place of origin where the arbitral award was rendered before seeking enforcement in another

62 Sultan Allen, p 816 (footnote 10 supra)
country. Confirming the arbitral award, however, may lead to some risk since the successful party should consider whether obtaining a judgment on this award would merge it into the judgment and thus the party may have to seek in the foreign country the enforcement of the judgment alone only and not the award, which is a very complicated issue, as there may be no international treaties covering this matter. If enforcement is sought in another Contracting State, the question would be whether the award would be enforced as a foreign arbitral award pursuant to the Convention or as a foreign judgment on another basis. Thus, the term “binding” was chosen on purpose, instead of “final”, because if an award were to be “final”, as it had to be under the Geneva Convention of 1927, the enforcing party would have to seek leave for enforcement in the country where the award had been made as well as in the country where the enforcement was sought. As a result, the elimination of the “double exequatur” and facilitation of the enforcement were achieved in accordance with Article III of the New York Convention. This Article states that: “Each Contracting State shall recognize arbitral awards as binding and enforce them...”

In addition, the significance of the New York Convention in facilitating the enforcement of foreign arbitral awards can now be understood by evaluating its provisions concerning the burden of proof of the finality of the awards; this is a “critical element of the New York Convention”. The New York Convention shifted the burden of proof to the party resisting enforcement under Article V (1). It provides that: “Recognition and enforcement of the award may be refused, at the request of the party

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65 Ibid
67 Article III of the New York Convention of 1958

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against whom it is invoked...”. Hence, the 1958 New York Convention rearranged the modalities as well as the extent of control of foreign arbitral awards by national courts by simplifying the process of enforcement of foreign arbitral awards. As a result, the New York Convention of 1958 is broader than the Geneva Treaties and has become the “cornerstone of current international commercial arbitration”. Moreover, it provides a unique legal framework, an indisputable advantage for the enforcement of foreign arbitral awards, which has encouraged the recognition and enforcement of commercial arbitration agreements in international contracts.

In 1958, everyone was delighted with the achievement of the New York Convention as a new international convention on international commercial arbitration, since at the time it was assumed that the text and the new arrangements guaranteed uniformity. But, unfortunately, this achievement was not secure for very long and a number of deficiencies have since emerged under the New York Convention.

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69 See Article V (1) of the New York Convention of 1958
70 Mosk Richard M and Nelson Ryan D, p 463 (footnote 64 supra)
72 Freyer Dana H and Gharavi Hamid G, p 102 (footnote 16 supra)
1.4. The Deficiencies of the New York Convention and their Effects

1.4.1. The Ambiguous Language of Article V

In spite of the facilitation of the enforcement of arbitral awards pursuant to the provisions of the Convention, it lists as restrictions under Article V a number of grounds for possibly refusing the recognition and enforcement of foreign arbitral awards. The grounds are divided into two parts: the burden of proving the first part is on the party resisting enforcement, but that of proving the second part is on the court, the competent authority, if it finds that the public policy of the law of the court is violated and if the subject matter is not capable of being settled by the arbitration.

Article V (1) provides that:

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that..."

Article V of the Convention is one of the most important provisions because it assumes the validity of the arbitral award and places the burden of proving its invalidity.

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74 The grounds listed under Article V (1) of the New York Convention are: a) the parties to the agreement referred to in article II 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 against whom the award is invoked 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 may be recognized and enforced; or (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, was not in accordance with the law of the country where the arbitration took place; or (e) 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.

75 Article V (2) provides that: Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

76 Article V (1)
on the party resisting enforcement. Furthermore, under Article V, the court now has
limited discretionary grounds to refuse to enforce a foreign arbitral award. But
unfortunately, Article V (1) uses ambiguous language which has affected the
implementation of its grounds for refusal. The problem is reflected in the word "may". This word has been widely interpreted by the national enforcement courts. Even if the refusal grounds existed, the court still has "residual discretion" to enforce the award because of the word "may". The supreme court of Hong Kong put this into eloquent words, when it held that:

"... Even if a ground of opposition is proved, there is still a residual
discretion left in the enforcing court to enforce nonetheless. This shows
that the grounds of opposition are not to be inflexibly applied. The
residual discretion enables the enforcing court to achieve a just result in
all the circumstances...."77

Since the text of the New York Convention does not clarify how this
discretionary power is to be exercised, it is for the enforcing judge to decide what a
"just result" would be.78 In addition, this has been reflected, for example, in the
decision of a Queen's Bench Division, an English commercial court. It stated that "it is
clear from the terms of the statute that refusal to enforce a Convention award is a matter
for the discretion of the Court".79 At first sight, the use of the term "may" grants some
discretionary power to a state's competent authorities. Thus, the enforcement court is
free to use this discretionary power to refuse or accept the enforcement of foreign
arbitral awards.

77 Di Pietro Domenico and Platte Martin, p 133 (footnote 8 supra)
78 Ibid, p 134
Furthermore, the different translations of the authentic texts of the New York Convention\textsuperscript{80} have affected the enforcement of a foreign arbitral award, although it has been said that each text is “equally authentic”.\textsuperscript{81} The French version would seem to oblige the authorities to enforce and recognise the arbitral award unless the party resisting enforcement proves the existence of one of the grounds listed in Article V (1).\textsuperscript{82} But, the Spanish,\textsuperscript{83} Russian and Chinese versions support the vision which was articulated by the English text.\textsuperscript{84} Also, an official Arabic translation of the authentic texts of the New York Convention\textsuperscript{85} reads as follows: “Recognition and enforcement of the award \textit{shall not be refused} unless the party resisting enforcement provides to the competent authority where recognition and enforcement is sought proof that: …”. Thus, I think there is some doubt whether these texts are equally authentic. The reason for the different interpretation, therefore, is linguistic and this still leaves a margin of discretion to the enforcement court. The court may or may not, in its discretion, refuse enforcement. In addition, the ambiguity of Article V (1) has given an adequate reason to national courts concerned to interpret the word “may” in accord with their desires and preferences. Accordingly, the problem changes to determining the conditions in which the discretionary power to refuse or enforce should be exercised.\textsuperscript{86}

\textsuperscript{80} The authentic texts of the New York Convention are in: English, French, Spanish, Russian and Chinese.
\textsuperscript{82} The French version of Article V (1) of the New York Convention reads: “\textit{La reconnaissance et l'exécution de la sentence ne seront refusées, sur requête de la partie contre laquelle elle est invoquée, que si cette partie fournit à l'autorité compétente du pays où la reconnaissance et l'exécution sont demandées, la preuve...}”
\textsuperscript{83} The Spanish text provides: “\textit{so lo se podrá denegar el reconocimiento y la ejecución de la sentencia... si esta parte prueba...}”
\textsuperscript{84} Mayer Ulrich C, p 588 (footnote 3 supra)
\textsuperscript{85} This official Arabic translation of the authentic texts of the New York Convention was prepared by the United Nations Secretary-General in his capacity as the depositary of the Convention.
\textsuperscript{86} Petrochilos Georgios C, ‘Enforcing awards annulled in their state of origin under the New York Convention’ (1999) 48 International Comparative Law Quarterly, p 858
1.4.2. The Absence of Annulment Grounds

The only mention of an arbitral award which could be set aside is found under Article V (1) (e), but the grounds on which an arbitral award can be set aside are not listed under the Convention. It is important also to mention that the main source of demonstrating the deficiency of not listing the annulment grounds is the ambiguous language of the opening paragraph of Article V (1), which is reflected in the word “may”. Although Article V authorises courts to deny enforcement on some limited grounds, it should not be forgotten that the fifth ground for refusal, V (1) (e), is seriously affected by the ambiguous language.

1.4.3. Ground V (1) (e)

The refusal ground that has been put under the spotlight and is the subject of debate at the international level is V (1) (e), which deals exclusively with annulled foreign arbitral awards. But it did not “draw a parallel link between setting aside and refusal of recognition and enforcement”.87 This ground has been called the “most problematic ground of the five”.88 Article V (1) (e) states that:

“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”.

Article V (1) (e) refers to the country in which, or under the law of which, the arbitral award was made. This is in recognition of the fact that the law applicable to the arbitration may not be the law of the country in which the arbitration takes place.90 But,

87 Yu Hong-Lin, ‘Is the territorial link between arbitration and the country of origin established by article I and V (1) (e) being distorted by the application of article VII of the New York Convention’ (2002) 5 (6) International Journal Law Review, p 197
88 Di Pietro Domenico and Platte Martin, p 134 (footnote 8 supra)
89 Article V (1) (e) of the New York Convention of 1958
90 Secomb Matthew, p 1 (footnote 68 supra)
it is clear according to Article V (1) (e) that the country in which, or under the law of which, the arbitral award was rendered “will be referred to as the place of origin” by the enforcement court where recognition and enforcement is sought.

Most of the debate has concentrated on the issue of whether the national enforcement courts have discretion to enforce an arbitral award even if it is annulled in its country of origin and whether this discretion should be exercised in favour of such enforcement. Article V (1) provides that a court may refuse the recognition and enforcement of an award if the party against whom it is invoked proves... that: (e) “the award...has been set aside... by a competent authority...”. The wording of the Article is such as to mean that the defence is subject to the discretion of the enforcing court. Thus, the enforcing court need not refuse enforcement if it is convinced or has found that enforcement would be proper even if the award has been set aside at the place where it was made. But if enforcement is refused in one jurisdiction, the winning party need not give up and can seek the enforcement in another jurisdiction, because denial of enforcement in one country does not deprive the award of its legal effect in another jurisdiction. This is because of the ambiguous language of the word “may” in the opening paragraph of Article V.

The ambiguity in essence has also encouraged the signatory countries, on the whole, to apply other Convention Articles such as Article III and VII (1). This occurs if the enforcement court wishes to avoid the problem and enforce the arbitral awards even if the refusal ground V (1) (e) is found. Thus, the implementation of this ground has come into conflict with other Convention Articles, due to the language of the opening paragraph of Article V (1).

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91 Secomb Matthew, p 2 (footnote 68 supra)
92 Ibid, p 7
1.4.4. Applying other Convention Articles

The most fundamental articles that have been applied by the enforcement courts are III and VII (1) of the Convention. Article III provides that:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.

In practice, this Article is considered to be the root of the Convention since it requests each Contracting State to recognise the arbitral awards as binding and enforce them. Thus, it supports the discretionary power of the enforcement courts to enforce the award even if the refusal ground V (1) (e) is found.

Article VII (1) of the Convention states that:

“The provisions of the present convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor 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”.

This article, Article VII (1), is called the “‘more-favourable-right’ provision”. This may be because no objection was raised against the standard of Article VI of the ECOSOC Draft Convention, which became Article VII of the New York Convention.

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94 Article III of the New York Convention of 1958
95 Article VII (1)
96 Weinacht Felix, 'Enforcement of annulled foreign arbitral awards in Germany' (2002) 19 (4) Journal of International Law, p 320
that the Convention shall not deprive an interested party of any right. This Article
does support the discretionary power of the national courts to ignore the ground (e)
under Article V (1) or to avoid the implementation of this article.

Thus, Article VII (1), in co-ordination with the word “may” in Article V (1),
performs a twofold function. On the one hand, it directs the courts where enforcement
is sought to more favourable provisions in their domestic law as a guide to exercising
their discretionary power. On the other, it makes the provisions of the domestic laws
prevail over the Convention provisions. Accordingly, the conflict lies between Articles
V (1), III and VII (1). Article V (1), by using the word “may”, grants the courts the
discretion to enforce or refuse enforcement of an award which is rendered in the
country of origin if the refusal ground (1) (e) is found. However, Articles III and VII
(1), by using the word “shall”, oblige the courts where enforcement is sought to
recognise and enforce the arbitral awards. It should not be ignored that although the
provisions of Articles III and VII (1) of the Convention expressly compel the
recognition and enforcement of arbitral awards, the enforcement courts certainly “have
the last word” in determining whether to enforce the awards or not, relying on their
discretionary power, particularly if one of the refusal grounds is found.

Article VI, moreover, gives the competent authority the discretionary power to
adjourn the enforcement proceedings since it provides:

“If an application for the setting aside or suspension of the award has been
made to a competent authority referred to in article V (1) (e), the authority
before which the award is sought to be relied upon may, if it considers it
proper, adjourn the decision on the enforcement of the award and may

97 Official Records ECOSOC, p 14 (footnote 45 supra)
98 Petrochilos Georgios C, p 861 (footnote 86 supra)
also, on the application of the party claiming enforcement of the award, order the other party to give suitable security”.

Again, as under Article V, this affects the implementation of the ground V (1) (e). The court has a discretionary power whether or not to adjourn the decision on enforcement. It should be noted that Article V (1) (e) is effectively the reason for the existence of Article VI. The difference between the articles is the time of implementation. Article VI applies if there is “an application for setting aside or suspension of the awards” whereas Article V (1) (e) applies when the award “has been set aside or suspended”. Also, Article V (1) (e) allows the court to refuse enforcement of the award, while Article VI allows the court to suspend or adjourn the enforcement of the award, awaiting the decision of the court at the place of origin.

These articles, particularly Articles III and VII (1), have given the national courts the flexibility to enforce foreign arbitral awards despite the existence of the refusal ground (1) (e) for enforcement. This international problem has generally led the courts where enforcement is sought to apply these Convention Articles as a loophole to avoid implementing the ground (1) (e) of Article V. However, it must not be forgotten that if the law of the enforcement court does not consider the ground of Article V (1) (e) of the Convention as a ground for refusing enforcement, an annulled foreign arbitral award may still be enforced there.

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100 Article VI of the New York Convention of 1958
101 For example, the French Code of Civil Procedure does not list annulment of the arbitral awards as a refusal ground for enforcement under Article 1502
1.5. Dealing with Annulled Foreign Arbitral Awards

It is undeniable that the arbitral award, "to be enforceable must be a valid award and be of a nature which is capable of enforcement".\textsuperscript{102} The validity of the arbitral award in essence is the most important requirement to ensure before seeking its recognition and enforcement. The Geneva Treaties as early attempts had no problem with annulled arbitral awards. The Geneva Protocol of 1923 did not list a ground in terms of annulled arbitral awards. This is because of the national scope of its application, which caused annulled arbitral awards not to be recognised or enforced in their country of origin. The Geneva Convention of 1927 did contain an explicit ground for refusing to enforce annulled foreign arbitral awards.\textsuperscript{103} But the problem has arisen only since the New York Convention. It is clear under Article V (1) that the reasons to deny the enforcement of a foreign arbitral award are limited, but the opening paragraph contains ambiguous language which is reflected in the word "may", since it stipulates that an annulled foreign arbitral award "may" be refused. This ambiguity, in addition to the absence of any annulment grounds, has led among academics to different views or interpretations of the enforcing of annulled foreign arbitral awards.

On the one hand, it has been said that the opening paragraph of the Article contains permissive language. Paulsson states: "the notion is that the English text of Article V (1) allows but does not require judges to reject applications to enforce awards that are deficient for one of the reasons defined in the five subparagraphs of that Article".\textsuperscript{104} He goes on to say that "the key words clearly limit the grounds for rejecting awards, but they do not establish what must happen if one of those grounds is extant.

\textsuperscript{102} Turner Ray, Arbitration awards: a practical approach (Blackwell Publishing Ltd, Oxford- USA- Australia 2005) 8
\textsuperscript{103} See footnote 13 supra
\textsuperscript{104} Paulsson Jan, 'May or Must under the New York Convention: an exercise in syntax and linguistics' (1998) 14 (2) Arbitration International, p 227
The word *may* leaves it to the judge’s discretion".\(^{105}\) Furthermore, it has been said that the word “may” gives a discretionary power to the national courts where recognition and enforcement is sought. Di Pietro states that “the court ‘may’ refuse enforcement, i.e. there is a discretion not to enforce, but no obligation to refuse enforcement”.\(^{106}\)

On the other hand, as Yu says, two possible scenarios can arise from the implementation of Article V (1) (e) of the Convention. The first scenario is that enforcement courts should apply Article V (1) (e) and refuse recognition and enforcement automatically if recognition or enforcement is refused at the place of arbitration; the second scenario concerns “the validity of an award which has been set aside by the competent court of the place of arbitration”.\(^{107}\) Advocates of the territorial connection between the arbitration and the country of origin have applied Article V (1) (e) and refused to enforce arbitral awards annulled in their country of origin.\(^{108}\) A number of academics go on to say that the annulled foreign arbitral award should be refused, since it does not have a legal value; courts should refuse to enforce an annulled foreign arbitral award, on the assumption that such an award no longer exists.\(^{109}\) Hence, once the award has been set aside, there is nothing left to be recognised and enforced. Furthermore, enforcing such awards “would be an impossibility or even go against the public policy of the country of enforcement”.\(^{110}\) In contrast, a number of academics say that there is no territorial link between the arbitral award and the seat of arbitration (the country of origin) and thus an annulled arbitral award should be enforced. Gaillard, for example, rejects the view that awards derive their legitimacy from the seat of

\(^{105}\) Paulsson Jan, p 228 (footnote 104 supra)

\(^{106}\) Di Pietro Domenico and Platte Martin, p 195 (footnote 8 supra)

\(^{107}\) Yu Hong-Lin, p 197 (footnote 87 supra)

\(^{108}\) Ibid

\(^{109}\) Lastenouse Pierre, ‘Why setting aside an arbitral award is not enough to remove it from the international scene’ (1999) 16 (2) Journal of International Arbitration, p 25

arbitration. He goes on to say that the place of arbitration is merely the location of “hotel rooms and conference centers” and thus “has no overriding stake in controlling the process”\textsuperscript{111}

The deficiencies of the New York Convention, in particular, the ambiguous language of Article V (1), have also given rise at the international level to differences among the national enforcement courts in terms of the enforcement of annulled foreign arbitral awards. In the Chromalloy case, for example, the U.S. District Court, District of Columbia decided to enforce an arbitral award annulled by the Court of Appeal at Cairo and did not give an effect to the annulment decision. The U.S. District Court held that the recognition and enforcement of foreign arbitral award pursuant to the Convention “may” be refused if Egypt proves that the arbitral award has been annulled by a competent authority\textsuperscript{112}. As a result, the U.S. court stated that it may by its discretionary power refuse to enforce the arbitral award\textsuperscript{113}.

It has been said that the entire purpose of the New York Convention was not to establish a uniform regime to govern the enforcement proceedings of foreign arbitral awards, but to simplify the procedures\textsuperscript{114}. In addition, it has been said that the New York Convention is an open-ended text, perhaps because if “the scope of the New York Convention is in the enforcement stage, no ground for annulment is needed”\textsuperscript{115}. But this does not seem to be the case. In fact, the New York Convention has limited the grounds for refusing to enforce foreign arbitral awards, but with ambiguous language which has affected their implementation. In addition, it has not listed grounds for setting aside rendered arbitral awards to ensure their uniform implementation at the international

\textsuperscript{111} Davis Kenneth R, p 81 (footnote 1 supra)
\textsuperscript{112} In the matter of Chromalloy Aeroservices and the Arab Republic of Egypt 939 F.Supp. 907 (D.D.C. 1996), p 909
\textsuperscript{113} Ibid
\textsuperscript{114} Mayer Ulrich C, p 584 (footnote 3 supra)
level. Accordingly, due to the deficiencies of the Convention, the national courts' discretionary power is not limited and it is not even clear how it should be exercised. Moreover, it has opened the door to the enforcement courts to decide whether to consider the refusal grounds or not. As a result, the question whether the refusal grounds listed under Article V of the Convention are mandatory is still the subject of debate.\textsuperscript{116}

Therefore, the hope that "the gap left open at Geneva has thus been closed at the United Nations Conference",\textsuperscript{117} which adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, did not survive very long. Thus, the issues to be discussed in the next chapters are as follows:

(1) the grounds upon which an arbitral award can be annulled;
(2) the effects of the absence of the annulment grounds, under the Convention; and
(3) the possibility of enforcing annulled foreign arbitral awards, due to the ambiguous language of Article V (1), the absence of the annulment grounds and the effect of other Convention Articles such as Articles VI (which gives the competent authority the discretionary power to adjourn the enforcement proceedings), III and VII (1).

\textsuperscript{116} Rico Rena M, 'Searching for standards: suspension of enforcement proceedings under article VI of the New York Convention' (2005) 1 Asian International Arbitration Journal, p 17
\textsuperscript{117} Contini Paolo, p 299 (footnote 20 supra)
1.6. Annulment of an Arbitral Award

“Setting aside is to reject, disregard, annul”. Hill says:

“There is inevitably a tension between two conflicting goals – the finality of an award and its legality. The goal of finality would be promoted by reducing the circumstances in which an arbitral award can be challenged in the courts. The goal of legality would be advanced by allowing a party to appeal to the courts on any question of substance or procedure”.119

Hill in this statement indeed identifies in brief what governs international commercial arbitration, as a fair alternative method. The goal of finality is well-known, as an arbitral award is final and binding once it is rendered. But the goal of legality, as Hill says, leads a party to seek or make an application to set aside an arbitral award. Usually, setting aside an arbitral award is the hope of a losing party who is looking forward to challenging the award by having a court declare that an award is unenforceable.120

Redfern and Hunter say that:

“No one likes losing. So it is not surprising that when a client is disappointed with an arbitral award, the first question he asks his lawyer is: “How can I appeal?” As so often happens when a lawyer is asked a question, the answer is: “It depends”.”121

“How to appeal” is an explicit question, due to the fact that an application has to be made by a party looking to challenge an arbitral award. But the expression “it depends” is vague. What does it depend on? Does it depend on parties’ will when they

118 Turner Ray, p 22 (footnote 102 supra)
enter into an arbitration agreement? Does it depend on the country whose law is chosen by the parties to be applicable?

The phrase “it depends” leads also to a number of other questions: what countries, if there are more than one, have an exclusive competence to set aside an arbitral award? Have the Signatory States of the Convention amended their national arbitration laws to set clear grounds for setting aside an arbitral award, due to the absence of a list of these under the Convention? If so, what are the grounds for setting aside an arbitral award? Are these grounds consistent or varying according to the jurisdiction where an application to set them aside is made? Are the grounds for setting aside an arbitral award mandatory, in accordance with national arbitration laws, or is it likely that courts will add non-statutory grounds? These issues will be discussed and examined in the next chapter.

1.7. Conclusion

It is clear that the Geneva Treaties attempted to facilitate the enforcement of arbitral awards, but they have all appeared unsatisfactory in some way. The Geneva Protocol of 1923 on “Arbitration Clauses” was merely applied nationally, in the country of origin, while the Geneva Convention of 1927 on the “Execution of Foreign Arbitral Awards” was broader, but imposed harsh restrictions, such as the so-called “double exequatur”. Thus, the international community sought to grant arbitral awards more flexibility in being recognised and enforced internationally, without restrictions. The New York Convention of 1958 on the “Recognition and Enforcement of Foreign Arbitral Awards” resulted from the efforts made by the international community, as well as the need to promote international trade.
The New York Convention was born out of the Draft Convention of the International Chamber of Commerce of 1953 (ICC) and the Draft Convention of the United Nations Economic and Social Council of 1955 (ECOSOC). It is certain that the New York Convention has facilitated the enforcement of foreign arbitral awards in states other than the states where they were issued. This advantage can be seen in its provisions guaranteeing such enforcement, for example, Article III and Article VII (1). Article III is considered to be the root of the Convention since it obliges the Signatory Countries to recognise and enforce the award as binding, whereas Article VII (1) is called the “most favourable right” provision, for it provides that the Convention provisions shall not deprive any interested party of any right. Therefore, these articles are undoubtedly considered to be the vital pillars of the New York Convention. In addition, the provisions of the Convention succeeded in abolishing the restrictions under the Geneva Treaties. It replaced the term “final”, under the Geneva Convention, by the word “binding”, to avoid the need to obtain leave for enforcement from the court of the country of origin or even in the country where the enforcement was sought, the so-called “double exequatur”. Furthermore, it turned over the burden of proving the invalidity of the arbitral award to the party resisting the enforcement.

However, in spite of granting arbitral awards the flexibility to be recognised and enforced without restrictions, the Convention set certain grounds, in Article V, to refuse to enforce them. The most problematic ground, which has given rise to intense debate is the fifth one, (1) (e), in particular the second part concerning arbitral awards annulled in their country of origin. In addition, the implementation of this ground has exclusively led to the deficiencies of the New York Convention being demonstrated. The first deficiency is reflected in the ambiguous language of the word “may” in the opening paragraph of Article V (1). On the one hand, this ambiguity has led to the enforcement
courts having the discretionary power to interpret the word "may" and, thus, affecting the implementation of the refusal ground (1) (e). Furthermore, interpretations of the word "may" vary among academics and the national enforcement courts. On the other hand, the refusal ground (1) (e) and the ambiguous language have revealed the second deficiency to have appeared, the absence of the annulment grounds.

In reality, it is not accurate to call the word "may" "permissive" (in the opening paragraph of Article V (1)). I submit that the language is ambiguous. Its ambiguity is shown in its effects on the implementation of Article V, particularly the ground V (1) (e). In addition, the deficiencies, particularly the ambiguous language of Article V (1), have led to the enforcement courts being encouraged to apply other provisions, such as Articles III and VII (1), which ensure the enforceability of the award and support the national courts' interpretations. Accordingly, if a ground for refusal (1) (e) existed, the enforcement court could make one of two choices, according to discretion. The first would be to apply Article V (1) (e) and then the annulled arbitral award would be refused; the second would be to apply Article III or Article VII (1) and this would enforce the award in spite of its being annulled. The different choices, based on the different interpretations and implementations, can help leading to inconsistent judgments among the national enforcement courts "which is never a helpful situation". The Chromalloy case has reflected this situation since the United States District Court enforced the arbitral award, in spite of its being set aside in Egypt.

122 Di Pietro Domenico and Platte Martin, p 133 (footnote 8 supra)
123 Ibid, p 174
2.1. Introduction

The significance of the New York Convention is that it ensures that an arbitral award is recognised and easily enforced in any of the Signatory States adhering to the Convention, particularly when recognition and enforcement are sought in a state other than the state where the award is rendered.

As Hill says, however, there is a tension between the finality of the arbitral award and its legality. The arbitral award is final and binding once it is rendered, unless a party asks to challenge it. Thus, its finality is supported by reducing the grounds upon which a rendered arbitral award can be challenged. Concerning its legality, it is clear that a number of requirements, such as the arbitration agreements and the application of the chosen laws, should be met in order to give the rendered arbitral award a legal value and make it valid and enforceable. In addition, the legality is advanced if the parties are allowed to appeal the rendered arbitral awards in the courts. Although the New York Convention is the legal document by which enforcement of a foreign arbitral award is granted and guaranteed, it “does not regulate in a general way the relationship between the arbitral process and national courts. So, the courts’ powers to grant interim relief or to set aside an award are derived entirely from municipal law”.

The only mention of a set aside arbitral award is found in Article V (1) (e) of the Convention, but the grounds on which an arbitral award can be set aside are not listed under the Convention. Therefore, it is necessary first to find out which country...
or countries, if more than one, have exclusive competence to set aside an arbitral award. In addition, it is necessary to find the grounds upon which an arbitral award can be set aside by a competent authority.

Paulsson and other commentators say that "not all countries are safe havens for international arbitration. Some cling to wide powers of judicial review. Others have unclear legislation. Yet others have apparently adequate legislation but their courts seem to misapply the law – for example by adopting an over-elastic interpretation of ‘violation of public policy’ as grounds for setting aside awards". Therefore, given the widespread acceptance of the New York Convention, it is impossible to illustrate the attempts of all the Signatory States to address the absence of annulment grounds in the Convention. The Arbitration Laws of England, France, Germany and the United States of America must serve as examples to illustrate how these countries have dealt with the issue of annulment. In addition, it is important to mention the amendments of their national arbitration laws which are required in order to conform to the New York Convention. The UNCITRAL Model Law furthermore will be discussed as a piece of modern legislation which deals with international commercial arbitration.

Hence, it must be assessed whether the provisions of national arbitration laws concerning the grounds for annulment are statutory and should be exclusively applied by national courts to annul a rendered arbitral award. First, in section (1) I focus on identifying a court which has an exclusive competence to set aside an arbitral award. Section (2) is an introduction leading to a discussion of the issue of annulment and attempts to amend national arbitration laws by a number of the Signatory States which are parties to the New York Convention. This section is divided into five

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In subsection (2) I discuss the French Code of Civil Procedure of 1981 and the way in which it deals with the annulment of an arbitral award, looking at whether it makes a distinction between national and international awards. Then the German Arbitration Act of 1998 will be discussed under subsection (3), to see whether it conforms to the New York Convention. In subsection (4), the UNCITRAL Model Law of 1985 as a legal document which has been accepted in several countries will also be examined, to see whether it has covered the annulment issue. I begin by listing the grounds upon which a rendered arbitral award can be annulled and end by dealing with the enforcement of an annulled arbitral award. In subsection (5), the U.S. Federal Arbitration Act will be highlighted to see whether it conforms to the New York Convention by listing clear grounds on which to set aside an arbitral award. Thereafter, I consider whether the Act has given courts an authority to add non-statutory grounds for setting aside and whether, if so, this authority has led to inconsistent decisions. Section (3) will be an introduction which seeks to clarify a number of issues for discussion and analysis in the third chapter.

2.2. The Competent Authority to Annul Arbitral Awards

A party with a disappointing arbitral award looks to challenge it. The hope of this party is to have a court declare that the rendered arbitral award is to be annulled and as a result unenforceable. Redfern and Hunter say that "if an award is set aside or
annulled by the relevant court, it will usually be treated as invalid and accordingly unenforceable, not only by the courts of the seat of arbitration but also by national courts elsewhere".4

It is clear that the New York Convention of 1958 does not deal with or set explicit grounds for challenging rendered arbitral awards. In addition, it is submitted that an arbitral award is not capable of recognition and enforcement in the country in which it is annulled, but it might still be capable of effects when seeking recognition and enforcement in a state other than the state where the award is annulled. Thus, a number of questions arise when a party determines to challenge an arbitral award: what is the relevant court to annul rendered arbitral awards? What does the annulment depend on? Does it depend on arbitration agreements? In other words, does it depend on the parties’ will in determining the law applicable to arbitration proceedings, under their arbitration agreement? If it does, this means that the law applicable to the proceedings determines which court has a competence to annul the rendered arbitral award. If it does not, what is the competent authority before which an application to seek annulment should be made? In addition, is it possible to seek annulment of the rendered arbitral award before two different jurisdictions or more?

Article V (1) (e) of the New York Convention mentions an arbitral award...

“that has been set aside...by a competent authority of the country in which, or under the law of which, that award was rendered”.5 Thus, the issue of annulment of the rendered arbitral awards has been left to national arbitration laws which are applied to the arbitration proceedings. Accordingly, it depends on the parties’ will when they made their arbitration agreement, under which the applicable law was chosen. Therefore, it is clear that the parties’ will plays an important role in determining

5 See footnote 89 supra, Chapter One, page 31
which court or courts, if more than one, have jurisdiction to annul the rendered arbitral awards. Furthermore, challenging an arbitration award depends on the provisions of the law which is applied to the arbitration.

Pursuant to Article V (1) (e), two jurisdictions have exclusive competence to decide on the action for setting aside an arbitral award. The jurisdictions are the country in which the arbitration takes place and the country whose law is applied to the arbitral proceedings. But the idea of determining the invalidity of arbitral awards by two authorities has been the subject of theoretical discussion amongst academics and legal scholars. Van den Berg supports the view that the authority rests with the country of origin in which the arbitration takes place, or the award is made. He says that the competent authority to annul arbitral awards according to Article V (1) (e) is “virtually always the court of the country in which the award was made”.6 He goes on to say that “the phrase “or under the law of which” the award was made refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made”.7

Furthermore, Redfem and Hunter say, concerning the issue of the competent authority, that “the concept that arbitration is governed by the law of the place in which it is held, which is the “seat” (or “forum” or “locus arbitri”) of the arbitration, is well established in both the theory and practice of international arbitration”.8 Later on, however, they admit that the idea that an award is governed by an arbitration law which is different from the law of the country where the award is rendered is

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7 Ibid
8 Redfem Alan and Hunter Martin, p 98 (footnote 4 supra)
"probably more theoretical than real". On the contrary, it has been said that the law applicable to arbitration "may not be that of the place of the arbitration".

It is submitted that the country in which the arbitration takes place is in the best position to review arbitral awards or annul them. If an arbitral award does not clarify the place of arbitration, then determining where the award was rendered would require a fact-finding procedure. Furthermore, the nationality of an arbitral award is taken from the country in which the arbitration takes place, which "affects the jurisdiction for challenge proceedings and the relevant enforcement regime". Redfern and Hunter say that applying a procedural law which is different from the law of the country in which arbitration takes place will lead the parties and the arbitral tribunal to have regard to two procedural laws. Furthermore, van den Berg says that applying two different laws is not recommended and might lead to inextricable complications. Therefore, if the parties can refer their disputes to arbitration and decide how proceedings are to be conducted, it becomes unnecessary to choose a law different from the law of the country in which the arbitration takes place.

It is also submitted that the early attempts to facilitate the enforcement of arbitral awards, the Geneva Treaties, gave the right to annul arbitral awards to the country in which the arbitration takes place or where the award is rendered. The Geneva Convention states that recognition and enforcement of the award shall be refused if the enforcement court is satisfied that the arbitral award has been annulled.

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9 Redfern Alan and Hunter Martin, p 507 (footnote 4 supra)
10 Paulsson Jan, Rawding Nigel, Reed Lucy and Schwartz Eric, p 27 (footnote 3 supra)
12 *Ibid*, p 646
13 Redfern Alan and Hunter Martin, p 103
15 Redfern Alan and Hunter Martin, p 507
in the country in which it was rendered. In addition, Article (2) of the Geneva Protocol provides that the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in which the arbitration takes place. Furthermore, the UNCITRAL Model Law is “based upon the principle that the local courts in the place of arbitration should support, but not interfere with, the arbitral process”.

As a result, the annulment grounds which should be applied are those under the national law of the court of the country of origin in which the award is rendered. In international arbitration, the country in which arbitration takes place is commonly “home to neither party to the dispute”. In addition, “one of the key decisions which has to be made when drafting the arbitration clause is as to the legal place or “seat” of the arbitration”. Furthermore, the place of arbitration is important only for the applicability of the Convention provisions.

However, legislative uniformity is required to give the exclusive competence to set aside an arbitral award to the law of the country in which the arbitral award is rendered. Gharavi supports this principle and goes on to say that this principle has its advantages, since it is “contrary to the extraterritorial jurisdiction rule” and “conflicts of jurisdictions are avoided since only courts of the State in which the seat of arbitration is located have jurisdiction to annul awards”.

The principle of the exclusive jurisdiction of courts at the place of arbitration to annul arbitral awards is adopted by the UNCITRAL Model Law. It states that the

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16 See footnote 13 supra, Chapter One, page 14
17 See footnote 6 supra, Chapter One, page 12
18 Paulsson Jan, Rawding Nigel, Reed Lucy and Schwartz Eric, p 28 (footnote 3 supra)
19 De la Houssaye Isabella, ‘Manifest disregard of the law in international commercial arbitrations’ (1990) 28 Columbia Journal of Transnational Law, p 469
20 Paulsson Jan, Rawding Nigel, Reed Lucy and Schwartz Eric, p 25
21 Koppenol-Laforce Marielle, International contracts: aspects of jurisdiction, arbitration and private international law (Sweet and Maxwell, London 1996) 104
provisions of this law “apply only if the place of arbitration is in the territory of this State”. 23 This principle has been also adopted by French law, which provides that “the action for setting aside is available against arbitral awards rendered in France in international arbitration...” 24 Furthermore, England has adopted this principle in accordance with the Arbitration Act 1996, since its provisions “…apply where the seat of the arbitration is in England and Wales or Northern Ireland”. 25 In addition, most States have adopted this principle, for example, Germany, the United States, Greece, Russia and Spain.

In reality, however, wherever the application is made to set aside an arbitral award the court takes into account the finality of the arbitral awards. The court may set aside the award in part or in whole, but it should be noted that the merits of arbitral awards are not usually reviewable. Van den Berg says that “in most countries it is a basic principle that the merits of an arbitral award cannot be reviewed by a court”. 26 In addition, the United States District Court for the Southern District of New York held, in a case discussed below, that “the whole point of arbitration is that the merits of the dispute will not be reviewed in the courts, wherever they be located”. 27 Otherwise the finality of arbitral awards as one of the principles of arbitration would be violated. 28

One fundamental issue should be made clear and borne in mind: this is that there is a difference between Procedural Law and Substantive Law. The Procedural

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23 Article I (2) of the UNCITRAL Model Law of 1985
24 Article 1504 of the French Code of Civil Procedure of 2005
Law is the law of the country where arbitration takes place or, if different, the law of the country which is chosen to be applied to the arbitration proceedings. The Substantive Law is chosen and applied to govern the parties’ agreement, or their contract, in general, not the arbitration. Therefore, the country whose law is applied to govern the agreement of parties does not necessarily have the competence to vacate an arbitral award. This trend has been confirmed by recent case law decided by the United States District Court for the Southern District of New York in *International Standard Electric Corporation v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial*, which illustrated the significance of the place of arbitration. Chapter 11 of the Agreement provided that “[a]ll disputes connected to this Agreement ... shall be settled or finally decided by one or more arbitrators appointed by the International Chamber of Commerce in accordance with the Rules of Conciliation and Arbitration.” Chapter 8 of the Agreement provided that the Agreement “would be governed by and construed under and in accordance with the laws of the State of New York.”

The International Chamber of Commerce signed and rendered a final arbitral award in Mexico City (the situs of the Award), a location chosen by the ICC Court of Arbitration pursuant to the rules of procedure explicitly agreed to by the parties. Standard Electric then filed a petition in the United States District Court in New York to vacate the award. Bridas cross-petitioned for dismissal of Standard Electric’s petition to vacate, on the ground 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

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30 *Ibid*, p. 174

31 *Ibid*
annulment request on the text of Article V (1) (e) of the New York Convention. International Standard Electric Corporation argued that "the competent authority of the country ... under the law of which [the] award was made," referred to the country whose substantive law, as opposed to procedural law, was applied by the arbitrators. Hence, International Standard Electric Corporation insisted that the United States District Court in New York had jurisdiction to vacate the arbitral award since the arbitrators applied substantive New York law. The District Court dismissed Standard Electric's petition for annulment. The court held that the phrase in question did not refer to substantive law but rather to procedural (i.e., arbitration) law:

"The contested language in Article V I (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".32

2.3. Grounds of Annulment of Arbitral Awards

Parties to the New York Convention have recognised the problem of the absence of annulment grounds. A number of Signatory States have responded and amended their national arbitration laws to cover this deficiency. These amendments are to conform to Article V (1) (e) (of the Convention) under which the countries in

which or under the law of which the arbitral award is made have the exclusive competence to deal with applications to set aside an arbitral award. This conformity has been reflected in the provision of a number of grounds upon which an arbitral award can be annulled.

In reality, it is not practicable to recite all the grounds on which an application to set aside an arbitral award can be made or even list the countries in which they may be available. Thus, given the large number of the Signatory States to the Convention, discussing all the grounds under national arbitration laws cannot be completed effectively in this chapter. The Arbitration Act 1996, the French Code of Civil Procedure, the UNCITRAL Model Law, the German Arbitration Act and the U.S. Federal Arbitration Act will instead be used as examples to clarify the annulment grounds of arbitral awards.

2.3.1. The Arbitration Act

England as one of the Signatory States to a number of international Treaties such as the Geneva Protocol of 1923, the Geneva Convention of 1927 and the New York Convention of 1958 has made several efforts to conform to the provisions of these Treaties. Amending its Arbitration Acts to facilitate the recognition and enforcement of foreign arbitral awards is one of such efforts. These efforts began with the Arbitration Act 1950, then the Arbitration Act 1975 and Arbitration Act 1979 and finally with the Arbitration Act 1996. However, before discussing the Arbitration Act 1996, it may be helpful to give a brief background to the Arbitration Acts which have affected the issue of the recognition and enforcement of arbitral awards.
2.3.1.1. The Developments of the Arbitration Acts

2.3.1.1.1. Arbitration Act 1950

The Arbitration Act 1950\(^\text{33}\) was enacted to conform to the Geneva Protocol of 1923 on “Arbitration Clauses” and the Geneva Convention of 1927 on the “Execution of Foreign Arbitral Awards”. The 1950 Act conformed to the Geneva Convention by setting the conditions upon which enforcement of foreign arbitral awards is refused. The Act listed these conditions under section 37 (2) which provided that: “subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part of this Act if the court dealing with the case is satisfied that: (a) “the award has been annulled in the country in which it was made”\(^\text{34}\). This section conformed to Article (2) of the Geneva Convention of 1927, under which a foreign arbitral award shall be refused if the enforcement court is satisfied that the arbitral award has been annulled in the country in which it was made\(^\text{35}\).

Therefore, the importance of the Arbitration Act 1950 was in facilitating and ensuring the issue of the enforcement of arbitral awards and by setting the conditions or the grounds on which the enforcement of a foreign arbitral awards should be refused. Thereafter, the New York Convention of 1958 was adopted. Thus, it became necessary to update the Arbitration Act to conform to the international developments concerning the issue of enforcement of arbitral awards.

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\(^{33}\) This Act was signed on behalf of His Majesty at a meeting of assembly of the League of Nations held on 24 September 1923

\(^{34}\) Section 37 (2) (a) of Part II of the Arbitration Act 1950

\(^{35}\) See footnote 13 supra, Chapter One, page 14
2.3.1.1.2. Arbitration Act 1975

In 1975 a new Arbitration Act was adopted to “give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards”. The Arbitration Act 1975 concerned arbitrations at the international level under the Conventions of Geneva and New York respectively. Section (5) of the Arbitration Act 1975 “mirrored the grounds for refusal as set out in Article V of the New York Convention”. Under this section, enforcement of an annulled foreign arbitral award may be refused, since it provides that: “(2) Enforcement of a convention award may be refused if the person against whom it is invoked proves:

“(f) That 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, it was made”.

Thus, by the enactments of the Arbitration Acts 1950 and 1975 the enforcement of foreign arbitral awards was granted and the grounds to refuse the enforcement were set. But it must be clarified that, unfortunately, the word “may” was found under the 1975 Act and thus restored the ambiguous language which was found in Article V (1) of the New York Convention. Furthermore, although the 1975 Arbitration Act was put into law to conform to the New York Convention, it did not cover the deficiencies of the Convention in not specifying the grounds on which a rendered arbitral award can be annulled.

This Act was criticised as the principal statute governing arbitration contained many deficiencies. “Its rules on procedure were limited, it gave excessive powers of

36 Tweeddale Keren and Tweeddale Andrew, A practical approach to arbitration law (Blackstone Press Limited, Great Britain 1999) 16
38 Tweeddale Andrew and Tweeddale Keren, Arbitration of commercial disputes: international and English law and practice (Oxford University Press, New York (United States) 2005) 487
39 Section 5 (2) (f) of the Arbitration Act 1975
intervention to the courts and there were several types of arbitral proceeding it did not cover".\textsuperscript{40} This criticism was due to the bilateral role of courts in the arbitral process. English law "allowed far too much judicial intrusion into the arbitral process, both during the reference through the special stated procedure, and after the award by way of appeal to the court to remit the award to the arbitrator for reconsideration or to set it aside for his 'misconduct'".\textsuperscript{41} As a result, the Arbitration Act 1979 was enacted to "stem mounting criticism from abroad of the arbitration process in England".\textsuperscript{42} Under this Act, the High Court had no jurisdiction to annul an arbitral award rendered on an arbitration agreement on the grounds of errors of fact or law, but only jurisdiction in terms of any question of law arising out of an arbitral awards made pursuant to or on an arbitration agreement.\textsuperscript{43}

It should be noted that the enactment of the 1979 Act did not put an end to the reforms in terms of the Arbitration Acts. The enactment of the UNCITRAL Model Law of 1985 had a fundamental role in the reform of the Arbitration Acts. The Department Advisory Committee on Arbitration Law\textsuperscript{44} "was given the task of considering how English arbitration law should be reformed and whether the UNCITRAL Model Law should be implemented in England".\textsuperscript{45} But in 1989 the Department Advisory Committee concluded that the Model Law of 1985 should not be adopted in England.\textsuperscript{46} The decision of the Committee was mainly built "on the basis that England already had an extremely sophisticated and highly developed body

\textsuperscript{40} Goode Roy, Commercial law (3rd edn. LexisNexis UK, London 2004) 1168
\textsuperscript{41} Ibid, p 1191
\textsuperscript{42} Tweeddale Andrew and Tweeddale Keren, Arbitration of commercial disputes: international and English law and practice, p 487 (footnote 38 supra)
\textsuperscript{43} See Section 1 of the Arbitration Act of 1979.
\textsuperscript{44} The Department Advisory Committee was set up by the United Kingdom Government to review the UNCITRAL Model Law of 1985
\textsuperscript{45} Hill Jonathan, International commercial disputes in English courts, p 628 (footnote 2 supra)
\textsuperscript{46} Ibid
of arbitration law, based on statute, case law, writings and usages". Thereafter, amendments were made to enact a new Arbitration Act which came into force in 1996.

2.3.1.1.3. Arbitration Act 1996

The Arbitration Act 1996 has replaced Part I of the Arbitration Act 1950 and the whole of the Arbitration Acts 1975 and 1979. The 1996 Act starts from the principle of party autonomy and limits the role of the courts to giving effect to the parties' wishes and protecting the public interest. The modern view is that the role of the court is "to support rather than to displace the arbitral process". In addition, the aim of this Act was to improve previous arbitration laws and to enable "business and other users of arbitration have access to a speedier, more cost effective and fair system of resolving disputes."

Section 58 of the Arbitration Act of 1996 concerning the effect of awards conforms to the New York Convention in terms of the finality of the arbitral awards since it states that: "(1) … 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". But, in accordance with subsection (2) of the same section, "This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this part".

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47 Hill Jonathan, *International commercial disputes in English courts*, p 628 (footnote 2 supra)
48 See footnote 25 supra
51 Section 58 (1) of the Arbitration Act of 1996
52 Section 58 (2)
In addition, the Arbitration Act 1996 covers the deficiency of the New York Convention which is reflected in the absence of any grounds upon which arbitral awards can be set aside. The 1996 Act provides that an award may be challenged on two general bases: lack of jurisdiction and serious irregularity. The aim of giving courts a power to remit or vacate arbitral awards for lack of jurisdiction or serious irregularity is to guarantee the fundamental integrity of the arbitral proceedings.53

The first mandatory Section is s. 67 (1), which provides for challenging the award on “substantive jurisdiction”. It states that:

“(1) a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court:

(a) Challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
(b) For an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction”.54

As Goode says, under Section 67 “a challenge to the jurisdiction could be on a number of grounds, for example, that the arbitrator was not validly appointed; the award was against or in favour of a person not a party to the arbitration agreement; the issue referred to the arbitral tribunal is outside the scope of the arbitration agreement or the respondent is entitled to state immunity from process”.55

In addition, the Act contains certain grounds for appeal, for “serious irregularity”. These grounds are mentioned under section 68 as a mandatory provision:

54 Section 67 (1)
55 Goode Roy, p 1192 (footnote 40 supra)
“(a) Failure by the tribunal to comply with section 33 (general duty of tribunal);
(b) The tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
(c) Failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
(d) Failure by the tribunal to deal with all the issues that were put to it;
(e) Any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
(f) Uncertainty or ambiguity as to the effect of the award;
(g) The award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
(h) Failure to comply with the requirements as to the form of the award; or
(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award”.

As a result, the award may be set aside by the courts if a serious irregularity is found, since section 68 (3) (b) of the Act states that: “If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may: (b) set the award aside in whole or in part”.

Unfortunately, with the language of the provisions of the Arbitration Act 1996 concerning the grounds for annulling arbitral awards we return to the ambiguous language of Article V (1) of the New York convention that was represented by the word “may”. Moreover, we return to the discretionary power given to national courts to enforce or refuse enforcement of arbitral awards under the New York Convention.
In addition, the Arbitration Act of 1996 sets a number of restrictions which have affected the applications made by a party to seek the annulment of rendered arbitral awards.

2.3.1.2. The Restrictions and the Ambiguity under the Arbitration Act 1996

2.3.1.2.1. The Restrictions

The Arbitration Act contains several restrictions which might affect the right of a party to appeal. The Act under the mandatory provisions, sections 67 and 68, requires that a party obtain leave from the court to seek or make an application to challenge an arbitral award. Subsection (4) of both mandatory sections of the Act provides that “the leave of the court is required for any appeal from a decision of the court under this section”\(^{58}\).

The second restriction adopted by the 1996 Act under Section 68 is the remission of an arbitral award to the tribunal. Subsection (3) of Section 68 states that: “if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may: (a) remit the award to the tribunal, in whole or in part, for reconsideration”.\(^{59}\) Therefore, “the court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration”.\(^{60}\) Thus, “the primary remedy envisaged is remission. But it is not every irregularity that will justify the grant of a remedy; a serious irregularity means one that has caused or will cause substantial injustice to the applicant”.\(^{61}\)

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\(^{58}\) Subsection (4) of sections 67 and 68

\(^{59}\) Section 68 (3)

\(^{60}\) Ibid

\(^{61}\) Goode Roy, p 1194 (footnote 40 supra)
Additionally, the third restriction is that the 1996 Act also requires parties to raise objections to jurisdiction or procedure at the earliest opportunity. Otherwise, they will lose the right to object or the right to appeal. This requirement is set under section 73 (1) of the Arbitration Act, which provides that: “if a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection ... he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection”.62

Consequently, three restrictions are adopted by the Arbitration Act: getting leave to challenge an arbitral award, remission of an arbitral award to the tribunal for reconsideration and raising an objection to jurisdiction or procedure. It is well known that getting leave from courts was one of the restrictions, the so-called “double exequatur”, under the Geneva Convention of 1927 to enforcing an arbitral award. In contrast, abolishing the principle of obtaining leave for enforcement is considered to be one of the accomplishments of the New York Convention. Therefore, why does a losing party have to obtain leave to set aside an arbitral award? The losing party has the right to challenge an arbitral award and it is known that the court has the last word to determine whether the arbitral award is valid or not. One of the fundamental principles is that the arbitral award is binding and enforceable once it is rendered. Why then do courts remit arbitration awards to the arbitral tribunal for reconsideration? The bases whereby the national courts are permitted to annul arbitral awards or remit them to the arbitral tribunal for reconsideration can be an important

62 Section 73 (1)
issue for parties in choosing the place of arbitration under their arbitration agreement.63

Concerning the third restriction, the time of raising an objection, it should not be forgotten that the courts should not preclude the parties from challenging the rendered arbitral awards if they do not raise objections during the arbitral process. Parties to arbitration have the right to seek annulment or challenging the rendered arbitral awards unless the time on which an application or appeal must be brought has elapsed.64 It is important also to mention that the Arbitration Act 1979 was enacted to stop judicial intrusion or the bilateral role of courts into the arbitral process. If parties raise objections to the courts during the arbitral process, this will allow and give powers of intervention to the courts and thus the arbitral process will be affected. As a result, the issue of annulment of arbitral awards under the provision of the 1996 Act is complicated, although the Department Advisory Committee recommended that:

"[English law] should be set out in a logical order, and expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman [and] consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law".65

This difficulty might be an advantage, in supporting the binding effect and the finality of the arbitration awards, but it might at the same time discourage a losing party to appeal, due to the complicated and restricted process. In addition, this


64 Section 70 (3) of the Arbitration Act 1996, for example, provides that "any application or appeal must be brought within 28 days either of the date of the award or of the date in which the applicant or appellant was notified of the result of that process"

65 Department Advisory Committee on Arbitration Law, A report on the UNCITRAL Model Law on international commercial arbitration (1989) p 34
difficult and long procedure would affect a number of the advantages held by international commercial arbitration, such as speed.

In spite of leaving the issue of annulment to the national laws of the Signatory States, the freedom of countries to specify grounds for setting arbitration awards aside under their national laws should not be used to complicate the issue of annulment. The appropriate way is to give a losing party the opportunity to make an application to set aside an arbitral award and accordingly to allow the court to have the last word and determine whether the arbitral award is valid or not.

2.3.1.2.2. The Ambiguous Language

The mandatory provisions, ss. 67 and 68, of the Arbitration Act 1996 use ambiguous language which might affect the application of the Act. This ambiguity has been reflected in the word “may” in the opening paragraphs. Section 67 concerning “challenging the awards: substantive jurisdiction” uses the word “may” in subsection (3). In addition, section 68 concerning “challenging the award: serious irregularity”, under which arbitral awards can be challenged or annulled has the word “may” in subsection (3) since the court may set the award aside in whole or part, if even one of the serious irregularities affecting the tribunal and the proceedings or the award is shown.

It is submitted that courts face a double ambiguity. The first ambiguity is under Article V (1) of the New York Convention for those seeking recognition and enforcement of an annulled arbitral award in England. The second ambiguity is under the mandatory sections 67 and 68 of the Arbitration Act 1996. It is known that the issue of annulment of arbitral awards is left to the national laws of the Signatory Countries of the New York Convention. Therefore, what would the solution be if a
party asks a court to enforce an annulled foreign arbitral award? It is submitted that the court will refer first to Article V (1) of the New York Convention and then it will find the ambiguous language which is reflected in the word "may". Thereafter, the court will refer to the Arbitration Act 1996 to see if the ground upon which the award has been set aside in the country of origin is one of the grounds listed under its Arbitration Act. If it is, the court will also find an ambiguity under the opening paragraphs of the mandatory sections. Accordingly, the court, if it decides to enforce the annulled award pursuant to its discretionary power, will apply either Article III or Article VII of the New York Convention to avoid the ambiguity. Therefore, although the issue of annulment of arbitral awards has been solved in accordance with the Arbitration Act 1996 by listing grounds for annulment, the problem of enforcing the annulled foreign arbitral awards has not been solved. This is reflected in the word "may" since an annulled foreign arbitral award may be refused if the award has been set aside in the country in which or under the law of which it was made.6 6 But it should be noted that this Act is distinct from a number of arbitration laws discussed below as examples. This is due to the effect of Article VI of the Convention on the 1996 Act. This Act gives courts the same discretionary power as provided under Article VI of the New York Convention to adjourn decisions over enforcement proceedings.6 7

As a result, the Arbitration Act has not given the courts a strict authority to deal with the applications by which the arbitral awards can be challenged or annulled.

66 Section 103 (2) (f); the opening paragraph of this section states that "Recognition or enforcement of the award may be refused..."
67 See footnote 100 supra, Chapter One, page 35; Article 103 (5) of the 1996 Act states that "where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2) (f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award"; the same discretion was also provided under Article 5 (5) of the Arbitration Act 1975 which was enacted to conform to the 1958 New York Convention
In addition, it has not given a clear and strict authority to deal with applications to seek the recognition and enforcement of arbitral awards annulled in their countries of origin. As Park says, “several approaches are open to British judges considering enforcement of awards vacated at the arbitral situs. They might (1) never defer to annulments, (2) always defer to annulments, or (3) defer to annulments only on certain conditions, such as compatibility with public policy or with English grounds for vacatur”.68

2.3.2. French Code of Civil Procedure

France also, as one of the parties to the New York Convention of 1958, has amended its Code of Civil Procedure to set clear grounds under which an arbitral award can be annulled.69 Until 1981, there was in France no statutory provision clarifying the scope of implementation of French arbitration law and the jurisdiction of the French courts to apply it.70 Prior to the Code, in addition, the French Court of Appeal had held that French courts lacked jurisdiction to hear direct appeals to challenge international arbitral awards, even if the arbitration was held in France.71 But, after adopting the Code of Civil Procedure of 1981 which governs international commercial arbitration, the French Court of Appeal may now set aside an international arbitral award rendered in France in an action for annulment.

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70 Petrochilos Georgios, Procedural law in international arbitration (Oxford University Press, United States 2004) 53
Although the Civil Code of 1981 has been amended and the new version came into force in 2005, it contains, in terms of arbitration, nothing more than the provisions provided under Book VI of the 1981 Code. Thus, the same distinction between national and international arbitration is found. The distinction is reflected under Article 1492, which provides that: “an arbitration is international if it implicates international commercial interests”. As stated recently by the Paris Court of Appeal:

“This text refers, independently of the nationality of the parties, the law applicable to the merits of the arbitration, or the seat of arbitration, to an exclusively economic definition of international arbitration according to which it is sufficient that the dispute submitted to the arbitrator relates to an operation that is not carried out exclusively in one state alone”.

Furthermore, the distinction is found also in the grounds for annulment. On the one hand, the grounds for vacating national arbitration awards are wider than the grounds for vacating international arbitral awards. On the other, under French law, the grounds for annulling international arbitration awards rendered in France are the same as the basis for refusing to enforce international arbitration awards rendered outside France. Article 1504 of the Code states that: “the action for setting aside is

75 See Article 1484 of the French Code. It states that: “...The action for setting aside may be based only on the following grounds: 1. if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired; 2. if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed; 3. if the arbitrator has not rendered his decision in accordance with the mission conferred upon him; 4. if due process has not been respected; 5. in all cases of nullity provided in Art. 1480; 6. if the arbitrator has violated a public policy rule”
available against arbitral awards rendered in France in international arbitration, on the grounds of Art. 1502...". The grounds under Article 1502 are:

- "If the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;
- If the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
- If the arbitrator has not rendered his decision in accordance with the mission conferred upon him;
- If due process has not been respected;
- If recognition or enforcement is contrary to international public policy".

This distinction as Webster says, is important for a number of reasons particularly because “national arbitration awards may be subject to appeal unless such an appeal is waived, while international awards are not subject to an appeal" if they are not rendered in France. Accordingly, pursuant to Article 1504, it seems that French courts do not vacate an arbitral award which is rendered outside France, even if the law applicable to the arbitration is the French Code. But pursuant to Article V (1) (e) of the New York Convention, the competent authority to set aside an arbitral award is the country in which or under the law of which the award is rendered. Why, then, has the French Code waived the right of French courts to set aside an arbitral award if the law applicable to the arbitration is the French Code? Although it is rare to choose a law which is different from the law of the country where the arbitration

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76 Article 1504
77 Article 1502
78 Webster Thomas, p 565 (footnote 74 supra); See Articles 1482, 1483 and 1484 of the French Code in terms of the possibility of waiving the right of appeal.
79 See footnote 76 supra concerning Article 1504 of the French Code
takes place, it might be against the principle of the Convention determining the competent authority to set aside an arbitral award.

2.3.3. German Arbitration Act

Under the German Act, a distinction is made between the enforcement of domestic and international arbitral awards. Domestic arbitral awards are enforced only if they have been declared enforceable by a German court. But "an application for a declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside under Section 1059 subs. (2) exists ..." In contrast, the German Arbitration Act has left the issue of enforcement of foreign arbitral awards to the provisions of the New York Convention of 1958. Section 1061 (1) concerning foreign awards provides that: "recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958..." As a result, a foreign arbitral award is declared enforceable by the German courts because of the binding effect of the arbitral award once it is rendered in accordance with the New York Convention. In addition, Germany has applied Article III of the Convention that in states: "... there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

80 Section 1060 (1) of the German Arbitration Act at
obtained 5/10/2007; this Act came into force on 1 January 1998
81 Section 1060 (2)
82 Section 1061
83 See footnote 94 supra, Chapter One, page 33
Concerning the issue of the enforcement of annulled foreign arbitral awards, Germany exclusively applies the ground V (1) (e) of the New York Convention as a ground for refusing recognition and enforcement of an arbitral award which is annulled in its country of origin. In other words, Germany leaves it to the national court where arbitration takes place, or the country whose law is applied, as a competent authority to have the last word in terms of rendered arbitral awards. According to section 1061 (3), “if the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made”. Thus, a German declaration for recognition and enforcement of a foreign arbitral award can be withdrawn if the arbitral award is annulled in the country where it is rendered. This approach in essence constitutes a legal framework for providing “the parties with protection against unfair awards”. In addition, taking into consideration the court decision concerning the award’s validity “makes it more likely that those courts will grant the same courtesy in future situations, when the reviewing and enforcing roles are reversed”. Thus, Germany’s approach is ideal and clear in granting recognition and enforcement, which may be another factor supporting consideration to the decisions of courts in countries of origin.

As has been seen, the German Arbitration Act on the enforcement of foreign arbitral awards refers exclusively to the New York Convention. This trend is also shown under Section 1059, which lists the grounds under which applications for setting aside arbitral awards are made. The grounds under the German law absolutely conform to the refusal grounds listed under Article V (1) and (2) of the New York Convention. Section 1059 provides that:

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84 Section 1061 (3)
86 Ibid, p 366
87 Ibid, p 367
(2) "An arbitral award may be set aside only if:

1. the applicant shows sufficient cause that:

   a) a party to the arbitration agreement referred to in sections 1029 and 1031
      was under some incapacity pursuant to the law applicable to him; or the
      said agreement is not valid under the law to which the parties have
      subjected it or, failing any indication thereon, under German law; or
   b) he was not given proper notice of the appointment of an arbitrator or of
      the arbitral proceedings or was otherwise unable to present his case; or
   c) the award deals with a dispute not contemplated by or not falling within
      the terms of the submission to arbitration, or 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, only that part of the award which contains
      decisions on matters not submitted to arbitration may be set aside, or
   d) the composition of the arbitral tribunal or the arbitral procedure was not
      in accordance with a provision of this Book or with an admissible
      agreement of the parties and this presumably affected the award; or

2. The court finds that:

   a) The subject-matter of the dispute is not capable of settlement by
      arbitration under German law; or
   b) Recognition or enforcement of the award leads to a result which is in
      conflict with public policy (ordre public)".  

Hence, the conformity of the German Arbitration Act to the Convention as
regards foreign arbitral awards is the right path to take to ensure uniformity when
implementing the provisions of the Convention so as to avoid the different
interpretations among the Signatory States, particularly in terms of the ambiguous
language of Article V (1) of the Convention. In reality, the official reason for this

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88 Section 1059 (2) of the German Act; See Article V of the New York Convention of 1958
under footnotes 74 and 75 supra of Chapter One, page 28
consistency, according to the German Government when presenting the new law to the German Parliament, was that “the enforcement regime of the Convention should be applied not only in relation to other States that are similarly parties to the Convention, but also in relation to those States that are not parties”.

2.3.4. UNCITRAL Model Law

The UNCITRAL Model Law of 1985 contains an exclusive list of limited grounds on which an arbitral award can be annulled. These annulment grounds are essentially the same as the refusal grounds listed under Article V of the New York Convention. It has been said that, by adopting or stating similar grounds, the model law “attempts to avoid the problem of “split validity” which enables an award to be found invalid in the state of origin but valid and enforceable abroad”. In addition, the fundamental purpose of stating similar grounds when dealing with arbitral awards is to get a uniform implementation.

According to Article 34, the only recourse possible against an award is the setting aside procedure pursuant to paragraphs 2 and 3 of the Article. This Article provides that:

“(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

(2) An arbitral award may be set aside by the court specified in Article 6 only if: (a) the party making the application furnishes proof that:

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90 The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on 21 June 1985
(i) a party to the arbitration agreement referred to in Article 7 was 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 this State; or
(ii) the party making the application was not given proper notice of the 
appointment of an arbitrator or of the arbitral proceedings or was 
otherwise unable to present his case; or
(iii) the award deals with a dispute not contemplated by or not falling within 
the terms of the submission to arbitration, or 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, only that part of the award which contains 
decisions on matters not submitted to arbitration may be set aside; or
(iv) the composition of the arbitral tribunal or the arbitral procedure was not 
in accordance with the agreement of the parties, unless such agreement 
was in conflict with a provision of this law from which the parties 
cannot derogate, or, failing such agreement, was not in accordance with 
this law; or

(b) The court finds that:
(i) The subject-matter of the dispute is not capable of settlement by 
arbitration under the law of this State; or
(ii) The award is in conflict with the public policy of this State”.

This Article thus states six grounds for setting aside arbitral awards. The proof 
of the ground in paragraph 2 (a) must be made by the party making the application to 
set aside the award, while the grounds listed in paragraph 2 (b) must be raised by the 
court. Therefore, the Model Law covers the deficiency of the New York Convention 
reflected in the absence of grounds for annulment. In addition, it is clear that no 
additional grounds may be invoked, but, under Article 36 of the Model Law, the

92 Article 34 of the UNCITRAL Model Law
grounds to refuse enforcement are the same as the refusal grounds listed under Article V of the New York Convention. Therefore, the matter of the enforceability of annulled arbitral awards has not been covered, since Article 36 (1) has the same ambiguity as is reflected in the word “may” of Article V (1) of the New York Convention." Fry says that, “as might be expected, the application of Art. (1) (e) has yielded inconsistent results. The UNCITRAL Model Law also does not provide a uniform standard for dealing with annulled awards, although it does provide a minimum standard for setting aside awards in Art.34, which is similar to Art. V (1) of the Convention”. In addition, van den Berg says that “it is worth noting that, when the Model Law was being drafted in the early 1980s, the drafters did not go outside the four corners of the Convention. The result is that the provisions relating to the enforcement of foreign arbitral award in the model Law are almost a carbon copy of the Convention”. Hence, I submit that the attempt of the UNCITRAL Model Law to avoid the problem of the “split validity” is not satisfactory and has not achieved its aim.

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93 Article 36 (1) states that “Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only…”


2.3.5. U.S. Federal Arbitration Act

The Federal Arbitration Act lists only a few narrow grounds upon which a rendered arbitral award can be vacated. These annulment grounds are as follows:

"(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made".

These grounds are considered to be the statutory grounds on which courts may vacate arbitral awards. The first three grounds are fundamental to ensure the validity of the arbitral proceedings but "the only statutory ground for vacatur that legitimates inquiry of any type into the actual merits of, and the reasoning underlying, the arbitration award is the "exceeded powers" criterion set forth in section 10 (a) (4)".

It should be noted that Chapter Two of the U.S. Act has been added to conform to the New York Convention of 1958 regarding the issue of enforcement of foreign arbitral awards. This conformity is found under Section 201 of Chapter Two.

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96 This Act applies to the United States of America. Title 9, US Code, Section 1-14, was first enacted on 12 February, 1925 (43 Stat. 883), codified 30 July, 1947 (61 Stat. 669), and amended 3 September, 1954 (68 Stat. 1233). Chapter 2 was added 31 July, 1970 (84 Stat. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on 1 December, 1990 (PLs669 and 702); Chapter 3 was added on 15 August, 1990 (PL 101-369); and Section 10 was amended on 15 November

97 Section 10 (a)

which provides that: “the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter”. But it is important to note that Chapter Two has not listed the grounds under which an American court can refuse to enforce a foreign arbitral award. Thus, does section 201 mean to refer to or apply the refusal grounds which are listed under Article V of the New York Convention? It does not seem so, because, for example, the German Arbitration Act covers the same points as section 201, but it goes on to list the grounds for refusing the enforcement of foreign arbitral awards and section 201 does not.

Moreover, it is submitted that the deficiency under the Convention regarding the grounds for annulment is unfortunately not covered under the Federal Arbitration Act, due to the absence of several grounds which protect parties to arbitration. The annulment grounds under section 10 (a) were listed in 1925, that is, before the New York Convention of 1958 was adopted. Furthermore, the annulment grounds are listed under Section 10 (a) of Chapter One, not under Chapter Two. In addition, no amendments were made to cover annulment proceedings when adding Chapter Two. Therefore, the annulment grounds do not contain grounds to protect the parties to arbitration such as those listed, for example, under Article V (1) of the Convention, if the parties were under some incapacity or were not given proper notice of the appointment of the arbitrator. In addition, the annulment grounds should have been moved to Chapter Two if the material was added to conform to the New York Convention. As Maggio says, “nothing on the face of the statute demonstrates a Congressional intent to insulate the parties against error of fact, law, or contract by

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99 Section 201, Enforcement of Convention, Chapter Two: Convention on the Recognition and Enforcement of Foreign Arbitral Awards
arbitrators that result in inaccurate or unfair awards". Therefore, there is in essence a doubt about the conformity of the Federal Arbitration Act, particularly Chapter Two, to the New York Convention.

Due to the deficiency of the Federal Act, particularly in terms of the narrow annulment grounds, the courts have established a number of non-statutory grounds for vacatur. This means that the standards for setting aside under section 10 (a), mentioned above, are not the exclusive grounds on which a court can set aside an arbitral award. This is because of the Supreme Court's decision of *Wilko v. Swan* in 1953 by which "manifest disregard of the law" by arbitrators would constitute an additional non-statutory ground to vacate arbitral awards, although the Supreme Court "has never directly determined whether the statutory vacatur standards are exclusive or can be expanded". Thus, the decision of the Supreme Court constituted the first non-statutory grounds to vacate an arbitral award. After this the door was open to courts to use their discretionary power to consider or adopt additional grounds to annul arbitral awards.

Taking into consideration or deciding to apply this non-statutory ground, the "manifest disregard of the law" is not clear and leads to uncertainty amongst courts over the nature of cases. This non-statutory ground does not force other courts to take it into consideration when annulling arbitral awards. However, although a number of non-statutory grounds such as public policy are consistent with the New York Convention, under Article V, no such mention is provided under section 10 (a) of the

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100 Maggio Margaret M and Bales Richard A, 'Contracting around the FAA: the enforceability of private agreements to expand judicial review of arbitration awards' (2002-2003) 18 Ohio State Journal on Dispute Resolution, p 164

101 *Ibid*, p 165

102 The non-statutory grounds to vacate arbitral awards which have been added by courts are: "manifest disregard of the law" by the arbitrator; conflict between the award and a clear and well-established 'public policy'; an award that is 'arbitrary and capricious' or 'completely irrational'; and a failure of the award to 'draw its essence' from the parties' contract"
Federal Arbitration Act. But it is submitted that the idea of applying grounds to vacate arbitral awards which are not listed under the law governing arbitration, is not acceptable. This idea will extend the annulment grounds and put no end to the judicial review of arbitral awards.

It is submitted also that if the United States of America is considered to be a Heaven for the enforcement of annulled foreign arbitral awards, particularly in the aftermath of the *Chromalloy* case, it is now considered to be a Hell for setting aside arbitral awards according to the increase of annulment grounds which depend on the discretionary power of the courts. If the issue of annulment were left to courts to determine the grounds at their discretion, the decisions of the courts would not be coherent or accurate.

Hence, the annulment grounds should be amended to conform at least to the refusal grounds of Article V (1) of the New York Convention and should be moved to Chapter two of the Act. In addition, the non-statutory grounds should not be applied and taken into consideration by courts. Furthermore, the annulment grounds under section 10 (a) should be construed narrowly as they had to be at the beginning, before the 1953 decision of the Supreme Court in *Wilko v. Swan*.

Although courts in some federal circuits have expanded the grounds on which an arbitration award may be vacated, they “have been inconsistent in defining what constitutes a ground sufficient to vacate a commercial arbitration award”. Even courts which look beyond the narrow confines of the Federal Arbitration Act in reviewing arbitration awards apply these non-statutory standards with marked restraint. The most significant non-statutory ground that has been recognised and adopted by a large number of American courts to annul rendered arbitral awards is

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“manifest disregard of the law”, which was the first ground to have been constituted. The “manifest disregard” ground is considered to be the primary non-statutory standard for setting aside an arbitration award. But this non-statutory ground is under the microscope and has given rise to a long debate among academics and courts.

2.3.5.1. Manifest Disregard of the Law

The question whether state courts are required to apply “manifest disregard of the law” as a ground for annulling arbitral award has been so much discussed because “the manifest disregard of the law doctrine does not find its basis in the USAA; rather, it is a creature of federal common law”. The foundation and the genesis of the “manifest disregard of the law” as a standard for vacating rendered arbitral awards was in 1953, as mentioned. The Supreme Court in its decision of Wilko v. Swan stated that:

“Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would ‘constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act’, that failure would need to be made clearly to appear. In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation”.

107 Wilko v. Swan et al. No. 39. 74 S. Ct. 182, (2nd Cir. 1953) pp 187-188
This statement has led to extending the grounds for annulling arbitral awards, supplementing the statutory grounds for setting aside by a judicially "manifest disregard" for the law as a standard which has been created. Thereafter, in 1960, the Supreme Court also established the second element of the foundation, providing that "when the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award".108 But, unfortunately, the Supreme Court did not clarify the exact meaning of "manifest disregard". Hence, the vagueness in determining the meaning of the "manifest disregard" has led to different attempts by courts to find an acceptable definition, although "manifest disregard" is rarely used to vacate arbitral awards. This is due to the absence of such language in the USAA and therefore it "must ordinarily be regarded as conclusive" according to the Supreme Court’s standards of statutory interpretation".109

2.3.5.2. The Definition of the “Manifest Disregard of the Law”

A number of federal circuits have recognised “manifest disregard of the law” and state that this standard is judicially created since it is not listed under section 10 (a) of the Federal Arbitration Act. This is because of the Supreme Court’s decision in which this standard was created, but “the definition and application given manifest disregard of the law has varied with the circuits”.110 But all federal circuits have the same opinion that “manifest disregard of the law” is something more than legal error or misinterpretation.111

109 Turner Paul, p 540 (footnote 106 supra)
111 Ibid
Since the Supreme Court’s decision of 1953, courts have had difficulty in deciding the meaning of the “manifest disregard” ground. The Second Circuit said: “how courts are to distinguish …between ‘erroneous interpretation’…and ‘manifest disregard’…we do not know. One man’s ‘interpretation’ may not be another’s ‘disregard’”. The earliest distinguished attempt at establishing a practical definition emanates from the Ninth Circuit in 1961. The Ninth Circuit interpreted “manifest disregard” “to be something greater than a mere error in the law or failure on the part of the arbitrators to understand or apply the law”. But the Second Circuit developed what has become one of the most notable definitions of “manifest disregard”. The Second Circuit created a functional definition of “manifest disregard”. It stated in Merrill Lynch, Pierce, Fenner & Smith v. Bobker that:

“The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator. Moreover, the term “disregard” implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the “manifest disregard” standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel’s award because of an arguable difference regarding the meaning or applicability of laws argued upon it”.

113 Mungioli Marcus, p 1097 (footnote 105 supra)
114 Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jack Bobker 808 F. 2d 930 (2d Cir. 1986) pp 933-934
Under this definition, three points distinguish “manifest disregard of the law” from ordinary judicial review. The first point is the degree of error, since the error must be obvious by a person qualified to serve as arbitrator. The second point distinguishing “manifest disregard of the law” from ordinary legal error is the degree of the arbitrators’ intent to ignore the provisions of the applicable law. The third point distinguishing “manifest disregard of the law” from ordinary judicial review is that misapplication of the provisions of the applicable law must be obvious or well-defined.

The Merrill Lynch definition, as de la Houssaye says, considers the following hypotheses: “Hypothetical 1: the arbitrator applies the wrong law. Nothing in the opinion suggests that he ignored the applicable law; he just applies the wrong law. Hypothetical 2: the arbitrator says he will apply the correct law, but then misapplies it. Hypothetical 3: the arbitrator says that the law is unsettled, X has been argued, but Y is better. He applies Y. Hypothetical 4: the arbitrator says the correct law is X, but applies Y”.115

The fourth hypothetical is clear. It indicates that the arbitrator does know the applicable law but ignores it. In addition, the fourth hypothetical conforms to the definition of Black’s Law Dictionary. The dictionary defines “manifest disregard” as follows: “manifest disregard doctrine: the principle that an arbitration award will be vacated if the arbitrator knows the applicable law and deliberately chooses to disregard it, but will not be vacated for a mere error or misunderstanding of the law”.116 Furthermore, a number of the federal circuits have described “manifest disregard of the law” ground as “very narrowly limited” or “severely limited”.117 The

115 De la Houssaye Isabella, p 454 (footnote 19 supra)
117 Turner Paul, p 541 (footnote 106 supra)
Eleventh Circuit Court of Appeals stated that “manifest disregard” exists when an arbitrator is aware of the law and deliberately ignore it.\(^{118}\)

The “manifest disregard of the law” ground of review for arbitral awards has traditionally been a continual basis of confusion for lawyers and courts.\(^{119}\) However, because “manifest disregard of the law” is not one of the four statutory grounds explicitly set out in the Federal Arbitration Act, courts have struggled to apply and interpret the standard. In addition, discussions of “manifest disregard of the law” have not led to a uniform and clear definition. As a result, different approaches have been found among the federal circuits as to whether or not to take the “manifest disregard of the law” into consideration, as a non-statutory ground to set aside an arbitration award.

2.3.5.3. Federal Circuits’ Approaches

A number of circuits have adopted the “manifest disregard of the law” ground as a non-statutory, judicially created ground. The Eleventh Circuit Court of Appeal, in *Montes v. Shearson Lehman Brothers, Inc.*, recognised “manifest disregard of the law” by an arbitrator and stated that “when it can be shown that the arbitrator knew the law and expressly ignored it, his decision will not be honored”.\(^{120}\) Other circuits, however, state that the “manifest disregard of the law” ground is implicitly provided under section 10 (a) of the Federal Arbitration Act. For example, the Sixth Circuit held that the “manifest disregard of the law” ground is not explicit under the Federal Arbitration Act.\(^{121}\) But it went on to say that even though it is not explicitly

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\(^{118}\) Cohen Daniel S, p 216 (footnote 112 supra)

\(^{119}\) Milam Adam, p 705 (footnote 110 supra)

\(^{120}\) Cohen Daniel S, p 207; see also *Montes v. Shearson Lehman Brothers, Inc.*, 128 F. 3d 1456 (11th Cir. 1997)

\(^{121}\) *M & C Corporation v. Erwin Behr GmbH & Co.*, KG, 87 F. 3d 844, (6th Cir. 1996) p 850
mentioned, "an award may be vacated under the Federal Arbitration Act if the arbitrator exhibits a "manifest disregard of the law"."\textsuperscript{122}

In contrast, several circuits recognise only the four procedural grounds for setting aside listed in section 10 (a) of the Federal Arbitration Act. The United States Court of Appeals for the Fourth Circuit, for example, has rejected the non-statutory grounds to annul arbitral awards and has declared that Congress, when enacting the Federal Arbitration Act, intended to limit the grounds for the annulment of commercial arbitration under section 10 (a).\textsuperscript{123} The Fourth Circuit's approach is reflected in \textit{Remmey v. Painewebber, Inc} since it stated that "courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts. In the Federal Arbitration Act, Congress has limited the grounds upon which an arbitral award can be vacated".\textsuperscript{124} Also, it stated that "the statutory grounds for vacatur permit challenges on sufficiently improper conduct in the course of the proceedings; they do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators reached".\textsuperscript{125}

Thus, the parties may not ask for a "second bite at the apple" because they wish for a different result.\textsuperscript{126} The approach of the Fourth Circuit is the right path to take to avoid potential different implementations or interpretations among the federal circuits when seeking to set aside an arbitration award. The "manifest disregard of the law" as a non-statutory ground has led to inconsistent decisions by the courts. This incoherence is evidenced in the approaches of several Federal courts. For example, the United States Court of Appeals for the Second Circuit held, in \textit{Alghanim & Sons v. Toys R Us, Inc}, that "manifest disregard of the law" or other "implied grounds" are

\textsuperscript{122} See \textit{M & C Corporation v. Erwin Behr GmbH & Co., KG}, pp 850-851 (footnote 121 supra)
\textsuperscript{123} Hayford Stephen L, p 462 (footnote 98 supra)
\textsuperscript{124} \textit{Remmey v. Painewebber, Inc}, 32 F. 3d 143, (4th Cir. 1994) p 146
\textsuperscript{125} \textit{Ibid}
\textsuperscript{126} \textit{Ibid}
accepted to vacate an international arbitral award made in the United States.\textsuperscript{127} Moreover, the court stated that when an action is brought for enforcement of a foreign arbitral award, the courts may refuse enforcement of the arbitral award only on the grounds listed under Article V of the New York Convention.\textsuperscript{128} This decision reaffirmed that the non-statutory grounds for setting aside cannot defeat the enforcement of arbitral awards rendered outside the United States or under foreign arbitration law.\textsuperscript{129} But this decision has made a distinction between the enforcement of an arbitral award and the seeking to set aside an arbitral award. According to the decision, non-statutory grounds can be applied to vacate a foreign arbitral award which is rendered in the United States, but refusing enforcement of foreign arbitral award is governed by the exclusive grounds listed under Article V of the Convention.

Another example is \textit{George Watts and Son and Tiffany and Co.} The United States Court of Appeals for the Seventh Circuit affirmed the decision of the United States District Court for the Eastern District of Wisconsin, which upheld the arbitrators' decision. The Court of Appeals stated that "an error of law is not a ground listed in 9 U.S.C. §§ 10 and 11 for vacating or modifying an award, but in dictum the Supreme Court has suggested that an arbitrator's "manifest disregard" of legal rules justifies judicial intervention".\textsuperscript{130} The Court of Appeals for the Seventh Circuit upheld a recent decision of the Supreme Court of the United States in \textit{Eastern Associated Coal Corp. v. United Mine Workers},\textsuperscript{131} which considered the related question of whether a violation of public policy justifies setting aside an award. The Seventh Circuit held, after \textit{Eastern Associated}, that "the "manifest disregard" principle is

\textsuperscript{127} \textit{Alghanim & Sons v. Toys R Us, Inc.}, 126 F.3d 15 (2\textsuperscript{nd} Cir. 1997) p 23
\textsuperscript{128} Ibid
\textsuperscript{129} Donovan Donald Francis, ‘United States’ (1998) 1 (2) International Arbitration Law Review, N 39
\textsuperscript{130} \textit{George Watts & Son Inc v. Tiffany and Co.}, 248 F. 3d 577 (7\textsuperscript{th} Cir. 2001) p 578
\textsuperscript{131} \textit{Eastern Associated Coal Corp. v. United Mine Workers of America}, 531 U.S. 57, 121 S. Ct. 462 (2000)
limited to two possibilities: an arbitral order requiring the parties to violate the law (as by employing unlicensed truck drivers), and an arbitral order that does not adhere to the legal principles specified by contract, and hence unenforceable under §10 (a) (4).”132

It is submitted that the Federal Circuits have inconsistent approaches to the idea of accepting the “manifest disregard of the law” as a non-statutory ground for setting aside an arbitration award. It is submitted also that the New York Convention of 1958 is clear and has listed under Article V the grounds upon which an arbitral award may be refused. Article V (1) (e) of the Convention gives a court in which or under the law of which the award was made the right to annul an arbitral award. The annulment issue is in accordance with the arbitration law of the country of origin. Therefore, the basis on which to vacate an arbitration award under the Federal Arbitration Act is not wide.

Kolkey says that “the selection of the United States as an arbitral site does not expand the losing party’s scope for challenging the award under the New York Convention, since the grounds for vacating an award under the Federal Arbitration Act are similar to, and arguably narrower than, those for refusing recognition of an award under the New York Convention (except for the ground of manifest disregard for the law)”133 In reality, the grounds under the Federal Arbitration Act are narrower than the refusal grounds under Article V of the New York Convention. But the “manifest disregard of the law” is not listed under section 10 (a) of the Federal Arbitration Act as an appropriate ground to set aside an arbitral award. In addition, the extension of the annulment grounds by courts conflicts with the finality of international commercial arbitration awards in settling disputes. Moreover, due to the

132 George Watts & Son Inc v. Tiffany and Co, p 581 (footnote 130 supra)
133 Kolkey Daniel M, p 700 (footnote 71 supra)
extension of grounds for annulment by courts, the United States will become the best
country in the world for having arbitral awards annulled. As a result, the Federal
Arbitration Act should be construed and implemented narrowly by courts to avoid
any inconsistency of decisions. The courts must consider the policies underlying the
Federal Arbitration Act, and check whether lower courts have the ability to make
such an exception functional.\textsuperscript{134} As Galbraith asks, "what is the advantage in making
agreements to arbitrate commercial disputes when the losing party in the arbitration
may routinely resort to the courts for relief from the arbitrator's award?"\textsuperscript{135} Parties
agree to enter into the arbitration process because the virtues presented to the
commercial public are substantial.\textsuperscript{136}

The idea of accepting the "manifest disregard of the law" as a non-statutory
ground to set aside an arbitral award has been also the subject of debate between legal
researchers at the international level. To vacate an arbitral award on the ground of
"manifest disregard of the law", "the arbitrator must understand and correctly state
the law, but proceed to disregard the same."\textsuperscript{137} This disregard for the law must be
obvious to a qualified arbitrator. However, it is well known that any chosen arbitrator
should be well-qualified to determine in commercial disputes which are going to be
solved by arbitration. Also, even if the chosen arbitrator is not well-qualified, the law
applicable will be clear and the fundamental role of the arbitrator is to apply the
provisions of this law.

"Manifest disregard of the law" has remained vague and imprecise and therefore
it is difficult to determine what degree of disregard is manifest. This fact leads to

\textsuperscript{134} Galbraith Brad A, p 258 (footnote 103 supra)
\textsuperscript{135} Ibid. p 259
\textsuperscript{136} Ibid
\textsuperscript{137} Younger Stephen P, "Agreement to expand the scope of judicial review of arbitration
uncertainty amongst courts and results in inconsistencies. O’Mullan says that, according to this standard:

“It appears that in order to qualify for vacatur under the manifest disregard of the law standard, the arbitrators must intentionally ignore what they know to be the obviously applicable and clearly governing law, and, moreover, they must do so expressly on the record. The result is unworkable standard”.¹³⁸

He goes on to say:

“Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. What is required, other than mere error or misunderstanding, has yet to be determined. The problem, then, consists of distinguishing such disregard of the law from ordinary legal error by the arbitrators, which most agree is beyond the scope of judicial review”.¹³⁹

De la Houssaye says that “Citing article V (2) (b) of the New York Convention, such parties have argued that manifest disregard of the law is a violation of public policy”.¹⁴⁰ It is true that “manifest disregard of the law” is violating the public policy of the country whose law is applied. But the most fundamental issue is that the “manifest disregard of the law” is violating the will of the parties. The parties in the arbitration agreement must have chosen the applicable law, a law which is considered to be the cornerstone and the foundation of the arbitration, in order for such arbitration to take place. Therefore, the chosen arbitrator should respect and take their selection into account. De la Houssaye also goes on to say that:

¹³⁹ Ibid, p 1127
¹⁴⁰ De la Houssaye Isabella, p 449 (footnote 19 supra)
“Likewise, in opposing foreign enforcement of awards rendered in the United States, non-prevailing parties have asserted that manifest disregard of the law is a valid ground upon which U.S. courts may set aside awards. Should an award be thus set aside, this “setting aside” is a defense to enforcement in the courts of the country in which enforcement is sought, according to Article V (1) (e) of the New York convention”.141

This question is fundamental in determining whether the annulment of arbitral awards on the “manifest disregard of the law” ground has legal value in the country where recognition and enforcement are sought. It is clear that the national arbitration laws vary from country to country, although, in general, the annulment grounds are similar in some countries to the refusal grounds listed under Article V of the Convention. In addition, the annulment grounds vary from country to country, although the main reason of the amendments made by the Signatory States was to conform to the New York Convention and cover its deficiencies. Furthermore, it is important to reiterate that the “manifest disregard of the law” standard is not accepted or adopted by all the circuits in the United States. It is then impossible to recognise this standard abroad, in a state other than the state in which it is applied; in particular this standard was created by the Federal Supreme Court’s decision. Also, the creation of this standard was based mainly on the Supreme Court’s discretionary power. Moreover, annulment decisions based on the mandatory annulment grounds listed under the national arbitration laws may not be taken into consideration by the national enforcement courts. This is reflected, for example, in the decision of the U.S. court in the Chromalloy case, whereby the arbitral award annulled in Egypt was recognised and enforced.142 Therefore, the incoherence of the grounds has affected the issue of

141 De la Houssaye Isabella, p 450 (footnote 19 supra)
142 See footnotes 112 and 113 supra, Chapter One, page 38
enforcement of an annulled arbitral award in a country other than the country where the arbitral award was rendered. Accordingly, widening the annulment grounds or going beyond the grounds listed under the national arbitration laws which would undoubtedly extend the national enforcement courts’ discretion in terms of recognising the annulment decisions made by the competent authorities, is not recommended.

It is submitted that the court of the country where recognition and enforcement are sought will have double discretion. The first discretion is whether to enforce the annulled arbitral awards, given the ambiguous language of Article V (1) of the New York Convention. The second discretion is whether to refuse the enforcement of annulled arbitral awards which have been set aside on the grounds of “manifest disregard of the law”. According to the second discretion, the court will examine two points: the first is to look at the Federal Arbitration Act and therefore enforce the arbitral award because “manifest disregard of the law” is not listed as a statutory ground for setting aside an arbitral award. The second point is to use its discretion whether to enforce or refuse the enforcement if “manifest disregard of the law” is a ground for setting aside under its law. It is submitted also that the countries which have adhered to the New York Convention have amended their arbitration laws to deal with the annulment issue. Thus, an attractive and easier solution is to implement the “manifest disregard of the law” ground in Section 10 (a) of the Federal Arbitration Act in order to safeguard statutory rights in the arbitral proceedings.  

143 Mungioli Marcus, p 1116 (footnote 105 supra)
2.4. Are the Annulment Grounds Mandatory?

It is clear that countries adhering to the New York Convention of 1958 have made a number of efforts to cover the Convention’s deficiencies. Such efforts have been reflected, for example, in amending national arbitration laws and providing grounds upon which a rendered arbitral award can be annulled.

As has been seen, the phrase "it depends" has been the answer of the lawyers to parties who look forward to challenging or annulling arbitral awards once made. But have the amendments of the national arbitration laws adequately answered the parties to arbitration? In other words, is the phrase "it depends" no longer needed to answer the parties due to provide the annulment grounds? If so, the parties to arbitration will ask the lawyers to challenge the resulting arbitral awards straightaway. If not, what does it still depend on?

Whether the phrase "it depends" is still needed or not requires examining the annulment grounds listed under the national arbitration laws to discover their mandatory effects. If the annulment grounds are not mandatory, this means that they can be waived, but by whom? On the one hand, will the parties play an important role in waiving the annulment grounds listed under the national arbitration laws concerned? If so, are such parties’ agreements accepted by the national arbitration laws? If so, moreover, to what extent are such parties’ agreements accepted and taken into consideration? In other words, are such parties’ agreements restricted by the national arbitration laws? If they are restricted, does this restriction apply to the time before which the parties should enter into a waiver agreement or the grounds which can be waived?

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144 See footnote 121 supra, Chapter one, page 40
On the other hand, do the national arbitration laws of the Contracting States play an important role in deciding the parties’ right to seek annulment of the resulting arbitral awards? In other words, do national arbitration laws make provision for dealing with waiver agreements? If so, are waiver agreements restricted in terms of the annulment grounds which can be waived? If not, does this mean that the parties are precluded from entering into waiver agreements? But does such preclusion differ between the parties to arbitration according to their different nationalities?

All these issues relate also to the possibility of extending the annulment grounds listed under the national arbitration laws. Thus, waiver and expansion agreements will examine whether the phrase “it depends” is still needed, whether the annulment grounds are mandatory and whether the amendments of the national arbitration laws have covered the deficiencies of the New York Convention. In addition, these issues will examine whether the enforcement refusal ground V (1) (e) has been affected by the non-mandatory effects of the annulment grounds. Moreover, it is also important to find out whether the discretion of national courts will play an important role in dealing with such agreements, particularly if a number of laws lack explicit provision to deal with such agreements. Chapter Three will examine the waiver and expansion agreements and their effects in some detail.

2.5. Conclusion

An exclusive competence authority to set aside an arbitral awards is restricted pursuant to Article V (1) (e) of the New York Convention of 1958. The courts which have such an authority are the court of the country in which the arbitration takes place, the seat of arbitration and the court of the country whose law is applied to the arbitral proceedings. Thus, the courts of other Signatory States have a secondary
jurisdiction whether to enforce or refuse enforcement of a foreign arbitral award. A number of legal scholars, such as van den Berg, Redfern and Hunter, have argued that the phrase “or under the law of which” is referring to a theoretical situation, considering that the place of arbitration normally and usually coincides with that of the annulment of arbitral awards.

Parties to the Convention have amended their national arbitration laws to set the grounds for the annulment of an arbitral award. England is an ideal model of conformity to international Treaties to facilitate the enforcement of arbitral awards. England started by enacting the Arbitration Act 1950 which was drafted to conform to the Geneva Treaties, Geneva Protocol of 1923 and Geneva Convention of 1927, and took into account the early attempts to facilitate enforcement of arbitral awards. Thereafter, England has become a party to the New York Convention of 1958 on the “Recognition and Enforcement of Foreign Arbitral Awards”. Thus, the first amendment which England made was the enactment of the Arbitration Act 1975 in order to conform and give effect to the New York Convention. The 1975 Act adopted the ambiguous language of the Convention concerning the grounds upon which a foreign arbitral award might be refused. In addition, the Arbitration Act 1979 was enacted to put an end to the judicial intrusion of the courts into the arbitral process. The last amendment was the enacting of the Arbitration Act 1996. According to this Act, some grounds upon which an arbitral award can be set aside have been added. These grounds are divided into two mandatory sections: s. 67 concerning the lack of jurisdiction and s. 68 regarding serious irregularity. Unfortunately, three restrictions have been found under the 1996 Act: (1) requiring a losing party to obtain leave to challenge an arbitral award from the courts; (2) remission of an arbitral award to the arbitral tribunal for reconsideration before determining to set aside an arbitral award;
and (3) requiring parties to raise objections to jurisdiction or procedure at the earliest opportunity if they do not want to lose the right to appeal. In addition to these restrictions, the 1996 Act has an ambiguity under its mandatory provisions. This ambiguity is reflected in the word “may”, since the court may set aside an arbitral award. Therefore, the court will face double ambiguity, particularly when seeking the recognition and enforcement of an annulled foreign arbitral award in England. The first ambiguity is provided under Article V of the New York Convention and the second ambiguity is provided under the opening paragraphs of the mandatory provisions, 67 and 68 of the 1996 Act.

France also amended its Code of Civil Procedure in 1981 and 2005. Under Article 1502 of this Code, the grounds for annulment of arbitral awards are listed. But the French Code distinguishes between national and international arbitrations, since the grounds for vacating national arbitration awards are wider than the grounds for vacating international arbitral awards. In addition, the French Code waives the right of the French courts to set aside an arbitral award rendered outside France even if the law applicable to the arbitration is the French Code.

Germany, as one of the Signatory States, has amended its Arbitration Act. The German Arbitration Act in terms of the enforcement of foreign arbitral awards contains nothing more than general and exclusive references to the New York Convention. The German Act allows under section 1061 the refusal of recognition and enforcement of an arbitral award if the courts of the country where the award was made have annulled the award. This conformity is also illustrated under Section 1059 which lists the grounds for annulment. These grounds are absolutely the same as the refusal grounds listed under Article V of the New York Convention.
The UNCITRAL Model Law lists under Article 34 the annulment grounds are also essentially the same as the refusal grounds listed under Article V of the New York Convention. In addition, Article 36 lists the refusal grounds, which are the same as the grounds of Article V of the Convention. But the issue of the enforceability of annulled arbitral awards is not covered because Article 36 (1) has the same ambiguity, which is reflected in the word “may” under Article V of the Convention.

The Federal Arbitration Act has also been discussed. This Act lists under section 10 (a) four statutory grounds for setting aside an arbitral award. But these grounds do not conform to the New York Convention as they were listed in 1925, i.e. before the Convention was adopted. This reason has led courts to establish non-statutory grounds for annulment. “Manifest disregard of the law” is considered the primary non-statutory ground. It was constituted in 1953 by the Supreme Court’s decision in Wilko v. Swan. It is important to clarify that not all federal circuits have recognised or adopted the non-statutory grounds. For example: the Fourth Circuit has merely recognised the grounds listed under section 10 (a), but the Second Circuit has applied “manifest disregard of the law” as a ground for setting aside. Although all circuits agree that “manifest disregard of the law” is something more than mere legal error or misinterpretation, Federal Circuits have not reached a uniform definition. Therefore, Federal Circuits’ approaches are inconsistent and as a result have led to different decisions by the courts.

Without the ambiguous language of Article V (1) of the New York Convention, the national enforcement courts would not have made inconsistent decisions when seeking recognition and enforcement of an annulled foreign arbitral award. The problem which has occurred by leaving the issue of annulment to the national arbitration laws of the countries is the lack of consistency over the grounds
for annulment. First, it is submitted that national courts face a double "may": the first one is provided under Article V (1) (e) of the Convention; the second one is provided under a number of national arbitration laws, such as the Arbitration Act 1996, in the opening paragraphs of the mandatory provisions list the grounds for annulment. Therefore, there is no doubt that the word "may", under Article V (1) of the Convention, has had a bad influence on the amendments of the national arbitration laws. It is clear that the purpose of the ambiguous language of Article V (1) is to confer on foreign arbitral awards flexibility and international acceptance, but the grounds for annulment should instead be restrictive and construed narrowly.

Second, the idea of applying non-statutory grounds for annulment by courts does not serve the needs of international commercial arbitration because of the final and binding advantages of the decisions. In addition, this restricts the parties when choosing the law applicable to their dispute. Therefore, it is not appropriate to restrict the freedom which has been granted them by arbitration. As a result, uniformity over the annulment grounds is needed, to avoid the different implementations and interpretations by national courts either when seeking the annulment of arbitral awards or seeking the recognition and enforcement of annulled arbitral awards.
Chapter Three: Waiver and Expansion of Parties’ Right to Annul Arbitral Awards and their Effects

3.1. Introduction

One of the advantages of arbitration is that once the arbitral awards are rendered they are final and binding on the parties. But this finality exists only unless one of the parties seeks or applies to annul the rendered arbitral award. The agreement of the parties to arbitration is the vital pillar without which the arbitral proceedings are not valid. Furthermore, in the absence of a clear and valid arbitration agreement there can be no arbitration; the national court will retain its normal jurisdiction. In addition, the parties to arbitration have the freedom to choose which arbitration law is to apply to their dispute and to the proceedings. But to what extent should this freedom be exercised? Can parties stipulate how to apply the chosen law on the arbitral awards once they are rendered? In other words, can parties enter into an agreement to prevent or avoid the application of a number of applicable law provisions, particularly the provisions listing the grounds upon which an arbitral award can be annulled? Such an agreement is commonly called a waiver agreement.

Accordingly, the important question is whether private parties can enter into an agreement to waive the grounds upon which resulting arbitral awards can be annulled and whether the waiver agreement is given effect under all national arbitration laws. If so, this means that the waiver agreements are accepted and the annulment grounds are not mandatory and thus the absence of annulment grounds under the New York Convention is not been covered by amendments to the national arbitration laws. If not, it is clear that three types of law will exist: the first type, which contains silent arbitration laws; the second type, containing arbitration laws which do not give effect to
such waiver agreements and the third type, which gives effect to waiver agreements. Thus, it is important to find out how national arbitration laws deal with waiver agreements. Moreover, to what extent are such waiver agreements accepted?

In addition, due to the important role of the parties to arbitration, it is important to find out whether private parties have the right or the freedom to change or even expand the applicable legal grounds upon which an arbitral award can be annulled. This is commonly called an expansion agreement. If so, are such parties’ agreements taken into consideration by national arbitration laws or national courts before which annulment applications are made? If so, moreover, do such agreements affect the issues of the annulment and enforcement of annulled foreign arbitral awards? To answer these questions and determine the effects of such different agreements, it is important to find out: (1) whether private parties can enter into an agreement to waive the grounds for setting aside an arbitral award; (2) whether private parties can enter into an agreement to expand the grounds for setting aside an arbitral award; and (3) whether all national arbitration laws and notional courts give effect to such agreements.

To discuss these issues in greater depth, this chapter is divided into six main sections. The first section deals with the issue of waiving the right to seek annulment of a resulting arbitral award. This section examines also how national arbitration laws deal with the issue of waiver. First, I discuss a number of arbitration laws which give the right of waiving so long as the parties’ agreement exists. Second, I concentrate on laws which waive the parties’ right without their agreement. Third, I discover what laws are silent in terms of the waiver issue. Fourth, I discuss national arbitration laws which do not give clear effect to waiver agreements. In section (2), I examine why a number of laws are mandatory and the others are not. Section (3) deals with the effects of waiver agreements on the annulment and enforcement issues. In section (4), I clarify and
discuss some proposed solutions to avoid possible difficulties when seeking annulment and enforcement of rendered arbitral awards. Section (5) examines mainly the issue of the expansion of the grounds upon which resulting arbitral awards can be annulled. This section examines also the national courts' approaches to the expansion of agreements and considers the views of academics. Furthermore, this section clarifies and examines proposed solutions to avoid splits in the national courts in this regard and the difficulties which may ensue. In section (6) I discuss the effect of expanding the grounds on the issue of enforcement. The last section, (7), serves as an introduction to clarify issues to be discussed and examined in the next chapter.

3.2. Waiving the Right to Seek Annulment of an Arbitral Award

Private parties to arbitration have a right to seek annulment of an arbitral award once it is rendered. This right is guaranteed by the national arbitration laws of the countries which have adhered to the New York Convention of 1958. The national arbitration laws list the grounds upon which an arbitral award can be set aside. In reality, arbitration is a private method of dispute resolution which does not exist without the parties' consent. The parties' agreement to refer their disputes to arbitration is the vital pillar without which arbitral proceedings are not valid. In fact, the private parties have a great opportunity and freedom by which the arbitral tribunal and applicable law are chosen. But, does this freedom give the parties the flexibility to stipulate any clauses and conditions through the implementation of the chosen law? In other words, can the parties enter into an agreement to waive their right to set aside resulting arbitral awards, either in advance or when a dispute arises? If so, this means that the annulment grounds of the chosen laws are not mandatory and will not be applied. Moreover, this means that the rendered arbitral awards will be final and
binding on the parties once they are rendered, any right to seek annulment of a resulting arbitral award is waived and an application to set aside may not be accepted by a court of the country in which or under the law of which the arbitral award is rendered.

Baizeau says that:

“It is not uncommon for arbitration clauses in international contracts to contain specific language with respect to the finality of the award. The arbitration clause may either refer to a set of arbitration rules or contain specific language to the effect that the award will be final and binding and that any right of appeal is excluded”.

To what extent should the private parties stipulate such specific language to reach the finality and binding effects of resulting arbitral awards? It is undeniable that under their arbitration agreement private parties may stipulate preferred clauses in order to facilitate the resolution of their quarrel and obtain the required results as quickly as possible. But can the parties waive the provisions of the chosen arbitration laws? It sounds strange if so.

A number of legal scholars have discussed the issue of waiver of the annulment grounds. Baizeau states that “the parties’ intention is usually to increase the finality of the award by avoiding lengthy and costly challenges before the state courts and ensure prompt enforcement. Commonly, there is also a concern to ensure the confidentiality of the dispute and its resolution by avoiding public court proceedings”. Kerameus also states that “a waiver of the right to set aside an arbitral award may give a twofold meaning. First, it gives expression to the firm intention of the parties to consider arbitration as the final resolution of their dispute not subject to any further control.

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2 Ibid
Second, the state authorizes and consents to this intention by dispensing with a judicial check").³

It is submitted that speed, finality and confidentiality are among the advantages of international commercial arbitration. Moreover, the contracting parties who expect to have a dispute or already have it choose arbitration precisely for its finality and binding effect. Graving says that arbitration “means ‘binding’ arbitration. The award is final, not merely a preparatory step to ‘serious’ litigation. At least that is the theory and that is the way it ought to be”.⁴

In addition, the merits of the disputes are usually not reviewable by courts when a losing party seeks to challenge or set aside an arbitral award and thus the confidentiality of the disputes are maintained. However, the parties should be protected, in particular, the losing party who may not be satisfied with the rendered arbitral award. The waiver in reality may encourage arbitrators to abuse their authority or go beyond the scope of the arbitration purpose, e.g. arbitrators may not apply or may even avoid the implementation of a number of applicable law provisions. Thus, the losing party will be at the mercy of the arbitral tribunal and also deprived from seeking those rights of his which may have been lost during the arbitral proceedings.

The waiver of the right to seek annulment may expedite proceedings to seek recognition and enforcement of an arbitral award, once rendered. Also, it may be true that the suggestion to waive the right to seek annulment of the arbitral award is a method of avoiding potential disputes when seeking enforcement of a set aside foreign arbitral award, in a state other than the state where the arbitral award is

⁴ Graving Richard J, 'The international commercial arbitration institutions: how good a job are they doing?' (1989) 4 American University Journal of International Law and Policy, p 322

³ Kerameus K.D, 'Waiver of setting-aside procedures in international Arbitration' (1993) 41 American Journal of Comparative Law, p 74. The matter of waiver is linked to the well-known question of the “Kompetenze-Kompetenze” letter which indicates that arbitration, if requested by the parties, will decide their authority in a final system which is not subject to a later judicial control
rendered. But it means, in essence, ignoring or avoiding the implementation of statutory provisions of the national arbitration laws which are chosen by the parties. Accordingly, can parties exercise their freedom, in contracting, to ignore the arbitration laws? Or do national arbitration laws give the parties the flexibility to ignore their statutory provisions? If so, to what extent may a right be waived? Is there any limitation? Can the parties stipulate the waiver of the right under all circumstances? And is the will of the parties to waive the right accepted by all national arbitration laws?

3.2.1. The National Arbitration Laws

It is important first to mention that the absence of annulment grounds under the New York Convention has led to inconsistent approaches among national arbitration laws in terms of the issue of waiver. Inconsistent approaches have even been put into effect under a number of national arbitration laws, such as the laws of Switzerland and Belgium. These laws have made a distinction among the parties to arbitration in terms of their rights of seeking annulment and thus it is important to clarify these laws before continuing. Due to this inconsistency, national arbitration laws can be divided into four groups. The first group includes a number of arbitration laws which give private parties to arbitration the opportunity to enter into an agreement to waive their right to seek annulment of the resulting arbitral awards. But these laws are also variable; some of them restrict such parties’ agreement, while others are liberal. The second group includes a number of silent national arbitration laws which do not mention the issue of waiver under their provisions. The third group includes a number of laws which expressly waive the parties’ right to seek annulment. In other words, parties are precluded from seeking the annulment of resulting arbitral awards by the law’s
provisions and not by their consent. The fourth group includes a number of laws which clearly express that the parties' agreement to waive their right to seek annulment is inadmissible. Thus, it is necessary to examine further how national arbitration laws deal with the parties' agreements to waive the right to seek annulment.

3.2.1.1. Waiving the Annulment Grounds by Parties' Agreement and the Arbitration Act 1996 as an illustrative example

This Act is a legal document whereby private parties to arbitration have a wide variety of grounds to set aside a rendered arbitral award. But it makes a distinction between annulment grounds. This distinction is dealt with in a division of the grounds into two parts: the first part contains Sections 67 and 68 as mandatory provisions; the second part includes section 69 as non-mandatory and thus capable of being waived by parties' agreement.

3.2.1.1.1. Section 69 (1) of the Act

The 1996 Act is also unusual in providing the mechanism by which private parties to arbitration can appeal to courts against the arbitrator's decision on a question of law. Section 69 (1) states that:

"Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

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5 See footnote 25 supra, Chapter Two, page 51
6 See footnotes 54 and 56 supra, Chapter Two, pages 59-60 concerning Sections 67 (substantive jurisdiction) and 68 (Serious irregularity)
An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section”.

This non-mandatory provision is merely relevant to an appeal on a point of law in order to set aside an arbitral award. Accordingly, the only way in which an error of law can be corrected is by an appeal under section 69 of the 1996 Act. But the liberal language of the opening paragraph of this section allows the parties to arbitration an opportunity to determine whether to apply this section or not. The words “unless otherwise agreed” in the opening paragraph in essence reflect this liberality and permit the parties to arbitration to agree before or after a dispute arises to waive their right to bring questions of law before the courts. Pursuant to this section, also, the parties’ right to apply this section can moreover be waived if the parties agree that the award can be rendered without reasons. But how can parties waive the implementation of Section 69 (1)? In other words, has the Arbitration Act set specific conditions which should first be fulfilled before waiving under this section?

3.2.1.1.2. The Requirements of the Waiver Agreement

The 1996 Act does not, in fact, set specific requirements which should be found in parties’ agreements to validate the waiver. Accordingly, it is important to mention that waiver agreements or exclusion agreements, as they were commonly called in the past, occurred under the Arbitration Act 1979. This Act set merely one condition to fulfil and required that such waiver agreements should be in writing and need not be clearly expressed as a waiver agreement. But, until 1996, a waiver agreement was valid and recognised only in international arbitrations and was not taken into consideration.

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8 Section 69 (1)
when all the parties involved were British, unless the waiver agreement was entered into after the commencement of arbitration proceedings.\textsuperscript{9} Thus, parties' right to enter into a waiver agreement depended upon the nationality of the parties involved. Moreover, English courts have given waiver agreements more scope to be valid and recognised. In \textit{Marine Contractors Inc. v. Shell Petroleum Development Ltd.}, the parties agreed that the arbitration should be conducted in London in accordance with the Rules of the International Chamber of Commerce.\textsuperscript{10} The Rules provide under Article 24 that:

\begin{quote}
1. The arbitral award shall be final; 2. By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made''.\textsuperscript{11}
\end{quote}

The court interpreted this article and held that the parties' agreement was sufficient to demonstrate their intention to exclude the right of appeal against the resulting arbitral award. Thus, an application for leave to appeal was refused.\textsuperscript{12}

As a result, waiver agreements should be in writing and no further conditions are required. Also, an implied waiver may also exclude the jurisdiction of the courts if parties enter into an agreement and select a set of procedural rules which waives the right of appeal. This is the mechanism whereby private parties to arbitration can exclude their right to seek annulment of the resulting arbitral awards, either in advance or when a dispute arises.

\textsuperscript{9} Curtin Kenneth M, 'An examination of contractual expansion and limitation of judicial review of arbitral awards' (2000) 15 (2) Ohio State Journal on Dispute Resolution, p 358
\textsuperscript{10} \textit{Marine Contractors, Inc. v. Shell Petroleum Development Ltd.}, [1984] 2 Lloyd's Rep., p 79
\textsuperscript{11} Article 24 of the Rules of Conciliation and Arbitration of 1988 of the International Chamber of Commerce
\textsuperscript{12} See \textit{Marine Contractors, Inc. v. Shell Petroleum Development Ltd.}, p 79 (footnote 10 supra)
3.2.1.1.3. The Need for Section 69 (1)

In reality, Section 69 of the 1996 Act is entirely derived from Sections (1) and (3) of the Arbitration Act 1979. But the current language of its opening paragraph, the words “unless otherwise agreed by parties”, was not provided under the 1979 Act.

A number of legal scholars have discussed Section 69. Kolkey considers the reforms of the English Arbitration Act and states that:

“A principal advantage of the English reforms is that for most international arbitrations parties may exclude in advance the right of appeal by entering into a written exclusion agreement by which judicial review is precluded...An exclusion agreement can exclude judicial review... judicial determination of preliminary points, and even an order for reasoned award”.14

Curtin also supports Section 69 and states that:

“The increased use of exclusion agreements demonstrates the integrity of the arbitral process and the trust that parties to an arbitral agreement have in such a process. The use of exclusion agreements not only will assure the uninterrupted enforcement of arbitral awards, but also will promote the intentions of the parties in agreeing to arbitrate disputes”.15

In addition, Hill says that:

“The existence of an appeal procedure which was open to abuse did little to encourage the international business community to regard England as an appropriate place for international commercial arbitration. Indeed, the very existence of a right of appeal to the court on a point of law – which is not found in continental legal systems – undermines the finality of the arbitrator’s decision. The 1979 Act radically altered the position; the old

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13 See Sections (1) and (3) of the Arbitration Act 1979
15 Curtin Kenneth M, pp 360-361 (footnote 9 supra)
forms of appeal were abolished and a new limited right of appeal was introduced".16

English reforms are undeniable in their facilitation of international commercial arbitration. But is giving parties the right to exclude one of the provisions to be considered a principal advantage, as Kolkey says? Is excluding national courts’ jurisdiction to be considered a principal advantage? Do private parties to arbitration have trust in the integrity of the arbitral process only if they can exclude one of the provisions or the national court’s jurisdiction? Arbitration in essence is private and parties are not obliged to refer their dispute to arbitration. Private parties prefer arbitration due to their important role in determining how to conduct proceedings. Thus, the integrity of the arbitral process and trust in it are guaranteed by the choice of arbitration even before adopting any clause which permits parties to exclude it. I submit that Section 69 in essence is no longer needed, as under the Arbitration Act 1979. It should not be forgotten that the Arbitration Act 1979 was enacted to stem criticism from abroad of the arbitral proceedings in England.17 Before the enactment of the 1979 Act a party to arbitration who looked forward to appealing on a point of law could make a request to the arbitrators to state a case for the opinion of the High Court if the dispute concerned involved a real question of law.18 In addition, before the enactment of the 1979 Act, parties who wished to avoid the delay in meeting their commitments “came to realise that the special case procedure could be manipulated to produce very considerable delay".19 It should not also be forgotten that the English Arbitration Act

16 Hill Jonathan, p 643 (footnote 7 supra)
17 See footnote 42 supra, Chapter Two, page 57
18 Hill Jonathan, p 643
19 Ibid
was criticised and suffered many deficiencies at the international level due to the bilateral role of national courts in the arbitration proceedings.  

The absence of the need for Section 69 was also evidenced in a number of calls and attempts to abolish it, prior to the enactment of the Arbitration Act 1996. But the Department Advisory Committee on Arbitration Law (DAC) decided to keep the right to appeal in what is now Section 69 of the 1996 Act. The reason for keeping it was reflected in the decision of the DAC:

"It seems to us, that, with the safeguard we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of law clause to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with force that in such circumstances, the parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that, if the tribunal fail to do this, it is not reaching the result contemplated by the arbitration agreement".

Pursuant to this statement, improper application by the arbitral tribunal of the law chosen by the parties is possible. Accordingly, an arbitral award may be rendered and affected by this improper application. Thus, such a rendered arbitral award should be annulled. Why then is Section 69 non-mandatory? In other words, why does it have the liberal language reflected in the words “unless otherwise agreed by parties”? I submit that keeping Section 69, with its liberal language, which gives the parties the freedom whether or not to apply it, is not convincing. In addition, giving the parties the freedom to determine whether or not to apply this section may have a number of effects.

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20 See supra footnotes 40 and 41, Chapter Two, page 57
21 The Department Advisory Committee was set up by the United Kingdom Government to review the UNCITRAL Model Law of 1985.
22 Tweeddale Andrew and Tweeddale Keren, Arbitration of commercial disputes: international and English law and practice (Oxford University Press Inc., The United States (New York) 2005) 798
on the arbitral proceedings. The arbitrators may fail in applying the applicable law and also may abuse their power during the implementation of the applicable law.

I submit once more that this section should be abolished and Sections 67 and 68, which set the mandatory annulment grounds, are sufficient. Hill supports this view by stating “while many of the provisions of the 1996 Act are based on repealed legislation, almost no provision of the previous statutes has been restated in its original words”.23 This is true. Moreover, private parties and drafters of arbitration agreements should be aware of it. Baizeau says:

“The distinctive feature of English arbitration law is well known to English practitioners, including those involved in drafting arbitration clauses in international contracts. They may thus, in certain circumstances, purposely decide to insert language to the effect that any form of appeal is excluded, in order to avoid an appeal on a question of law, considering that such language will not exclude their right to challenge the award under the Act for want of jurisdiction or serious irregularity”.24

3.2.1.2. Waiving the Parties' Right under the National Arbitration Laws

3.2.1.2.1. Swiss Private International Law Act of 1987 (PIL)

Swiss Law lists four grounds on which an arbitral award can be annulled. These grounds are listed under Article 190 (2). But in accordance with Article 192 (1) of the Law, there are many possibility of waiver by parties’ agreement either in advance or when a dispute arises. The Article provides that:

“1. If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express

23 Hill Jonathan, p 630 (footnote 7 supra)
24 Baizeau Domitille, pp 70-71 (footnote 1 supra)
statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190 (2).”

In the light of this section, it seems that waiving the right to seek annulment is restricted. In other words, this section makes a distinction between parties to arbitration as it applies merely to parties who have no real link or connection with Switzerland. Thus, non-Swiss parties are entitled to waive their right to seek the annulment of rendered arbitral awards. In addition, they are entitled to waive the grounds in part or in whole at will. But why has the Swiss Law made this distinction between Swiss and non-Swiss parties? Why are Swiss parties precluded from waiving their right to set aside a rendered arbitral award? In addition, why does this law give non-Swiss parties absolute liberty to waive one or more of the annulment grounds?

Although I submit that the waiver itself is not positive, this distinction between the parties to arbitration is not justified. The waiver of the right to seek annulment of the resulting arbitral awards is governed by the law itself and the parties’ agreements. Furthermore, whatever the purpose of the distinction and the aim of giving the right of waiver, non-Swiss parties should not have the opportunity to apply one or more of the annulment grounds pursuant to their desires. Furthermore, it is submitted that the grounds upon which an arbitral award can be set aside should be mandatory and indisputable. What are the benefits of amending national arbitration laws if the parties have the opportunity to ignore or avoid them? The amendments should have aimed to conform to the New York Convention of 1958. But by giving parties the opportunity to enter into a waiver agreement, the deficiency of the New York Convention which is reflected in the absence of the annulment grounds will not be covered.

Under the opening paragraph of Article 192 (2), the Swiss Law provides that:

"If the parties \textit{have waived} fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy".\textsuperscript{26}

Article 194 of the same law states that:

"The recognition and enforcement of a foreign arbitral award is \textit{governed} by the New York Convention of June 10, 1958 on the Recognition and Enforcement of foreign arbitral Awards".\textsuperscript{27}

It is a fact that recognition and enforcement of foreign arbitral awards is governed by the New York Convention. But pursuant to these articles, it is clear that the acceptance of the parties' agreement to waive their right to seek annulment does affect the enforcement of foreign arbitral awards. Article V of the Convention is essential and lists a number of grounds to refuse recognition and enforcement. Thus, giving the parties the opportunity to waive their right under affects the enforcement refusal ground (e) of Article V (1), which deals exclusively with annulled foreign arbitral awards. Accordingly, the Swiss law has excluded ground (e) and does not conform to the purpose of the Convention which should be followed by the Signatory States.

In what circumstances will the arbitral awards be enforced outside Switzerland? Do the national courts where recognition and enforcement is sought accept and take such parties' agreements into consideration? In particular, Article 192 (2) contains the words "if the awards are to be enforced in Switzerland". It has been said that "a waiver under Art. 192 of the PIL Act does not affect the parties' right to resist enforcement of

\footnotesize{\textsuperscript{26} Article 192 (2) \\
\textsuperscript{27} Article 194}
the award in Switzerland or abroad, but it is nonetheless rarely advisable". On the one hand, I submit that such waiver agreements will not affect the recognition and enforcement in Switzerland. This is because the rendered arbitral awards will be binding, final and cannot be challenged. In other words, they will be valid and enforceable due to the legal effect of the waiver agreements in Switzerland or under the Swiss Law. On the other hand, the parties' right to resist recognition and enforcement outside Switzerland may be affected. This may occur if two jurisdictions have competence to deal with the resulting arbitral awards, for example, if the seat or the place of arbitration was in Switzerland and the parties agreed to apply the U.S. Federal Arbitration Act. This means that two jurisdictions have competence to annul the resulting arbitral awards. It is important to note that the Federal Arbitration Act is silent and does not make any provision to deal with waiver agreements. Thus, the waiver agreement is valid under Swiss Law and the arbitral awards are enforceable, but the parties may resist recognition and enforcement in the United States. In the United States, the courts' discretion will play an important role and accordingly it is not clear if the waiver agreement will be accepted or even taken into consideration. Thus, an application to annul the arbitral awards can be made and parties' right to resist recognition and enforcement may be affected.

In addition, for example, if the parties agreed to apply a law which does not give effect to the waiver agreements, such as the Egyptian and Jordanian Arbitration Laws, applications to seek annulment can be made and the parties can resist the recognition and enforcement of the arbitral awards. Furthermore, if the second law restricts the parties' right to enter into waiver agreements, such as the UK Arbitration Act 1996, since only Section 69 can be waived, the rendered arbitral award can be annulled on the

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28 Baizeau Domitille, p 77 (footnote 1 supra)
grounds listed under Ss. 67 and 68 and the parties can resist the recognition and enforcement of the arbitral awards.

As a result, the issue of enforcement of the rendered arbitral awards may be affected when seeking recognition and enforcement of the arbitral award in a state other than the state where it is rendered. For example, if the arbitral award has been annulled in the United States or Egypt, national courts’ discretion where enforcement is sought may be applied in favour of enforcing the annulled award, particularly if their national laws take waiver agreements into consideration. In addition, if the law of the national enforcement court does not take waiver agreements into consideration, the courts’ discretion may be applied in favour of refusing the enforcement of the annulled awards. Furthermore, if the law of the country where recognition and enforcement is sought is silent about waiver agreements, the courts’ discretion may be applied in favour of refusal or enforcement, but relying on the ambiguous language of Article V (1), Articles III and VII (1) of the New York Convention of 1958.

However, although the waiver agreement is rarely advisable, as Baizeau says, the parties are not encouraged to use their contracting freedom by stipulating clauses which may not be accepted by all national courts and arbitration laws.

3.2.1.2.2. The Belgian Judicial Code

The Belgian Judicial Code has clearly granted private parties to arbitration the opportunity to waive their right to seek annulment of the resulting arbitral awards. It is important first to note that amendments of the Belgian Judicial Code are unusual. In the 1985 Code and its amendments, non-Belgian parties were precluded from the right to seek the annulment of resulting arbitral awards in international arbitration. The right of non-Belgian parties was excluded by the provisions of the Code, not by their
agreement. Non-Belgian parties were not even permitted to agree that the Belgian courts would have jurisdiction to set aside the resulting arbitral awards in international arbitration. Furthermore, Article 1717 (4) of the 1985 Code was extreme, since it stipulated that even non-Belgian parties who had their normal residence or a legal branch office in Belgium were precluded from making an application to annul the resulting arbitral awards.

At the time, it was said that the purpose of this stipulation was owing to the significance of Belgium as a centre for international commercial arbitration. The justification for providing such paragraph under the 1985 Code was as follows:

"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”.

At this time, in addition, proponents and opponents discussed the issue of precluding non-Belgian parties from the right to seek annulment. Proponents described the Belgian amendment as a “paradise for international commercial arbitration”. But some opponents said that the numbers of candidates for international commercial

29 See Article 1717 (4) of the 1985 Code. It provided that: “the Belgian Court 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 (une succursale) or some seat of operation (un siège quelconque d’opération) there”; the Law of 1985 was entitled “Relating to the Setting Aside of Arbitral Awards”


31 Ibid

arbitration had decreased, because parties appeared to be reluctant to give up the right to challenge an arbitral award in the courts.33

Nowadays, Belgian parties are precluded from their right to seek annulment of resulting arbitral awards, whereas non-Belgians are entitled to do so. The Belgian Judicial Code of 1985 has been amended and the new version came into force in 1998. Article 1717 (4) of the 1998 Code provides that:

“The parties may, by an express statement in the arbitration agreement or by a subsequent agreement, exclude any application to set aside the arbitral award where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there”.34

It seems that this amendment was made because of the decrease in the number of international commercial arbitrations.35 It may also have been due to the fact that precluding non-Belgian parties from their right to seek annulment of the resulting arbitral awards did not enhance Belgium’s standing as a centre for international commercial arbitration. I think that Belgium should have abolished the distinction between parties, rather than diverting or redirecting it from non-Belgian to Belgian parties. However, it is not clear whether non-Belgian parties are permitted to agree to exclude the annulment grounds in part or in whole.

The Belgian Code and the Swiss law have converged in precluding their nationals from exercising their right to seek the annulment of rendered arbitral awards. But what are the benefits of such a stipulation under the Law? Does giving Belgian parties the opportunity to seek annulment of the resulting arbitral awards affect the

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33 Van den Berg Albert Jan, p 144 (footnote 30 supra)
35 See footnote 33 supra
position of Belgium as a centre for international commercial arbitration? Private parties choose the arbitration laws which protect their rights and conform to their desires. Hence, the parties will look for laws which give them the opportunity to seek annulment if they are not satisfied with the rendered arbitral awards.

Thus, although precluding national parties from their right to seek annulment will increase international arbitration, by encouraging parties to choose foreign laws and foreign seats of arbitration, Swiss and Belgian parties are not encouraged to choose the laws of their countries to be applied to their disputes. They should also be aware that such stipulations will affect the parties’ rights, particularly the losing party, who will be deprived from enforcing those rights of his which might have been lost during the arbitral proceedings.

3.2.1.3. Silent Arbitration Laws

3.2.1.3.1. The U.S. Federal Arbitration Act of 1925

The Federal Arbitration Act, as noted above, faces a number of deficiencies which have mainly been reflected in the absence of comprehensive grounds upon which rendered arbitral awards can be set aside. Thus, this raises the question whether waiving the right to seek annulment is provided under or even accepted by the Federal Arbitration Act. In reality, this law is silent about the capability of private parties to enter into an agreement to waive their right to seek annulment, either in advance or when a dispute arises.

In spite of the silence, it seems that courts of the United States accept the idea of waiving the right to seek annulment. This perspective was evidenced in the Chromalloy case (1996) in which the parties agreed to waive their right to seek annulment of the

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36 See footnote 96 supra, Chapter Two, page 75
37 See Section 10 (a) under footnote 97 supra, Chapter Two, page 75
resulting arbitral awards. Chromalloy (CAS) sought enforcement of the arbitral award in the United States. Thereafter, the United States District Court for the District of Columbia recognised and enforced the arbitral award in spite of its being set aside in Egypt. A number of statements were made and relied on by the District Court to justify its decision for enforcement:

The U.S. court stated that:

"The parties agreed to apply Egyptian Law to the arbitration, but, more important, they agreed that the arbitration ends with the decision of the arbitral panel".  

Also, it stated that:

"The Court has already found that the arbitral award is proper as a matter of U.S. law, and that the arbitration agreement between Egypt and CAS precluded an appeal in Egyptian courts".

Furthermore, when Egypt argued that "by choosing Egyptian law, and by choosing Cairo as the sight of the arbitration, CAS has for all time signed away its rights under the Convention and the U.S. law", the U.S. court stated that:

"When CAS agreed to the choice of law and choice of forum provisions, it waived its right to sue Egypt for breach of contract in the courts of the United States in favor of final and binding arbitration of such a dispute under the Convention. Having prevailed in the chosen forum, under the chosen law, CAS comes to this Court seeking recognition and enforcement of the award. The convention was created for just this purpose".

38 See footnotes 39 and 40 infra
40 Ibid, p 913
41 Ibid, p 914
42 Ibid
In addition, although the Federal Arbitration Act is silent about the waiver issue and the U.S. court relied on its discretion, Kolkey goes on to say that:

"Parties who wish to avoid any of the risks of review can exclude judicial review under the Federal Arbitration Act and thus enhance the finality of their award. A contractual waiver of all judicial review of the arbitration proceedings, if clear and unequivocal, is valid".43

Kolkey says that the parties can enter into waiver agreements under the Federal Arbitration Act, but the waiver agreements must be clear and unequivocal. In other words, it seems that Kolkey has determined the requirements of valid waiver agreements without giving any attention to the Federal Arbitration Act provisions. I submit that if the U.S. Federal Act is applied, the validity of the waiver agreements depends entirely on the discretionary power of the courts. Thus, it is difficult to determine that the waiver agreements are valid if they are clear and unequivocal.

In Gateway Technology, Inc., v. MCI Telecommunications Corp., the parties agreed and stated that the arbitration award would be final and binding on them “except that errors of law shall be subject to appeal”.44 In reality, the parties’ contract contained two different agreements. The first agreement waived all the annulment grounds; the second agreement contained an expansion of the grounds45, for an error of law is not listed under Section 10 of the Federal Arbitration Act as one of the annulment grounds. But the Fifth Circuit did not deny such parties’ agreement and stated that arbitration is a creature of contract.46

It is submitted that enforcement of the annulled foreign arbitral awards will depend on the discretionary power of the enforcing courts, which is never a helpful
situation. In addition, the parties’ agreement to waive their right to seek annulment should not be valid if the Federal Arbitration Act is applied to disputes, because of its unclear guidance about waiver agreements.

3.2.1.3.2. The French Code of Civil Procedure

The French Code of Civil Procedure makes a distinction between domestic arbitral awards and arbitral awards made abroad or in international arbitration. Due to this distinction, the issue of waiver is restricted. Parties to arbitration have the opportunity only to enter into an agreement to waive their right to seek annulment of domestic arbitral awards.

Article V (1) (e) of the New York Convention of 1958 deals with annulled foreign arbitral awards. Thus, it is important to find out whether annulment of arbitral awards made abroad or in international arbitration can be waived by parties’ agreements. Article 1504 of the French Code provides that:

“The action for setting aside is available against arbitral awards rendered in France in international arbitration, on the grounds of Art. 1502.
No recourse is available against court orders granting exequatur of such awards”.

In accordance with the French Code in terms of international arbitration rendered in France, there is no explicit provision dealing with waiver agreements. Thus, the French Code is silent. The only mention of them deals with the availability of recourse against courts’ decisions granting enforcement of an arbitral award. Pursuant

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47 See supra footnote 73, Chapter Two, page 67
49 Article 1504 of the French Code; the annulment grounds provided under Article 1502 are mentioned under footnote 77supra, Chapter Two, page 68
to article 1504, the Court of Appeal where the award is rendered has competence; parties applying to seek the annulment of arbitral awards which were rendered in France in international arbitration should go before it. But the parties to international arbitration awards rendered in France cannot challenge the Court of Appeal’s decisions granting enforcement of the rendered arbitral awards. In other words, the parties have the right to challenge or seek annulment of the rendered arbitral awards before the Court of Appeal, but they cannot challenge its decisions granting enforcement.

3.2.1.4. Inadmissible Effects for Waiver Agreements and the Jordan Arbitration Law of 2001 as an illustrative Example

Jordanian Law is quite explicit in terms of the issue of the waiving of grounds on which an arbitral award can be set aside. Article (50) of the law provides that:

"An action for nullity of the arbitral award must be raised within thirty days following the date on which the arbitral award was notified to the party against whom it was rendered; and such action is admissible even if the party invoking nullity had waived his right to do so before the issuance of the arbitral award".

Pursuant to this Article, an agreement between the parties to waive their right to seek annulment of resulting arbitral awards is inadmissible, whether it is made in advance or when a dispute arises. This law makes no distinction between Jordanian parties and non-Jordanian. Nor does it give parties the opportunity to waive even one of the grounds for setting aside. It is submitted that this law puts an end in advance to any potential arguments which may arise concerning waiver. I would strongly advocate

50 Article 1505 provides that "the setting aside procedure of Art. 1504 is brought before the court of appeal of the place where the arbitral award is rendered..."
51 Jordan Arbitration Law of 2001 is mainly derived from the Egyptian Arbitration Act No. 27 of 1994, which is based on the UNCITRAL Model Law of 1985 on International Commercial Arbitration
52 Article (50) of the Jordanian Arbitration Law
such direction, as it a highly recommended way of avoiding problems with waiver agreements, such as giving national courts wide discretion. I submit also that the Jordanian Law has protected its provisions and dealt with them as mandatory and impossible to avoid. In addition, this law protects private parties, particularly the losing one, who may have lost rights during the arbitral proceedings. Furthermore, this law does not give national courts the discretionary power to deal with waiver agreements.

3.3. Why Annulment Grounds are not Mandatory under a Number of Laws

It is clear that a great number of countries adhering to the New York Convention have amended their national arbitration laws to cover the Convention deficiencies, in particular, the deficiency reflected in the absence of the annulment grounds. But, unfortunately, such annulment grounds are not given the same legal value and effect by the national arbitration laws; some national arbitration laws have given legal effects to their provisions, whereas others have not. Even a number of national arbitration laws have made a distinction between their provisions in terms of their mandatory effects.

What is the purpose or the need for this inconsistency? Why are some legal provisions mandatory and some not? Do countries or national arbitration laws tend to keep or not to cover the deficiencies of the Convention and as a result are the parties entitled to waive the grounds for annulment? If so, this means that there was no need to amend the national arbitration laws to cover the New York Convention deficiency. If so, moreover, it seems that a number of countries take into consideration and belief what has been said: that the scope of the New York Convention lies in the enforcement stage and thus no annulment grounds are needed.53 This being the case,

53 See footnote 115 supra, Chapter one, page 38
what need was there to amend the national arbitration laws by listing the annulment grounds?

It seems, furthermore, that a number of countries take into consideration and support the goal of finality in arbitral awards, which would be promoted by reducing the circumstances in which such awards can be challenged. If so, it should not be forgotten that the goal of legality in arbitration awards is also essential. This goal would be advanced by allowing a party to appeal and challenge the resulting arbitral awards. But, to advance this goal, a party looking to challenge the rendered arbitral award must make an application before a competent authority. The competent authority according to ground (e) of Article V (1) of the New York Convention is the court of the country in which arbitration takes place and the country under the law of which or whose law is applied to the arbitration proceedings. Thus these countries are the only competent authorities to deal with applications to challenge or annul the resulting arbitral awards. But allowing the parties to contract and waive the annulment grounds will displace the jurisdiction of the national courts of the countries of origin. Yet is it possible to displace the jurisdictions of the national courts of the countries of origin? If so, the rendered arbitral awards will be detached from their countries of origin and as a result there will be no competent authorities. In other words, waiving the right to seek annulment will deprive the competent courts from exercising their normal jurisdictions on the arbitral awards rendered within their territory. Thus, the parties' right will be affected, in particular, that of the losing party who looks to challenge the resulting arbitral awards; as a result the annulment issue is affected. However, it should not be forgotten that national courts' jurisdictions cannot be displaced by parties' agreement. In addition, it should be recalled that the courts' jurisdictions are not created by parties' will.
Whatever the reason is, it in essence would sound strange if private parties to arbitration could enter into an agreement and waive the annulment grounds, since it is well known that some provisions of the laws are mandatory, have a legal effect and it is difficult to avoid them once they are chosen. Furthermore, it would sound strange if private parties to arbitration could create or displace national courts' jurisdictions. In addition, it would sound strange if a number of countries accepted and agreed to displace their national courts' jurisdictions. However, if these countries tend to keep the deficiencies of the Convention; if these countries believe that the scope of the Convention is only at the enforcement stage; and if these countries tend to support the goal of the finality of arbitral awards, does this mean that a distinction should be made between the parties to arbitration according to nationality, such as Swiss and Belgian?. In other words, what difference does the preclusion of the parties, either national or international, make or give to the countries? Why are Swiss parties precluded from waiving annulment grounds listed under the Swiss law? I submit that the countries adhering to the New York Convention have no stable policy to deal with the deficiencies of the Convention, in particular, the absence of annulment grounds. This is reflected, for example, in the amendments of the Belgian Judicial Code. In 1985, non-Belgian parties were precluded from their right to waive the annulment grounds, whereas Belgians were entitled to do so. Nowadays, Belgian parties are precluded from their right to waive the annulment grounds and non-Belgians are entitled to do so. In other words, why are the annulment grounds mandatory against nationals, but not in favour of internationals? However, it should be noted that such discrimination among the parties to arbitration is damaging and should not be found. In addition, it should not be forgotten that the national courts' jurisdictions are not and should not be created or displaced on the basis of parties' nationalities. Moreover,
I submit that if the annulment grounds can be waived and thus the national courts' jurisdictions are displaced, there will be no control over the arbitral process and as a result the parties to arbitration will be at the mercy of the arbitral tribunal.

Some may argue that the Arbitration Act 1996 makes a distinction between the annulment grounds in terms of their mandatory effect. In other words, some may argue that Sections 67 and 68 are mandatory whereas Section 69 is not and thus can be waived and therefore national courts' jurisdictions can be displaced. I think that if parties to arbitration enter into an agreement to waive Section 69 of the 1996 Act, this does not mean that the courts' jurisdictions are displaced. This is because Section 69 is no longer needed since it was listed under the Arbitration Act 1979 to stem criticism from abroad due to the liberal role of the English courts in the arbitral process. Thus, giving the parties leave to agree to waive Section 69 does not mean or lead to a displacement of the English courts' jurisdictions, since Sections 67 and 68 are mandatory and sufficient to annul the resulting arbitral awards.

I submit once more that the countries such as the UK and Jordan which give mandatory effects to the provision of their laws have a stable policy. Those countries aim, on the one hand, to promote and advance the goals of finality and legality for the arbitration awards. On the other, they do not displace their courts' jurisdictions but keep them as competent authorities, as granted and guaranteed by the New York Convention. In addition, these countries have aimed to cover the deficiencies of the New York Convention as reflected in the absence of annulment grounds. Moreover, those countries tend to protect those parties who may have lost their rights during the arbitral proceedings.

Concerning the countries whose national arbitration laws are silent, I submit that whether the annulment issue will be affected or not depends on the national
courts’ discretionary power. In addition, whether national courts’ jurisdictions can be displaced depends also on the national courts’ discretion.

3.4. The Effects of Waiver Agreements on the Annulment and Enforcement issues

It is clear now that not all national arbitration laws accept the possibility of waiving the grounds upon which a rendered arbitral award can be annulled. In addition, not all parties to arbitration are entitled to enter into an agreement waiving the annulment grounds of the national arbitration laws concerned. But do waiver agreements affect the parties’ right to seek annulment of the rendered arbitral awards and thus their enforcement? In particular, do the waiver agreements affect the enforcement issue when the recognition and enforcement of the arbitral awards is sought in a state other than the state where they are rendered?

The Swiss Law, for example, gives non-Swiss parties the freedom to apply the annulment grounds or not, but it states under Article 192 (2) that if the resulting arbitral awards are to be enforced in Switzerland, the New York Convention will be applied by analogy. But if the arbitral awards are to be enforced outside Switzerland, will the New York Convention then be applied by analogy? In other words, does the law of the enforcing state ever matter?

In addition, Gharavi states:

“The possibility given to parties, in certain hypotheses, to waive their right to annul arbitral awards has not given rise to an extensive doctrinal debate because as predicted by some commentators, it is hardly ever exercised in practice”.

54 See footnote 26 supra
Concerning the annulment issue, it may be true that the waiver issue has not given rise to a highly controversial debate at the international level, but it is not recommended to wait for problems to arise which will affect the stability of the awards of international commercial arbitration. In addition, the existence of such a case in practice is possible and can be verified. This was evidenced in the Chromalloy Case (1996) in which the parties agreed to apply the Egyptian Law and entered into an agreement and waived their right to seek annulment of the resulting arbitral award. The agreement stated that the decision of the arbitrators would be final and binding on the parties and also that it did not permit appeal against the decisions of the arbitrators to the Egyptian courts as competent authorities. Despite this condition, the Air Force of Egypt sought to set aside the arbitral award in Egypt and the Court of Appeal at Cairo issued an order nullifying it.

I submit that it is important to note that the decision of the Egyptian court was justified, despite the waiver agreement. The parties agreed and chose the Egyptian Law under which waiving the right to seek annulment is not accepted. Article 54 of the Egyptian Law states that:

"1....An action for nullity is admissible even if the party invoking nullity waived his right to do so before the arbitral award was issued".

Thus, the annulment issue was not affected by the parties' agreement to waive their right to seek annulment. This is because of the inadmissible effects of the waiver agreements under Article 54 of the Egyptian law. But it is clear that in the light of Article V (1) (e) of the New York Convention of 1958, two countries have an exclusive competence to set aside rendered arbitral awards, the country in which or under the law

56 In the matter of Chromalloy Aeroservices and the Arab Republic of Egypt, p 907 (footnote 39 supra)
57 Article 54 (1) of the Egyptian Arbitration Act of 1994
of which an arbitral award is rendered. If parties agree to choose or apply to their disputes a law which is different from the law of the country in which the arbitration takes place, will the annulment issue be affected? In addition, they may enter into an agreement to waive their right to seek annulment of the resulting arbitral awards. Thus, two countries will be involved. On the one hand, what will the resolution be if only one of the countries has laws which take into consideration such parties’ agreements to waive their right? Does this affect the right of a party who wishes to set aside an arbitral award? Will the losing party have the opportunity to seek annulment despite the waiver agreement? It seems that the losing party will seek annulment of the arbitral award in the country whose law does not take into consideration agreements which waive the right to seek annulment. Thus, the annulment issue will not be affected.

On the other hand, if the law which is different from the law of the country in which arbitration takes place is silent and it is not clear whether the waiver agreements are given effect or not, will the annulment issue be affected? I submit that whether the waiver agreements are accepted or not will depend entirely on the national courts’ discretionary power and this may have been reflected in the decision of the United States District Court in the Chromalloy case (1996) in which the waiver agreement was one of the grounds relied on by the U.S court. Accordingly, the arbitral award may or may not be annulled and as a result the annulment issue may be affected, because the national courts concerned will have the last word in deciding whether to annul the arbitral awards or not.

Regarding the enforcement issue, in particular, the enforcement of the annulled foreign arbitral awards, it is important to find out whether or not the parties’ will to apply a law which is different from the law of the country where the arbitration takes

58 See footnotes 39 and 40 supra
place affects the recognition and enforcement of the annulled arbitral awards. If so, this
means that the law of the recognising and enforcing state is a matter. On the one hand,
it is submitted that the winning party will seek enforcement of the rendered arbitral
awards promptly if he has agreed to waive his right to seek annulment. But what will
the resolution be if the law of the country in which enforcement is sought does not take
waiver agreements into consideration? I submit that if the arbitral award is annulled in
its country of origin, the country in which recognition and enforcement is sought will
have two choices: the first choice is to refuse enforcement of the annulled arbitral
award, relying on the ambiguous language of Article V (1) of the New York
Convention which can be interpreted against the enforcement; the second choice is to
enforce the annulled foreign arbitral award, but by relying on the inadmissible effects
of the waiver agreements under its laws and also by relying on its discretionary power
based on the ambiguous language of Article V (1) of the New York Convention,
Articles III and VII (1).

On the other hand, if the law of the country in which recognition and
enforcement of the annulled foreign arbitral award is sought is silent and does not make
any provision in terms of waiver agreements, such as the U.S. Federal Arbitration Act,
will an annulled arbitral award be enforced? In other words, will the enforcement issue
be affected? It is submitted that if there is no mention of such an issue, the decision will
depend entirely on the discretionary power of the national courts involved. This was
also evidenced in the Decision of the U.S District Court in the Chromalloy case (1996),
in which the U.S. court should have respected the provisions of the chosen law and
refused to enforce the arbitral award annulled by the Court of Appeal at Cairo. Even if
the law of the country in which recognition and enforcement is sought gives an effect to
the waiver agreements, the enforcement of the annulled foreign arbitral awards will
depend on the national courts’ discretionary power, relying on their desire and based on the ambiguous language of Article V (1) of the New York Convention, Articles III and VII (1). As a result, the issue of enforcement of annulled foreign arbitral awards will be affected.

Another matter also may affect the annulment and enforcement issues and also expand the national courts’ discretion. This matter is the public policy of the country of origin and of the country where enforcement is sought; it has been said that “in principle, court control over an arbitration award in challenge proceedings cannot be excluded. Such exclusion could be considered a violation of public policy unless the applicable arbitration law expressly permits the exclusion”.59 But public policy is a ground for setting aside arbitral awards under a great many arbitration laws. Furthermore, it is listed under Article V (2) of the New York Convention as a ground to refuse to recognise and enforce foreign arbitral awards.60 Thus, on the one hand, will national courts, particularly those whose laws give parties the opportunity to waive all annulment grounds or even those countries whose laws are silent, apply waiver agreements if their public policy is violated by the rendered arbitral award? In other words, will national courts annul an arbitral award which violates their public policy despite the waiver agreement? On the other hand, will national courts where recognition and enforcement is sought enforce an arbitral award by which their public policy is violated, even if their laws take the waiver agreements into consideration? I submit that discretion of national courts will play an important part in deciding this issue, depending on the extent in which the public policy is violated.

Thus, I submit that two matters affect the issue of the enforcement of annulled foreign arbitral awards when a waiver agreement is found; the first issue is that the

60 See footnote 75 supra, Chapter One, page 28
acceptance of parties' agreement to waive their right to seek annulment depends on the laws of countries. In other words, I submit that the law of the recognising and enforcing state is a matter. The second issue is the national enforcement courts' discretionary power, which plays an important part in deciding whether or not to enforce an annulled foreign arbitral award. In particular, furthermore, the national enforcement courts' discretionary power will be expanded and play an important part if it is not clear whether or not the waiver agreements are accepted under their laws.

I submit once more that ground (e) of Article V (1) of the New York Convention will be affected by the waiver agreements. This ground is the only refusal ground which deals with annulled foreign arbitral awards. By accepting waiver agreements, refusal ground (e) will not be implemented by national courts where annulment is sought. In addition, by accepting the waiver agreements, ground (e) will not be implemented by the national courts where recognition and enforcement is sought. Furthermore, ground (e) will be affected particularly by courts whose laws are silent, such as the Federal Arbitration Act and thus discretionary power will play an important role. Accordingly, the purpose of the New York Convention will not be implemented by the Contracting States and thus the Convention will be affected.
3.5. Proposed Solutions to Avoid such Effects

Van den Berg says that:

“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 arbitration in many countries”.

What van den Berg says is true, since private parties have the power to find out how chosen arbitration laws, if more than one, deal with waiver agreements and whether they are accepted or not. But, if the law which is chosen, such as the Federal Arbitration Act, is silent about the effect of waiver agreements, will the parties know whether their agreement is accepted or not? In addition, what will the solution be in such situations? Will the national courts involved have merely an exclusive competence whether to accept waiver agreements or not? Clearly it seems they will.

Kerameus also proposes another solution:

“It is fair to state that, almost without exception, national legal systems refuse to recognize as valid waivers of the right to challenge an arbitral award made in advance, i.e., before the award is rendered”.

Kerameus’s proposal means not accepting waiver agreements made before the arbitral award is rendered. In other words, parties should not stipulate in their arbitration agreement that rendered arbitral awards should be final, binding and not subject to any challenge. This proposed solution is convincing. But a number of issues should be mentioned. The first issue is that a great many national arbitration laws which

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61 Van den Berg Albert Jan, pp 141-142 (footnote 30 supra)
62 See texts at footnotes 39 and 40 supra
63 Kerameus K.D, p 87 (footnote 3 supra)
give private parties the opportunity to enter into a waiver agreement do not state the
time at which the parties should agree. Thus, these national arbitration laws should be
amended. The second issue is that most national arbitration laws have adopted
limitations for seeking annulment of an arbitral award, usually from one month to three.
Accordingly, applications for seeking annulment of rendered arbitral awards should be
made within this time. Otherwise, a party who is not satisfied with the rendered arbitral
award and wishes to set it aside will lose this right if he delays his annulment
application. Furthermore, if parties seek recognition and enforcement of the rendered
arbitral award, this means that they agree indirectly to waive the right to seek
annulment. It means moreover that their agreement conforms to the limitations under
the arbitration laws. Thus, I submit that the problem is mainly with agreements which
waive the right in advance, not with agreements made after rendering the arbitral
awards. But it is important to note that German Law also gives the parties the
opportunity to waive their right to seek annulment of the arbitral awards, but in a
different way. It does not put specific limitations on setting aside an arbitral award.
Applications for setting aside may be admissible even after three months commencing
on the date when the parties receive the award. Thus, the rendered arbitral awards can
always be attacked unless they have been finally declared enforceable by the courts.64 It
would be strange in essence to allow the setting aside and attacking of rendered arbitral
awards, notified to the parties, at any time, even years later.65

64 Section 1059 (3) of the German Arbitration Act of 1998 states that: "unless the parties have agreed
otherwise, an application for setting aside to the court may not be made after three months have
elapsed. The period of time shall commence on the date on which the party making the application
had received the award. If a request had been made under section 1058, the time-limit shall be
extended by not more than one month from receipt of the decision on the request. No application for
setting aside the award may be made once the award has been declared enforceable by a German
court"; See http://www.sccinstitute.com/_upload/shared_files/lagar/German%20Arbitration%20Act.pdf,
obtained 5/10/2007

65 Kerameus K.D, p 77 (footnote 3 supra)
3.5.1. Invalidity of the Waiver agreements

A number of arbitration laws, such as the Egyptian Law and Jordan’s Arbitration Law, give no effect to parties’ agreements which waive the grounds upon which an arbitral award can be set aside either in whole or in part. Thus, if such agreements exist, the national courts involved should consider them invalid in so far as they go beyond or against the provisions of the law.

National courts which apply arbitration laws which are silent about waiver agreements, such as the Federal Arbitration Act of 1925, furthermore, should consider such agreements invalid. This is because the invalidity of such agreements will minimise national courts’ discretion, which undoubtedly has an important role and affects the enforcement of arbitral awards.

3.5.2. No Distinction among the Parties to Arbitration

National arbitration laws should not make distinctions between private parties to arbitration. National and non-national parties should be treated alike. Distinction between them is not justified. I submit that giving national parties the same opportunities and rights as international parties will not affect the international position of the countries.

3.5.3. Amendment of the National Arbitration Laws

National Arbitration laws which give effect to waiver agreements should be amended to avoid the prospective effects on the enforcement of annulled foreign arbitral awards. This amendment must be done by abolishing the statutory provisions of laws which give effect to waiver agreements or by stipulating that waiver agreements will not be admissible. In addition, arbitration laws which set no limits on setting aside...
resulting arbitral awards should be amended as a priority. An example of such laws is
the German Law, since parties have an opportunity to set aside the rendered arbitral
award even years later, unless it has been declared enforceable and final by a German
court.

Private parties to arbitration should examine chosen laws before entering into
an agreement to waive their right to seek annulment, in order to avoid potential
difficulties when seeking the enforcement of a set-aside foreign arbitral award. In
addition, if the chosen law allows private parties to enter into a waiver agreement, it is
not normally recommended or advisable to do so. Furthermore, applying waiver
agreements will affect those who draft international arbitration agreements. These
people seem to be preoccupied with assuring themselves that none of the contractual
provisions will be interpreted as a waiver of the right to seek annulment of rendered
arbitral awards if the place of arbitration is in one of the countries whose national
arbitration laws apply or take into consideration such waiver agreements.

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66 Lew Julian D M, Mistelis Loukas A and Kroll Stefan M, p 684 (footnote 60 supra)
67 Gharavi Hamid G, p 24 (footnote 55 supra)
3.6. Expansion of the Grounds for Annulling Arbitral Awards

It is certain that parties' agreement to waive their right to seek annulment of resulting arbitral awards is an issue which has been accepted by a number of national arbitration laws. In other words, parties' will to waive the grounds upon which an arbitral award can be set aside either in whole or in part, is accepted. But another issue which should be discussed is whether or not parties to arbitration can enter into an agreement to expand the grounds of national arbitration laws for setting aside resulting arbitral awards. In other words, as Moses says in the title of her article, “can parties tell the court what to do?”

Accordingly, the important question to debate is whether or not parties' agreements to expand the grounds are accepted by the national courts before which an application to set aside an arbitral award is made. Although a number of national arbitration laws have been amended and the issue of waiver is provided, they do not deal with the issue of expansion of the annulment grounds by the parties' agreement. In the first instance and before discussing this issue, it should be noted that the issue of expansion has given rise to a highly controversial debate among Federal Circuit Courts of the United States. The Federal Arbitration Act 1925 opened the door for the issue of expansion. This Act has a deficiency reflected in the annulment grounds listed under section 10 (a). These grounds were listed in 1925 under Chapter One of the Act and were not amended in 1970 when Chapter Two was added to conform to the New York Convention of 1958. In addition, these annulment grounds are limited and very narrow and do not protect the rights of parties to arbitration. Thus, parties to arbitration with the support of the Supreme Court's decision of Wilko v. Swan (1953) have entered into agreements which expand the annulment grounds listed.

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69 See footnote 97supra, Chapter Two, page 75
under section 10 (a) of the Federal Act. Such agreements in essence have become the
subject of increased debate, not only among federal circuits of the United States but
also academics. Thus, it is necessary to start by clarifying the Federal Circuit Courts’
approaches. A number of federal circuits’ decisions will serve as to illustrate that
there is some debate about the legal value of expansion agreements.

3.6.1. The Federal Circuit Courts’ Approaches

In 1995, the Fifth Circuit was the first of the Federal Circuit Courts of Appeal to
decide and accept the issue of the contractual expansion of annulment grounds which
go beyond the limited annulment grounds of the Federal Arbitration Act. The Fifth
Circuit addressed the issue of expansion in *Gateway Technology, Inc., v. MCI
Telecommunications Corp.* \(^{70}\) In this case, the parties provided and agreed under Article
(9) of their contract that “the arbitration decision shall be final and binding on both
parties, except that errors of law shall be subject to appeal”. \(^{71}\) Pursuant to this
agreement, the Fifth Circuit stated that “such a contractual modification is acceptable
because, as the Supreme Court has emphasized, arbitration is a creature of contract and
the FAA’s pro-arbitration policy does not operate without regard to the wishes of the
contracting parties”. \(^{72}\) Thus, the Fifth Circuit accepted “errors of law” as a ground for
setting aside an arbitral award, although it is not listed under Section (10) (a) of the
Federal Arbitration Act.

The Ninth Circuit also addressed the issue of expansion of the annulment
grounds. This was evidenced in *Kyocera Corporation v. Lapine Technology
Corporation.* \(^{73}\) The parties in this case agreed to refer all disputes to arbitration. The

\(^{70}\) *Gateway Technology, Inc., v. MCI Telecommunications Corp.*, (footnote 44 supra)

\(^{71}\) Ibid, p 996

\(^{72}\) Ibid

\(^{73}\) *Kyocera Corporation v. Lapine Technology Corporation*, 130 F. 3d 884 (9th Cir. 1997)
agreement provided that “the decisions and awards of the Tribunal may be enforced by the judgment of the Court or may be vacated, modified or corrected by the Court (a) based upon any grounds referred to in the Act, or (b) where the Tribunal’s findings of fact are not supported by substantial evidence, or (c) where the Tribunal’s conclusions of law are erroneous”. The United States District Court for the Northern District of California before which a motion to vacate was made refused to review the arbitration award for errors of law or fact. In addition, it merely recognised the statutory grounds of the Federal Arbitration Act for setting aside. But the Ninth Circuit Court of Appeal said that “we must honor that agreement. We must not disregard it by limiting our review to the FAA grounds”. Thus, from the viewpoint of the Ninth Circuit, a contractual expansion is acceptable.

The Ninth Circuit in a recent case involving Kyocera Corp. v. Prudential-Bache Trading Services made an inconsistent judgment regarding parties’ agreement to expand the grounds of the Federal Arbitration Act. The parties agreed that “the decisions and awards of the Tribunal may be enforced by the judgment of the Court or may be vacated, modified or corrected by the Court (a) based upon any grounds referred to in the Act, or (b) where the Tribunal’s findings of fact are not supported by substantial evidence, or (c) where the Tribunal’s conclusions of law are erroneous”. It should be noted that this agreement between the parties is the same as the agreement made by the parties in Kyocera Corporation v. Lapine Technology Corporation in which the Ninth Circuit accepted the agreement expanding the annulment grounds listed under section 10 (a) of the Federal Arbitration Act. But the Ninth Circuit Court

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74 See Kyocera Corporation v. Lapine Technology Corporation, p 887 (footnote 73 supra)
75 Ibid
76 Ibid, p 888
77 Kyocera Corp. v. Prudential-Bache Trading Services, 341 F. 3d 987, (9th Cir. 2003)
78 Ibid, p 990
79 See footnotes 74 and 76 supra
of Appeal denied Kyocera's motion, in *Kyocera Corp. v. Prudential-Bache Trading Services*, to vacate the arbitral award and held that it would merely consider the statutory grounds of Section (10) of the Federal Arbitration Act. It stated:

"Private parties have no authority to dictate the manner in which the federal courts conduct judicial proceedings. That power is reserved to Congress – and when Congress is silent on the issue, the courts govern themselves. Here, because Congress has determined that federal courts are to review arbitration awards only for certain errors, the parties are powerless to select a different standard of review – whether that standard entails review by seeking facts unsupported by substantial evidence and errors of law or by "flipping a coin or studying the entrails of a dead fowl". Private parties may design an arbitration process as they wish, but once an award is final for the purposes of the arbitration process, Congress has determined how the federal courts are to treat that award. We hold that the contractual provisions in this case providing for federal court review on grounds other than those set forth in the Federal Arbitration Act are invalid and severable". 80

Due to the inconsistent judgments, moreover, the discretionary power of the Federal Circuit Courts clearly governs the application of the expanded standards by parties' agreement. Thus, accepting the expansion agreements of parties to arbitration depends on the discretionary power of the Federal Circuit Court before which an application to seek annulment is made.

Although inconsistent judgments do not make for a helpful situation and are unacceptable, I submit that this debate among federal circuit courts is justified. The justification is due to two reasons: the first reason is the Supreme Court's decision of 1953 in *Wilko v. Swan*. At this time, the Supreme Court played an important role and constituted the first non-statutory ground for setting aside an arbitral award.

80 See *Kyocera Corp. v. Prudential-Bache Trading Services*, p 1003 (footnote 77 supra)
"Manifest disregard of the law" was the first ground that went beyond the scope of the Federal Arbitration Act and expanded its limited annulment grounds. The second reason is the Supreme Court’s decision of 1989 in *Volt Information Sciences, Inc., v. Board of Trustees of the Leland Stanford Junior University*. The Supreme Court held in this case that "there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate". In addition, the Court held that "the FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration". Furthermore, it stated that the parties are free to structure their arbitration agreement as they desire and see fit because the arbitration pursuant to the Federal Arbitration Act is a matter of consent, not coercion. Moreover, it said that as the private parties may limit by contract or agreement the issues which they will refer to arbitration, "so too may they specify by contract the rules under which the arbitration will be conducted".

Thus, the Federal Circuit Courts relied at the beginning on the Supreme Court’s decision in *Wilko v. Swan* which opened the door to constituting a number of non-statutory grounds. Thereafter, the statement of the Supreme Court in *Volt Information Sciences* led to encouraging a number of federal circuit courts to state that private parties to arbitration may contract around the Federal Arbitration Act and expand its limited grounds for setting aside an arbitral award. The Fifth Circuit relied in its

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81 See footnote 101 supra, Chapter Two, page 77
83 Ibid, p 469
84 Ibid
85 Ibid
86 Ibid.
decision on the Supreme Court’s statement in *Volt Information Sciences*. The Ninth Circuit furthermore relied and built its decisions on the Supreme Court’s statement in *Volt Information Sciences* and on the Fifth Circuit’s decision in *Gateway Technology, Inc., v. MCI Telecommunications Corp.*, in which the parties’ agreement to expand the grounds of setting aside was accepted.

In spite of the Supreme Court’s statements, the Tenth Circuit Court of Appeal was the first court to hold that parties may not contract for an expanded standard of review. The Tenth Circuit in a recent decision rejected parties’ agreements which expand the grounds for setting aside an arbitral award. It addressed this rejection in *Bowen v. Amoco Pipeline Co.*, in which the parties agreed to apply Rules for Non-Administered Arbitration of Business Disputes and expand the scope of judicial review. The parties also agreed that they would have the right to appeal any arbitral award to the United States District Court for the Eastern District of Oklahoma within thirty days, “on the grounds that the award is not supported by the evidence”. The District Court denied the application of this expanded standard and decided that “parties may not alter the traditional standards of review by contract”.

The Tenth Circuit Court of Appeal confirmed this judgment. It also disagreed with the Fifth and Ninth Circuits’ decisions in which they relied on the Supreme Court’s statement in *Volt Info. Sciences, Inc.*. Thus, it stated that although the Supreme Court has emphasised that a private party may “specify by contract the rules under which arbitration will be conducted, it has never said parties are free to interfere with

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87 See footnote 83 supra; See *Gateway Technology, Inc., v. MCI Telecommunications Corp.*, p 996 (footnote 44 supra)
88 See *Kyocera Corporation v. Lapine Technology Corporation*, pp 888-889 (footnote 73 supra)
89 *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001) p 930
91 *Ibid.*, p 933
the judicial process".92 Furthermore, the court said that the Federal Arbitration Act does not contain any language which would require federal courts to follow parties' agreement.93 In addition, it stated:

“We would reach an illogical result if we concluded that the FAA’s policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated. The FAA’s limited review ensures judicial respect for the arbitration process and prevents courts from enforcing parties’ agreements to arbitrate only to refuse to respect the results of the arbitration. These limited standards manifest a legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process".94

Moreover, the Tenth Circuit concluded that “because we hold that, in the absence of clear authority to the contrary, parties may not interfere with the judicial process by dictating how the federal courts operate, we need not decide whether contractually created standards impermissibly attempt to create federal jurisdiction”95

It is important first to mention that the purpose of adopting the Federal Arbitration Act of 1925 was to give effect to arbitration agreements and enforce them in the same way as other provisions of contracts. Thus, it concerns only the preparation of arbitration agreements. The Supreme Court has recognised Congress' intention to deal with arbitration agreements as with other contracts and has instructed courts to recognise and enforce arbitration agreements pursuant to their terms.96 The Supreme Court has also addressed and given importance to the finality of arbitrators' decisions and thus a rendered arbitral award should merely be annulled in narrow

92 See Bowen v. Amoco Pipeline Co., p 934 (footnote 89 supra)
93 Ibid, p 935
94 Ibid
95 Ibid, p 937
circumstances. But I submit that the Supreme Court's decisions in *Wilko v. Swan* and *Volt Information Sciences* have also opened the door to private parties to arbitration to enter into an agreement in order to expand the grounds upon which resulting arbitral awards can be set aside. As a result, the parties have become more confident in stating under arbitration agreements whatever they desire as a way to resolve their disputes.

### 3.6.2. Academic Approaches

A number of academics advocate, or at least permit the idea of expansion agreements. They emphasise that private parties have freedom in contracting and that arbitration is a creature of contract. Thus, the parties to arbitration can tailor the scope of arbitration and the way in which the issues are to be conducted in a way which fits their desires. In addition, the advocates of expanding the grounds emphasise that the purpose of adopting the Federal Arbitration Act was to ensure the enforceability of arbitration provisions in the same way as other contracts. But a number of academics reject the application of a contractual expansion, due to the legal effect of the limited annulment grounds listed under the Federal Arbitration Act.

Murray as one of the advocates of the contractual expansion states:

"As has been seen, the courts have already granted expanded review of arbitration awards made under statutory claims because of the nature and importance of the claims. Although permitting parties to modify the scope of judicial review may impose issues of efficiency and finality upon the courts, parties will be more likely to submit to arbitration if they feel that they have some control over the outcome of the process. In order to promote arbitration as an alternative to litigation, as opposed to "a preliminary step before litigation", the importance of freedom of contract and individual rights must be recognized. The practice of allowing parties to contractually modify the scope of review of

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97 Murray Cynthia A, p 637 (footnote 96 supra)
arbitration awards effectively promotes the legislative intent of the FAA and, equally as important, is not unconstitutional.\(^9\)

Moses also supports the idea of expanding the annulment grounds. She bases her argument on the non-enforcement grounds of Article V of the New York Convention, particularly ground (1) (e). She states that local arbitration laws are permitted to set aside an arbitral award and “this creates a loophole that could greatly expand the grounds for non-enforcement”.\(^9\) She goes on to say that “if, for example, an award is vacated on a ground of local law that would not be a valid ground to prevent enforcement under the Convention, the award in most cases will still not be enforced because it was vacated in the place where made. Nonetheless, the Convention’s provisions make possible the enforcement of a vacated award”.\(^10\) In fact, Moses has built her analysis on two issues: \(^10\) the first is the ambiguous language of Article V (1) (e); the second is Article VII (1), the “more favourable right” provision, of the Convention, which obliges each contracting state not to deprive any interested party of any right. But, on the contrary, Moses says that “although it is not clear that the Convention drafters intended this provision to permit the enforcement of an annulled award, commentators have noted that nothing in the language appears to preclude this interpretation”.\(^10\)

International commercial arbitration is in essence an alternative method of resolving disputes. In addition, the New York Convention is the most important document in promoting arbitration. It has given arbitral awards the flexibility to be recognised and enforced internationally, without restrictions. Furthermore, while

\(^{9}\) Murray Cynthia A, p 656 (footnote 96 supra)
\(^{9}\) Moses Margaret, p 459 (footnote 68 supra)
\(^{10}\) Ibid, p 460
\(^{10}\) Ibid; see also footnote 95 supra, Chapter One, page 33 concerning Article VII (1) of the New York Convention of 1958
\(^{10}\) Ibid
permitting private parties to expand the annulment grounds promotes arbitration, the
New York Convention will not give local arbitration laws the exclusive competence
to set aside an arbitral award. The Convention by Article V (1) (e) protects the
important role of the national courts concerned. Moreover, the purpose of adopting
the Federal Arbitration Act was to ensure the enforceability of arbitration agreements
or clauses as of other contracts. Thus, do contractual expansion agreements promote
the intent of the Federal Arbitration Act? When the Federal Arbitration Act was
adopted in 1925, the very restricted annulment grounds were inserted on purpose by
Congress to limit a courts' capability to interfere with the arbitration proceedings, and
"to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate". 103

If Moses is an advocate of expanding the grounds of annulment, how strong is
her analysis? Are these criteria enough to permit the parties to arbitration to expand
grounds of setting aside? The ambiguous language of Article V (1) (e) has some
bearing on this particular issue in the enforcement of annulled foreign arbitral awards.
In addition, Articles III and VII (1) of the Convention are the vital pillars ensuring the
recognition and enforcement of arbitral awards in a state other than the state where the
arbitral awards are rendered. Furthermore, leaving the issue of annulment to local
arbitration laws does not mean giving private parties the possibility of stipulating
whatever they desire. If parties can do so, why have a number of Contracting States
amended their national arbitration laws to set clear grounds upon which an arbitral
award can be set aside? If parties can do so, moreover, there is no need for these
amendments if parties can decide the mechanism of arbitration as a whole, for example:

103 Moses Margaret, p 430 (footnote 68 supra)
entering into an arbitration agreement, the proceedings to be conducted and deciding
the extent of the national courts' jurisdiction in reviewing the resulting arbitral awards.

It should be mentioned that international commercial arbitration is well defined
by the Dictionary of Conflict Resolution as “an informal, inexpensive, fast, and private
adjudicative process that may consider custom as well as principles of fairness and
equity to reach an outcome that is final and subject to very limited appeal”. The
advantages of arbitration would undoubtedly be affected by allowing parties to expand
the grounds upon which an arbitral award could be set aside. The finality of arbitral
awards, one of the advantages of arbitration, would be affected, because arbitral awards
are highly likely to be annulled if a wide range of annulment grounds were accepted
and applied. In addition, allowing parties to go to arbitration in order to settle their
dispute without having to obtain the leave of national courts would be an advantage.
But permitting parties to expand the annulment grounds “would take away this
advantage by allowing a party back into court for a ‘second bite at the apple’”. Sullivan rejects the issue of expansion accepted by a number of federal circuits.
He states that “allowing parties to expand judicial review of awards by agreement is
unacceptable for two broad reasons. First, it will threaten the integrity of the arbitration
process because of additional costs and time, and will lead to arbitration becoming
another form of adjudication rather than the alternative to litigation that it is supposed
to be. Second, parties cannot alter the federal court process or create federal jurisdiction
solely by their contract without Congress stating that they may do so”. He goes on to
say that allowing expanded grounds for errors of law of fact would transform

105 Sullivan Kevin A, ‘The problems of permitting expanded judicial review of arbitration awards
106 Ibid, pp 548-549
arbitration into “a preliminary step to litigation” and this “cannot be what Congress or the Supreme Court intended”.

I submit that any expansion of the grounds upon which an arbitral award can be set aside will affect the implementation of the provisions of the New York Convention and thus enforcement. National courts will have discretion whether to recognise and enforce an arbitral award which is set aside on an expanded standard, whether by parties’ agreements or not. In addition, any expansion of judicial review will affect the finality and binding effects of the arbitral awards, as arbitral awards will face a wide range of annulment grounds. As Sullivan states, “expanded review would bring the courts back into the process beyond the limited functions they perform under the FAA and cause a ‘flood of appeals’ tossing arbitration ‘into a litigation-like quagmire’”.

National courts’ discretionary power will play an important role when parties seek either to appeal or grant enforcement. This was evidenced in the two inconsistent judgments of the Ninth Circuit. For example, Murray says that if the arbitral award does not fall into one of the four grounds of Section 10 (a) of the Federal Arbitration Act, the court will simply confirm the award which is made by arbitrators. Also, if the arbitral award does not fall into the limited annulment grounds, the national courts have discretion and may take the expanded standard into consideration, relying, for example, on the Supreme Court’s decisions of 1953 and 1989 or their discretion. Longo states that whether arbitrating parties expand the annulment grounds by agreements, whether accepted or not, will continue to depend on the court which the parties find themselves in, until the Supreme Court resolves this issue. In addition, Judge Richard

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107 Sullivan Kevin A, pp 554-555 (footnote 105 supra)
108 Ibid, p 554
109 See footnotes 76 and 80 supra
110 Murray Cynthia A, p 637 (footnote 96 supra)
Posner, writing for the Seventh Circuit Court of Appeal, rejected the idea that the parties to a pre-dispute arbitration clause could contractually expand the scope of judicial review beyond the Federal Arbitration Act. The Judge stated that "if the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award. But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract".

Eventually, I support Longo’s statement and submit that the Supreme Court’s decisions are the real reason for the split in the Federal Circuit Courts. In addition, Welsh says that “the Supreme Court has only itself to blame for the confusion and contradictory holdings that have followed its FAA rulings of the last forty years”. The legislative history of the Federal Arbitration Act indicates that Congress’s aim was to place the agreements of parties to arbitration on the “same footing” as other provisions of contracts. Thus, the Supreme Court should resolve this split among the federal circuit courts. Moreover, private parties to domestic or international arbitrations held in the United States should exercise great care and should merely enter into an agreement to expand the judicial review of their rendered arbitral award if they are completely aware of the enforcement issues. They should also be aware of and provide in the arbitration agreement all possible means to ensure that enforcement decisions will not undercut what they were intended to achieve by expanded judicial review or grounds for annulment.

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112 Chicago Typographical Union v. Chicago Sun-Times, Inc. 935 F. 2d 1501 (7th Cir. 1991)
113 Ibid, p 1505
115 Ibid, p 585
116 Moses Margaret, p 432 (footnote 68 supra)
117 Ibid
3.6.3. Academics’ Attempts to Reconcile the Split in the Federal Circuit Courts

To avoid the matter of the Circuits’ split concerning expansion of the grounds upon which an arbitral award can be set aside, Longo proposes a solution. He states:

“The Supreme Court of the United States should adopt an alternative solution to resolve the circuit split. Instead of one hard rule, either permitting the expansion of judicial review in all cases or denying it in all cases, the Court should avoid the potentially disastrous consequences of such a hard-line position.”

Rather, he continues, the Supreme Court should establish an assumption in favour of parties’ freedom to enter into an agreement to expand the review and also place the burden on opponents to demonstrate why contractually expanded grounds or review offend state contract law or policy.119

Placing the burden on the opponents is, however, not justified and will not resolve the courts’ split, since each court will prove its own views. Thus, inconsistent judgments will appear and will complicate the matter. It is true that the Federal Arbitration Act was meant to give effect to arbitration agreements in the same way as other contracts and to guarantee the enforcement of arbitral awards. But Sullivan says that “it would be incredulous to think that Congress intended that arbitration agreements could direct a court how to conduct itself”.120

I submit that if the Congress had intended or the Federal Arbitration Act had meant to give effect to contractually expanded review, provisions which permit such expansion would have been found. Moreover, amendment of the Federal Arbitration Act of 1970 did not even handle the annulment grounds listed under Chapter (I) which should have been moved on to Chapter (II) (added after adhering to the New York

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118 Longo Anthony J, p 1010 (footnote 111 supra)
119 Ibid
120 Sullivan Kevin A, p 555 (footnote 105 supra)
Convention). Accordingly, the annulment grounds listed under Section 10 (a) of the Act are mandatory and do not allow parties to contract around. Furthermore, if parties could do so, the Act would mention it and would leave private parties to agree and determine the grounds upon which a resulting arbitral award would be annulled. In addition, such expansion agreements affect and go beyond the scope of those Federal Arbitration Act provisions which should be applied. Moreover, applying unfamiliar and unusual rules or procedures would place federal courts in an awkward position. 121

3.6.4. The Effect of the Expanded Grounds

The important role of the discretionary power of federal circuit courts when seeking annulment on an expanded ground will affect the issue of enforcement. In the Chromalloy Case (1996), for example, the United States District Court for the District of Columbia mentioned that “manifest disregard of the law” is a ground for setting aside an arbitral award.122 It is clear that the Court relied on the Supreme Court’s decision in Wilko v. Swan of 1953 which established “manifest disregard of the law” as a ground. In addition, the court applied this ground to see whether or not the reason for seeking annulment reached the level of “manifest disregard of the law”.123 But due to the absence of this ground under the Federal Arbitration Act and the effect of the courts’ discretion, the court played an important role and stated that the misapplication of the law did not rise to the level of “manifest disregard of the law” and at worst it was merely a mistake of law.124

121 See Bowen v. Amoco Pipeline Co., p 935 (footnote 89 supra)
122 In the matter of Chromalloy Aeroservices and the Arab Republic of Egypt, p 910 (footnote 39 supra)
123 “Error of law” was the reason on which the application for setting aside the arbitral award was made and relied
124 In the matter of Chromalloy, p 911
It is undeniable that the absence of the annulment grounds for arbitral awards under the New York Convention affects the issue of enforcement. In addition, it is clear that leaving the issue of annulment to national arbitration laws of the Signatory States has led to the demonstration of other deficiencies, such as the issue of expansion. Thus, the issue of enforcement of annulled arbitral awards in a state other than the state where it is rendered has been affected. This effect is due to the discretionary power of courts involved, which will play an important role in deciding whether to accept or reject expanded annulment grounds. In addition, the enforcement of arbitral awards set aside on expanded grounds will continue to depend on the discretion of the national enforcement courts.

3.7. To what extent is Article V (1) (e) of the New York Convention applied?

The ambiguous language of Article V (1) and the absence of the grounds upon which a rendered arbitral award can be annulled are, as noted above, the main deficiencies of the New York Convention relating to the enforcement refusal ground V (1) (e), dealing exclusively with annulled foreign arbitral awards. But to what extent has this refusal ground been affected by the deficiencies and their effects, reflected mainly in the lack of consistency of the annulment grounds listed under the national arbitration laws and also in the lack of consistency in their mandatory effects?

Thus, on the one hand, is it possible to enforce an arbitral award annulled in its country of origin? Will the national enforcement courts rely on the deficiencies and their effects to justify their decisions to enforce annulled foreign arbitral awards? If so, will this mean that the national enforcement courts’ discretion will play an important role? If so, moreover, to what extent should this discretion be exercised? If not, will the national enforcement courts refuse to enforce an arbitral award annulled in its country
of origin? And if they refuse, does this mean that the national enforcement courts’ discretion will not be applied? Or will national enforcement courts apply their discretion, but relying on another basis than the deficiencies of the New York Convention?

Eventually, what are the criteria or factors governing and affecting the issue of enforcement of annulled foreign arbitral awards? Furthermore, are such criteria or factors applied or taken into consideration by all the national courts, even those in the same country? Moreover, do academic approaches and views supporting the idea of enforcing annulled foreign arbitral awards? All these questions will be examined and answered in some depth in the next chapter.

3.8. Conclusion

It is clear that the capability of private parties to arbitration to enter into an agreement which waives the grounds on which an arbitral award can be set aside depends on the applicable law or the law which governs the disputes. This is because national arbitration laws vary from country to country. For example, the UK Arbitration Act of 1996 lists a number of grounds for annulment and the only ground which can be waived by parties’ agreement is Section 69 (1). Accordingly, other grounds are mandatory and cannot be waived.¹²⁵ In contrast, a number of arbitration laws, such as the Swiss Law and the Belgian Law, have made a distinction among parties to arbitration. The Swiss and Belgian Laws have precluded national parties from entering into an agreement to waive their right to seek annulment of the rendered arbitral awards. The Jordanian Arbitration Law is explicit and does not give effect to parties’ agreements, since applications for annulment are admissible even if the parties have

¹²⁵ See Sections 67 and 68 of the Arbitration Act 1996 under footnotes 54 and 56 supra, Chapter Two, pages 59-60
waived their right. Thus, the applicable laws to the disputes govern such waiver agreements and determine whether they are accepted or not.

However, it is not clear why the annulment grounds are mandatory under some laws and are not under others. In addition, it is not clear why a number of laws have made a distinction among the parties to arbitration in terms of their right to enter into an agreement waiving their right to seek annulment of the resulting arbitral awards. But it should be noted that the annulment and enforcement of the annulled foreign arbitral awards issues will be affected by these waiver agreements. On the one hand, the national courts of the countries of origin, in particular, those whose laws are silent, will apply their discretionary power in deciding whether to annul the rendered arbitral awards when a waiver agreement is found. In addition, the annulment issue will be affected if the parties agree to apply a law which gives effect to the waiver agreements. Moreover, the annulment issue may be affected if the parties agree and apply a law which is different from the law of the country in which the arbitration takes place.

On the other hand, the national courts where recognition and enforcement is sought will apply their discretion – in particular, if their laws are silent about waivers – when seeking enforcement of an arbitral award annulled in its country of origin. Moreover, the national enforcement courts will apply their discretionary power if their laws do not give effect to the waiver agreements. Even if the national enforcement courts’ laws do give effect to the waiver agreements, an arbitral award annulled in its country of origin may be enforced, depending on their discretionary power based on the ambiguous language of Article V (1), Articles III and VII (1) of the New York Convention. Thus, I submit that the law of the recognising and enforcing state and the discretionary power of the national courts affect the issue of enforcement of arbitral awards annulled in their countries of origin.
Concerning the issue of expanding the grounds upon which an arbitral award can be annulled, it is clear that the national arbitration laws do not set provisions to determine the legal effect of expansion agreements. It is noteworthy that this issue has given rise to uncertainty among Federal Circuit Courts of the United States. The increased debate among these courts is justified by the Supreme Court's decisions of 1953 and 1989. The decision of 1953 in *Wilko v. Swan* constituted the "manifest disregard of the law", which is a non-statutory ground for setting aside and went beyond the limited annulment grounds listed under the Federal Arbitration Act. Whereas the decision of 1989 in *Volt Information Sciences* stated that arbitration is a creature of contract and thus private parties can contract around the Federal Arbitration Act and set whatever conditions conform to their desires. These decisions have in essence led to the Federal Courts' split and thus the national courts' discretionary power has played an important part in determining whether expanded grounds are accepted or rejected. For example, the Fifth Circuit gave effect to the expansion agreements in *Gateway Technology, Inc., v. MCI Telecommunications Corp.*, whereas the Tenth Circuit denied such agreements in *Bowen v. Amoco Pipeline Co.* Moreover, the important role of the courts' discretionary power was evidenced in the inconsistent decisions of the Ninth Circuit. In the first instance, the Ninth Circuit accepted the expansion agreements in *Kyocera Corporation v. Lapine Technology Corporation*, but it denied such agreements in *Kyocera Corp. v. Prudential-Bache Trading Services*.

In addition, the academics take different approaches to the expansion agreements. These inconsistent approaches and judgments among the academics and the Federal Circuits are due to their different perspectives. From the first viewpoint, the parties' choice to enter into an agreement to expand the annulment grounds is a matter of consent, exactly like any other part of their arbitration agreement. From the second
viewpoint, which opposes the expansion agreements, it is held that an agreement to expand the annulment grounds is in conflict with the Federal Arbitration Act as such an agreement fundamentally changes the nature of the arbitral process and constitutes new and different commitment for the courts. Thus, the grounds listed under Section 10 (a) of the Federal Arbitration Act are mandatory and exclusive and the private parties cannot contract around or go beyond them.

Eventually, I submit that the provisions of the national arbitration laws listing the grounds upon which a rendered arbitral award can be annulled should be mandatory and it should not be possible to waive them. Otherwise, the enforcement refusal ground V (1) (e) of the New York Convention dealing exclusively with annulled foreign arbitral awards will not be implemented by the national courts and will thus be affected. Moreover, if the annulment grounds are waived, the national courts’ jurisdictions will be displaced. In other words, the national courts of the countries of origin will be deprived from exercising their normal jurisdictions as competent authorities, granted and guaranteed by the New York Convention; in particular ground (e) of Article V (1) will be affected.
Chapter Four: The Possibility of Enforcing Annulled Foreign Arbitral Awards

4.1. Introduction

It is undeniable that the entire purpose of the international community in adopting the New York Convention has been to facilitate the recognition and enforcement of foreign arbitral awards. Thus, valid foreign arbitral awards are easily recognised and enforced in a state other than the state where such arbitral awards are made. In contrast, Article V of the Convention lists a number of grounds upon which the enforcement of a foreign arbitral award may be refused. The refusal ground which has been put under the spotlight and is the subject of debate at the international level is V (1) (e), which deals exclusively with arbitral awards annulled in their own country of origin.

The opening paragraph of Article V (1) contains ambiguous language which is reflected in the word “may”, since a set-aside foreign arbitral award may be refused. It has been said that the opening paragraph of the Article contains permissive language and thus judges are not required to reject applications to enforce arbitral awards so long as one of the refusal grounds is found. Thus, the word “may” leaves this issue to the judges’ discretionary power. The language of the opening paragraph and its effects on the application of the refusal ground (1) (e), concerning annulled arbitral awards, are also open to debate. Whether an annulled foreign arbitral award can be recognised and enforced has drawn increased attention and has given rise highly controversial debate. Thus, this issue has moved to the top of the legal agenda among academics and national courts where recognition and enforcement is sought.

1 See footnote 104 supra, Chapter One, page 36
2 See footnote 105 supra, Chapter One, page 37
It has been argued that an arbitral award annulled in its country of origin should have no existence and thus there is nothing left to be recognised and enforced. Legal scholars or academics who advocate this view argue that courts should refuse to enforce a set-aside arbitral award on the assumption that such an award no longer exists. In addition, such arguments are found among some national courts where recognition and enforcement are sought. Accordingly, it is important to concentrate on the approaches of national courts as well as the views of academics concerning annulled foreign arbitral awards and their legal effects at the international level. Thus, the most important question to ask is whether or not a foreign arbitral award set aside in its country of origin is capable of being recognised and enforced. This is because the language of Article V (1) makes it unnecessary that courts in other countries should take the same view and refuse to enforce an arbitral award even if the courts concerned have annulled it, once rendered. This leads to a situation in which an arbitral award annulled in its country of origin and thus unenforceable in the country where it was made may in one country be refused enforcement under the New York Convention of 1958, but in another be granted enforcement. The essential issue is how national courts deal with applications to seek enforcement of arbitral awards which are set aside in their country of origin. Clarifying whether national courts where enforcement is sought have discretion and an important role in dealing with such arbitral awards is also essential. Furthermore, it is important to assess whether political issues may have an influence on the decisions of national enforcement courts. In addition, the views of academics on the issue of enforcing a nullified foreign arbitral award are also important to clarify the situation as a whole.

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3 See footnote 109 supra, Chapter One, page 37
This chapter deals with the possibility of enforcing an arbitral award annulled in its country of origin; it is divided into three main sections. The first section concentrates on the national enforcement courts’ approaches, by clarifying and discussing a number of cases: (1) the Chromalloy case; (2) the Baker Marine case; and (3) the Hilmarton case. The second section deals with academics’ approaches and seeks whether different trends among academics can be found. If so, clarifying the justifications and legal grounds which they rely on is important if the issue of enforcement of annulled foreign arbitral awards is to be discussed in depth. Section (3) is devoted to finding the negative consequences for the enforcement of annulled foreign arbitral awards.

4.2. Approaches of National Courts

National courts around the world, particularly courts in countries adhering to the New York Convention, demonstrate an “increasing willingness” to recognise and enforce foreign arbitral awards and apply the Convention provisions. But, unfortunately, different approaches can be identified in different national enforcement courts. The national courts have reached inconsistent opinions and views concerning the enforceability of annulled foreign arbitral awards. In other words, national courts where enforcement is sought have come into conflict with one another concerning the enforcement of an arbitral award set aside in its country of origin. Thus, a number of cases or foreign arbitral awards should be considered to clarify the split between such courts. The Chromalloy, Baker Marine and Hilmarton cases demonstrate how differently national enforcement courts deal with foreign arbitral awards annulled in their country of origin.

4.2.1. The Chromalloy case

This case arose out of a contract between Chromalloy Aeroservices, an American company, and the Air Force of the Arab Republic of Egypt. In accordance with the contract, signed by the parties and entered into on 16th June 1988, Chromalloy Aeroservices (CAS) agreed to provide parts, maintenance and repair for helicopters belonging to the Air Force of Egypt (AFE). On 2nd December 1991 the AFE terminated the contract and sent a notification to the CAS representative in Egypt. Then, the AFE sent another notification to CAS Headquarter in Texas on 4th December 1991. On 15th December 1991, CAS notified AFE that it rejected the cancellation of the contract and started arbitration proceedings on the basis of the arbitration clause contained in Article XII and Appendix E of the signed contract. On 24th August 1994, the arbitral panel appointed by the parties ordered AFE to pay to CAS the sums of $272,900 plus 5 percent interest from 15th July 1991 (interest accruing until the date of payment) and $16,940,958 plus 5 percent interest from 15th December 1991 (interest accruing until the date of payment). The arbitral panel also ordered CAS to pay AFE the sum of GBP £606,920 (pounds sterling) plus 5 percent interest from 15th December 1991 (interest accruing until the date of payment). As a result, CAS applied for enforcement of the award which was made in its favour on 28th October 1994 to the United States District Court for the District of Columbia. But on 13th November 1994 AFE made an appeal to the Egyptian court to set aside the arbitral award. On 1st March 1995, AFE filed a motion with the U.S. District Court to adjourn the enforcement of the award. Thereafter, the Egyptian Court suspended the award on 4th April 1995 and on 5th May 1995 AFE filed a motion in the U.S. District Court to dismiss Chromalloy’s application seeking the enforcement of the rendered arbitral award. However, on 5th

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December 1995 Egypt’s Court of Appeal at Cairo issued an order nullifying the rendered arbitral award on the ground that the arbitral tribunal should have applied the Egyptian Administrative Law instead of the rules of the Egyptian Civil Code. Then, the U.S. District Court held a hearing in the matter on 12th December 1995. AFE argued that the District Court should deny CAS’s request to recognise and enforce the arbitral award; CAS argued that the District Court should confirm the award because AFE “does not present any serious argument that its court’s nullification decision is consistent with the New York Convention or United States arbitration law”.7

4.2.1.1. The Decision of the U.S. Court

The U.S. District Court said: “this Court must grant CAS’s Petition to recognize and enforce the arbitral award unless it finds one of the grounds for refusal...of recognition or enforcement of the award specified in the...Convention” and “under the Convention, “recognition and enforcement of the award may be refused” if Egypt furnishes to this court ‘proof that ...[t]he award has...been set aside...by a competent authority of the country in which, or under the law of which, that award was made’”.8 Thus, “the Court may, at its discretion, decline to enforce the award”.9 In addition, the District Court relied on the arbitration agreement between the parties which precluded an appeal in the Egyptian Courts since the agreement stipulated that the decision of arbitrators would be final and binding and could not be made subject to any appeal or other recourse.10

The Court, furthermore, held that “while Article V provides a discretionary standard, Article VII of the Convention requires that, ‘the provisions of the present

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7 In the matter of Chromalloy, p 908 (footnote 6 supra)
8 Ibid, p 909
9 Ibid
10 Ibid, p 907
Convention shall not...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...of the count[r]y where such award is sought to be relied upon".\textsuperscript{11} The court held, also, that “if the Convention did not exist, the Federal Arbitration Act ("FAA") would provide CAS with a legitimate claim to enforcement of this arbitral award”.\textsuperscript{12} The U.S. District Court stated that under Chapter 1 of the Federal Arbitration Act (FAA), 9 U.S.C. 10, arbitral awards rendered in the United States can be vacated only in very limited circumstances\textsuperscript{13} such as fraud, corruption, bias, procedural misconduct or exceeding of the arbitrator’s power in any way, including “manifest disregard” of the law.\textsuperscript{14} Therefore, the assumed erroneous misapplication of Egyptian law by the arbitrators did not rise to the level of “manifest disregard” of the law and it at worst constituted a mistake of law. As a result, the U.S. District Court, District of Columbia decided to enforce the award and did not give an effect to the annulment of the award by the Court of Appeal at Cairo.

The decision of the U.S. court has been adopted or supported by a number of commentators. Judge Green, in the U.S. decision and writing to the U.S. court, stated that “if the Egyptian arbitral award was enforceable under U.S. law, enforcement of the award was not only permitted, but was required, under both U.S. law and the New York Convention”.\textsuperscript{15} Furthermore, Sampliner attempts to support the U.S. District Court’s decision. He states that: “by limiting the ability of courts in the countries of origin to thwart enforcement abroad through the use of their nullification powers, the court’s decision sends message to businesses, governments, and arbitrators that they can rely

\textsuperscript{11} In the matter of Chromalloy, p 909 (footnote 6 supra)
\textsuperscript{12} Ibid, p 910
\textsuperscript{13} See footnote 97 supra, Chapter Two, page 75 in terms of the annulment grounds listed under section 10 (a) of the Federal Arbitration Act of 1925
\textsuperscript{14} In the matter of Chromalloy, p 910
\textsuperscript{15} Sampliner Gary H, ‘Enforcement of nullified foreign arbitral awards, Chromalloy revisited’ (1997) 14 (3) Journal of International Arbitration, p 151
on international arbitration for final and binding resolution of the merits of the disputes”.  

Moreover, it is noteworthy that arbitral awards are final and binding once they are rendered. Furthermore, there is no doubt that enforcement of a valid foreign arbitral award is permitted, but recognition and enforcement of an arbitral award annulled in its country of origin is not required. In addition, it is important to state that the New York Convention, particularly Article V (1), assumes the validity of foreign arbitral awards. The enforcement courts have merely secondary jurisdiction to determine whether to permit or refuse enforcement. Accordingly, it is peculiar to say that enforcement of annulled arbitral award sends messages to businesses or government to rely on arbitration for binding and final awards. Both businesses and governments can already rely on arbitration without the possibility of enforcing annulled arbitral awards in a state other than the state where they are made.

4.2.1.2. The U.S. Court’s Discretion and the Justifications of its Decision

The United States District Court (District of Columbia) stated in the Chromalloy case that “this is a case of first impression”.  

This case in essence had a comprehensive analysis in which it was found that there were issues affecting the procedure of enforcing of annulled foreign arbitral awards. The effective issues were the justification of the U.S. court’s decision. The first justification was the ambiguous language of the word “may” of Article V (1) (e), since recognition and enforcement of annulled foreign arbitral awards may be refused. The second justification was the absence of the grounds upon which an arbitral award can be annulled. The third justification was the parties’ consent or agreement to waive their right to seek annulment of the resulting arbitral

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17 In the matter of Chromalloy, p 911 (footnote 6 supra)
award, thus making the award final and binding and not subject to any appeal or other recourse. The fourth justification was Article VII (1), which ensures the enforceability of the foreign arbitral awards; thus the court used its discretion and was encouraged to apply it. The fifth justification was that the court considered that the erroneous misapplication of the Egyptian Law did not rise to the level of “manifest disregard” of the law.

In reality, the decision of the U.S. District Court has been the subject of debate and evoked both praise and criticism among academic scholars at the international level. The decision demonstrated an important role of courts in countries where recognition and enforcement are sought in determining the capability of enforcing an arbitral award annulled in its country of origin. It is important to note that the decision of the American court was not based on legal justifications. This is because of the court’s reliance on its discretionary power, not on legal conditions. The U.S. court committed an explicit abuse of its discretionary power without restrictions. In addition, the decision of the U.S. court was based on assumptions. The court assumed that Egypt sought annulment of the rendered arbitral award or sought to dismiss CAS’s petition “to repudiate its solemn promise to abide by the results of the arbitration”.¹⁸

It is axiomatic that provisions of laws are mandatory. In addition, the application of such provisions is not based or built on underlying intentions, for example. Laws deal with ‘acts’ not ‘intentions’. I submit that such a statement of the U.S. court undercut its legal position determining judgments. In addition, concerning the discretionary power, the Chromalloy case reflected the important role for national courts, to apply their discretion. The discretionary power appeared by avoiding the application of Article V (1) (e), of the Convention, relying on its ambiguous language

¹⁸ In the matter of Chromalloy, p 912 (footnote 6 supra)
reflected in the word “may”. Moreover, the U.S. court should not have stated that the arbitral award can be vacated in very limited circumstances. Annulment grounds under the Federal Arbitration Act should not have been applied by the court simply because the Federal Arbitration Act was not the law governing the arbitration proceedings. In addition, the United States was not the place of arbitration. In other words, therefore, the United States was not the competent authority in accordance with Article V (1) (e) of the Convention. Furthermore, the U.S. court used its discretionary power to include “manifest disregard” of the law as a ground for setting aside arbitral awards. The court, unfortunately, stated that the erroneous misapplication of the Egyptian law did not rise to the level of “manifest disregard” of the law. It is important to mention again that “manifest disregard” of the law is not listed under section 10 (a) of the Federal Arbitration Act as a ground for setting aside arbitral awards. It in essence was created or constituted by the decision of the Supreme Court relying on its discretion in Wilko & Swan in 1953.19 In addition, the U.S. court used its discretionary power again by defining “manifest disregard” of the law. The U.S. court stated that “indeed, we have in the past held that it is clear that [manifest disregard] means more than error or misunderstanding with respect to the law”.20 By such a statement, it is clear again that the “manifest disregard” of the law is not legally defined and thus taken into consideration by all courts. The court should not have used its discretion to apply this annulment standard, which is not even accepted by all federal circuits in the United States. Indeed, not even the definition of this standard is accepted or taken into consideration by all circuits. Accordingly, stating that the erroneous misapplication of

19 See footnote 101 supra, Chapter Two, page 77
20 In the matter of Chromalloy, p 910 (footnote 6 supra); see also in the matter of Chromalloy, p 910: the Court referred to First Options of Chicago v. Kaplan, 131 L. Ed. 2d 985 (1995) in which it was held that “an arbitral award will also be set aside if the award was made in ‘manifest disregard’ of the law”. The court also referred to Kanuth v. Prescott, Ball, & Turben, Inc., 949 F. 2d 1175, 1179 (D. C. Cir. 1991) in which it has been stated that “manifest disregard of the law may be found if [the] arbitrator[s] understood and correctly stated the law but proceeded to ignore it”
the Egyptian law did not rise to the level of "manifest disregard" of the law is not a sufficient legal ground upon which the court could have relied. The Egyptian courts have only the competent authority to decide whether the erroneous misapplication was found or not. In addition, Dr. Mahmoud Samir El-Sharkawi, the Egyptian government nominated arbitrator, issued a Dissenting Opinion stating the misapplication of the Egyptian laws. He went on to say that "Egypt was legally entitled to terminate the contract as it did, and that the award was "manifestly null" under the Egyptian Law of Arbitration, Law No. 27 of 1994".21

The discretionary power of the U.S. court also appeared by applying other Convention Articles such as Article VII (1). This Article ensures the enforceability of foreign arbitral awards since the provisions of the Convention shall not deprive any interested party of any right he may have to avail himself of. It is undeniable that Articles VII (1) and III are the vital pillars of the Convention, but Article V is also essential as it assumes the validity of foreign arbitral awards. Subparagraphs (1) and (2) of Article V list the grounds to refuse applications seeking enforcement of foreign arbitral awards. The discretion, furthermore, appeared by taking into consideration the parties' consent which waived the parties' right to seek annulment of the resulting arbitral award. First, the Federal Arbitration Act is silent about this issue and does not provide clear guidance whether to accept such agreements or not.22 Second, the Egyptian Arbitration Law of 1994 is explicit. It does not give an effect to such parties' agreements excluding the right to seek annulment of the resulting arbitral awards either in advance or when a dispute arises.23

Accordingly, not all the reasons which the U.S. court relied on are convincing. The U.S. court merely used its discretion without giving justified legal grounds. In

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21 Sampliner Gary H, p 143 (footnote 15 supra)
22 See Section 3.2.1.3.1. of Chapter Three, page 116
23 See footnote 57 supra, Chapter Three, page 126
addition, the argument of CAS before the District Court was ambiguous, since it said that the AFE did not present serious argument justifying the annulment decision of its court and the consistency of the decision with the New York Convention.\textsuperscript{24} I submit that this argument was based on misunderstood or incomplete knowledge of the provisions of the New York Convention. It is important to note that the order of the Egyptian court nullifying the arbitral award was built and based on its right in accordance with Article V (1) (e). The Egyptian court was the competent authority, as a place of arbitration, before which an application to seek annulment should have been made. In addition, the dispute was governed by the Egyptian laws. Therefore, the nullification by the Egyptian court was consistent with the purpose and the provisions of the New York Convention, as Egypt was the competent authority.

The U.S. court’s decision to enforce the arbitral award, in spite of its being set aside, was unjustified. Gharavi also supports this view and states that “despite the annulment of the award by the Court of Appeal of Cairo, the U.S. District Court decided to enforce the award based on a peculiar reasoning and unclear legal grounds”.\textsuperscript{25} Even the issue of public policy was expressed in the court’s decision. The court stated that “a decision to recognize the Egyptian court decision would violate this clear U.S. public policy”.\textsuperscript{26} Does recognition of a competent authority’s decision violate the public policy of the countries where the enforcement courts lie? In addition, is it possible to violate the provisions of the New York Convention giving the national courts concerned the competent authority to set aside arbitral awards? The public policy is also one of the grounds listed under Article V (2) to refuse enforcement of a foreign arbitral award, not a ground to recognise and enforce annulled foreign arbitral awards.

\textsuperscript{24} See footnote 7 supra
\textsuperscript{26} Sampliner Gary H, p 144 (footnote 15 supra)
The Baker Marine case reflected the deficiency of the U.S. court’s decision in *Chromalloy*. In addition, it confirmed that the U.S. court’s decision in *Chromalloy* was based on unclear and unjustified grounds, as it was mainly built on the discretionary power of the U.S. court. Thus, a contradiction is found between the *Chromalloy* and Baker Marine cases.

4.2.2. Baker Marine

*Baker Marine*, a company, entered into two contracts. The first contract was with *Danos and Curole Marine Contractors Inc.*, a second shipping firm; the second contract was jointly between *Baker Marine* and *Danos* with *Chevron (Nig.) Ltd*. Baker Marine and Danos agreed to provide barge services to Chevron; Baker Marine agreed to provide local support whereas Danos agreed to provide management and technical equipment. The parties agreed that all disputes would be referred to arbitration proceedings under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) and the substantive laws of the Federal Republic of Nigeria. According to the translation of the arbitration agreement provided to the United States District Court for the Northern District of New York, the parties’ agreement provided that “judgment upon the award of the arbitrators may be entered in [] any court having jurisdiction thereof, and that the contract and awards under it shall be governed by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards”.

Two disputes arose. The first dispute arose out of Baker Marine’s and Danos’ agreement; the second dispute arose out of Baker Marine’s and Danos’s joint agreement with Chevron. Thereafter, the parties referred to arbitration before two

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27 *Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd.*, 191 F. 3d 194 (2nd Cir. 1999) p 195

166
panels of arbitrators in Lagos, Nigeria. As a result, two arbitral awards were rendered in favour of Baker Marine in early 1996. The two panels of arbitrators found that Danos and Chevron had violated their contractual obligations.

Baker Marine promptly made an application and sought enforcement of both arbitral awards before the Nigerian Federal High Court. At the same time, Danos and Chevron appealed to set aside the arbitral awards before the same court. The Nigerian court issued two decisions in November 1996 and May 1997 nullifying the arbitral awards on various grounds. In the Chevron case, the court concluded that the arbitral tribunal had improperly awarded punitive damages, had gone beyond the scope of the parties' submission, improperly admitted parole evidence and had made inconsistent awards.28 In the Danos case, the court set aside the arbitral award on the ground that it was unsubstantiated by evidence.29

In August 1997, Baker Marine sought to confirm and enforce the arbitral awards, notwithstanding their annulment by the Nigerian court, before the United States District Court for the Northern District of New York. Baker Marine sought confirmation and the enforcement under Chapter 2 of the Federal Arbitration Act 1925 applying the New York Convention. But the Northern District of New York denied Baker Marine's request.30 Baker Marine appealed to the Second Circuit Court of Appeal. It argued that the Northern District Court of New York had failed to give effect or apply Article VII (1), which provides that the provisions of the New York Convention "shall not 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 count[r]y where such award is sought to be relied upon".31 Furthermore,

28 See Baker Marine, p 196 (footnote 27 supra)
29 Ibid
30 Ibid
31 Ibid
Baker Marine stated that the arbitral awards were set aside for reasons which would not be recognised by United States law as valid grounds for setting aside arbitral awards.\footnote{See Baker Marine, p 196 (footnote 27 supra)} In addition, Baker Marine made a further argument relying on the ambiguous language of Article V (1) (e) of the New York Convention, as reflected in the word “may”.\footnote{Ibid, p 197}

The Second Circuit Court of Appeal also denied Baker Marine’s arguments and stated that “it is sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria. The governing agreements make no reference whatever to United States law. Nothing suggests that the parties intended United States domestic arbitral law to govern their disputes. The ‘primary purpose’ of the FAA is ensuring that private agreements to arbitrate are enforced according to their terms”.\footnote{Ibid} Concerning Article V (1) (e), the court stated that “it is sufficient answer that Baker Marine has shown no adequate reason for refusing to recognize the judgments of the Nigerian court”.\footnote{Ibid} As a result, the decision of the Northern District of New York was affirmed by the Second Circuit U.S. Court of Appeal on 12\textsuperscript{th} August 1999.\footnote{Ibid, p 198}

4.2.2.1. The Contradiction between the Chromalloy and Baker Marine Decisions

In reality, the U.S. court’s decision in Baker Marine had a positive influence on international commercial arbitration. The Baker Marine decision was a step whereby the decision of the country of origin, as a competent authority, had been granted its importance in accordance with Article V (1) (e), of the New York Convention. The U.S. court considered and gave an effect to the Nigerian court’s decisions annulling the arbitral awards, while the United States District Court for the District of Columbia in
Chromalloy denied the annulment decision made by the Egyptian court. Furthermore, the U.S. court in Baker Marine did not apply Article VII (1). In addition, the court stated that the disputes were conducted in Nigeria and arbitrated in accordance with the laws of Nigeria notwithstanding the fact that the dispute of Chromalloy was conducted in Egypt and arbitrated by the Egyptian laws. Furthermore, the U.S court held that the arbitration agreements did not make any reference to or suggest that the parties intended the United States domestic arbitral law to govern their disputes. Did the Chromalloy parties make a reference to the United States domestic arbitration law? Was the dispute of Chromalloy arbitrated by the United States law? The parties of Chromalloy agreed to govern their dispute under the Egyptian arbitration law. In addition, the parties agreed to set Egypt as the place of arbitration.

It should also be mentioned that the U.S. court did not take Baker Marine’s arguments into consideration, although the arguments were sufficient compared to those in the Chromalloy case. Baker Marine argued that the arbitral awards were annulled on grounds not valid or listed under the Federal Arbitration Act. A further argument was made relying on the ambiguous language of Article V (1). In addition, Baker Marine argued that the court failed to apply Article VII (1). But the Second Circuit Court of Appeal denied Baker Marine’s arguments and stated that Baker Marine did not show an adequate reason to refuse the annulment decisions made by the Nigerian court.

It should be pointed out that two interesting statements were made by the U.S. courts. The first statement was made by the United States District Court for the Northern District of New York. It held that, under the Convention and principles of comity:
"It would not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts".\textsuperscript{37}

The second statement was made by the Second Circuit Court of Appeal. It stated that:

"As a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary with enforcement actions from country to country until a court is found, if any, which grants the enforcement".\textsuperscript{38}

This is true, as such a decision would not have prevented Baker Marine from making applications to seek enforcement in another state, notwithstanding the U.S. courts' decisions to deny enforcement of the arbitral awards set aside by the Nigerian courts. I submit that these statements were essential, for they take into consideration the decisions of competent authorities, or country of origin. These statements also respect and give international effect to decisions of the courts of origin. If national courts where enforcement of annulled foreign arbitral awards is sought adopt such opinions, the ambiguous language of Article V (1) will not appear. Although I strongly support the decisions and the statements of the U.S. courts in Baker Marine, unfortunately, it can be submitted that such opinions and statements made by the U.S. courts had an underlying or unexpressed intention. The U.S. courts did not refuse enforcement of the arbitral

\textsuperscript{37} See Baker Marine, p 196 (footnote 27 supra)
awards set aside in Nigeria in order to respect or even give effect to the decision of the country of origin. In addition, the U.S. courts did not intend to keep granting arbitral awards or the stability to maintain their nationality. And, furthermore, they did not intend to encourage parties to refer their expected disputes to arbitration as a trusted alternative way of resolving trade disputes. Concerning international comity, Egypt argued that, "comity is the chief doctrine of international law requiring U.S. courts to respect the decisions of competent foreign tribunals". But the U.S. court in Chromalloy stated that "comity does not and may not have the preclusive effect upon U.S. law that Egypt wishes this Court to create for it".

4.2.2.2. The Underlying Intention of the U.S. Court’s Decision in Baker Marine

Due to a number of other statements made by the Second Circuit Court of Appeal in Baker Marine, it can be submitted that a political issue was unexpressed but evidenced. The Second Circuit Court of Appeal made a distinction between Baker Marine and Chromalloy. In Chromalloy, the Second Circuit Court of Appeal stated that "the government of Egypt had entered a contract with an American company agreeing that disputes would be submitted to arbitration and that the decision of the arbitrator could not be made subject to any appeal or other recourse". Furthermore, the U.S. court concluded that "Egypt was seeking to repudiate its solemn promise to abide by the results of the Arbitration, and that recognizing the Egyptian judgment would be contrary to the United States policy favoring arbitration". In addition, another explicit statement proved the political issue, since the court stated that "unlike the petitioner in

39 In the matter of Chromalloy, p 913 (footnote 6 supra)
40 Ibid
41 See Baker Marine, p 197 (footnote 27 supra)
42 Ibid; the Second Circuit Court of Appeal referred to the statement of the United States District Court for the District of Columbia in which the Chromalloy decision was enforced; see in the matter of Chromalloy, p 912
Chromalloy, Baker Marine is not a United States citizen, and it did not initially seek confirmation of the award in the United States".43 The court also held that Chevron and Danos did not violate any promise by appealing the rendered arbitral awards to the Nigerian courts and thus recognition of the Nigerian judgments did not conflict with the public policy of the United States.44

I submit that if Baker Marine had been an American citizen, the U.S. court would not have recognised the Nigerian judgments setting aside the arbitral awards. In addition, if Baker Marine had been American, the U.S. court would promptly have used its discretionary power to apply Article V (1) (e) so as to benefit from its ambiguous language and also Article VII (1) as the "more-favorable-right" provision. Furthermore, if the U.S. court had intended to give effect to the judgments of the country of origin, it would not have made the distinction between Baker Marine and Chromalloy. Thus, it could criticise the judgment of the United States District Court for the District of Columbia in Chromalloy and state that the judgments of countries of origin should be respected and taken into consideration. Moreover, what was the ground upon which the U.S. court considered that the recognition of the Nigerian judgments was not in conflict with the United States public policy? It was clear that the U.S. court denied the applications seeking enforcement because Baker Marine was not an American citizen. However, the New York Convention facilitates recognition and enforcement of foreign arbitral awards, but does not deal with nationalities of parties to arbitration.

43 See Baker Marine, p 197 (footnote 27 supra)
44 Ibid
4.2.2.3. The Effect of the U.S. Courts’ Decisions in the Chromalloy and Baker Marine on the Views of Academics

Political issues have been expressed or evidenced by a number of commentators. A prominent American commentator notes that:

“Chromalloy is a favorable development in the history of international arbitration in the United States. The Court’s decision will go a long way toward alleviating one of the chief concerns of American business investing abroad (especially where a state party is involved): that they will be unable to enforce a favorable arbitral award because of the intervention of a (possibly biased) judiciary of the country in which they are investing”.45

In the aftermath of Chromalloy, Sampliner also supported the U.S. court’s decision and considered that enforcement of an arbitral award annulled in its country of origin is a “major victory” for supporters of binding international arbitration awards.46 Even a number of supporters for enforcement of annulled arbitral awards have gone on to say that the decision of the U.S. court in Baker Marine is two steps back. It has been said that “the new line of case law in the USA, which severely restricts the circumstances in which an award set aside at the seat may be enforced in the USA, is quite clearly two steps back from what had previously been perceived as a step towards the proenforcement approach in Chromalloy”.47 In addition, they state that “the recent U.S. cases defer to the review of the courts of the seat, rejecting the more modern theory that the courts of the host country have equal, if not superior, legitimacy to

46 Sampliner Gary H, p 142 (footnote 15 supra)
47 Gaillard Emmanuel and Edelstein Jenny, p 43 (footnote 45 supra)
determine under what circumstances an arbitral award may be enforced on its
territory". Furthermore, as Nazzini says,

“It appears clear that in the Baker Marine case the Court is not
contradicting the Chromalloy decision, it is only clarifying it, in so far
that the recognition of the award annulled in its country of origin should
not be automatic in the United States. The court must consider whether
or not the annulment ruling is in violation of US public policy. If the
annulment ruling does not violate US public policy, the award cannot be
recognised. The key to determining whether or not the foreign
annulment ruling prevents recognition of the award lies in deciding
whether the suit or appeal against the award is in accordance with the
will of the parties. Indeed, the fundamental difference between the two
cases is that in the Chromalloy case both parties had agreed that the
award would be final and binding and not be subject to subsequent court
action, whereas in the Baker Marine case the parties had agreed that the
arbitration should be subject to Nigerian law”.49

Although the decision of Baker Marine may have been politically motivated, I
submit that the decision of the U.S. court in Baker Marine became and reflected a
“major victory” for supporters of the legitimate and international effect of the decisions
described it in the aftermath of Chromalloy, has not been true for very long.

Concerning the “more modern theory” or the so-called “modern theory” that
supports the idea of enforcing an arbitral award annulled in its country of origin, I
submit that the provisions of laws are mandatory and should be applied when

48 Gaillard Emmanuel and Edelstein Jenny, p 43 (footnote 45 supra)
49 Nazzini Renato, ‘The arbitral award in the multiple interaction of state legal system’ (2001)
European Business Law Review, p 126
necessary. If there are theories in academics’ approaches, it is reasonable to mention them as an attempt to amend the laws or the conventions to conform to developments at the level of international trade. Otherwise, the law’s provisions should be applied. Furthermore, using the discretionary power to apply the provisions of the New York Convention in a way which conforms to the so-called “modern theory”, as commentators go on to say, is not a reasonable or even a helpful way, at the international level, to support international commercial arbitration.

Some may argue that Chromalloy also sought enforcement in France of the arbitral award annulled by the Egyptian court, and was granted enforcement. The Paris Court of First Instance decided to grant the arbitral award enforcement on 4th May 1995. This decision was affirmed by the Court of Appeal of Paris on 14th January 1997, to recognise and enforce the arbitral award despite its annulment by the Egyptian court.

This may support the so-called “modern theory”. But, as Gharavi states, the enforcement of the award annulled by the Egyptian court in France does not protect the Chromalloy decision or make it immune from criticism. He goes on to say that “in fact, the analysis of the French practice of enforcing set aside awards demonstrates that U.S. Courts, unlike French courts, may not have the legal framework for enforcing set aside awards”. This is true, since Article 1502 of the French Code of Civil Procedure does not list annulment abroad as a refusal ground for recognition and enforcement.

In addition, it is not convincing to go to say that the decision of the U.S. court’s refusal to enforce the annulled arbitral awards was to give the impression that the

50 See judgment of the Paris Court of First Instance of May 4, 1995 (The Arab Republic of Egypt v. Chromalloy Aeroservices Inc), translated in XXII Y. B. COM. ARB. 691 (1997), p 692
52 Gharavi Hamid G, ‘The legal inconsistencies of Chromalloy, p 22 (footnote 25 supra)
53 Ibid
54 See footnote 77 supra, Chapter Two, page 68
enforcement of annulled foreign arbitral awards should not be automatic in the United States. In reality, this proves the important role of the discretionary power on which the U.S. courts rely. Also, it proves that there is no stable policy in applying the provisions of the New York Convention. In addition, I submit that the Baker Marine case is contradictory to Chromalloy due to the statements of the two U.S. courts. Furthermore, saying that the will of the parties is the only key to determine whether to refuse or accept recognition and enforcement of the annulment decisions is not justified and is unacceptable. This is because, in *Chromalloy*, for example, the annulment ruling was governed by the Egyptian Arbitration Law, not by the will of the parties, and waiver agreements, under the Egyptian law, are inadmissible either made in advance or when a dispute arises.55

However, unfortunately, the issue of enforcing a set aside arbitral award has become more problematical. The different approaches vary now not merely from country to country but from court to court in the same country. The U.S. courts, for example, have used many different approaches. On the one hand, the United States District Court for the District of Columbia enforced an arbitral award which had been set aside in Egypt, as mentioned. On the other hand, the United States District Court for the Northern District of New York refused to enforce an arbitral award that had been set aside in Nigeria.

Last but not least, Schwartz states "I fear that the more likely consequence of decisions such as Chromalloy may be to undercut the efforts of those who have been labouring for years to restore confidence in the international arbitration process in Egypt and elsewhere in the Middle East, where international arbitration has long been

55 See footnote 57 supra, Chapter Three, page 126
viewed with suspicion". He goes on to say that “it is for parties to take heed; for as long as they face the risk of decisions such as the one of the Cairo Court of Appeal in Chromalloy, Egypt will be a less secure place to arbitrate than many other venues. It is for Egypt also to measure the possible consequences of this and to consider bringing its law into closer alignment with the rules established by the international community if it wishes to encourage the development of international arbitration within its borders”.

I submit that the decision of the U.S. court in Baker Marine was an adequate answer to Schwartz’s statements. Although Schwartz says that Egypt’s adoption of the UNCITRAL Model Law was a remarkable achievement, he failed to express an opinion in the aftermath of Chromalloy. In other words, he failed to demonstrate his legal justifications to support the Chromalloy decision. He assumed that the Chromalloy decision would be a clear guide to other U.S. courts, but the decision in Baker Marine disproved this assumption, since the arbitral award annulled in Nigeria was not granted enforcement in the United States. Furthermore, by whom has international arbitration long been viewed with suspicion, in Egypt or in the Middle East? Everything he says is an attempt to support the Chromalloy decision. Schwartz should have known that unclear and illegal decisions such as the Chromalloy decision will not undercut the efforts of Contracting States, such as Egypt. Furthermore, the efforts were not made to restore confidence, but to conform to the international developments to facilitate international trade. Egypt and other countries in the Middle East, such as Jordan, have adopted modern arbitration laws to bring their laws into closer alignment with the rules established by the international community. Egypt adopted a new arbitration law in 1994, based on the UNCITRAL Model Law of 1985.

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57 Ibid
58 Ibid
In addition, for example, Jordan adopted a new arbitration law in 2001 which was mainly derived from the Egyptian Arbitration law of 1994.\(^5\) Moreover, it is not built on legal and complete knowledge to say or declare that Egypt will not be a place to arbitrate with pleasure or a less secure place. In the Hilmarton case discussed below, a French court granted enforcement of a foreign arbitral award set aside by a Swiss court.\(^6\) Although France does not consider annulment abroad and an annulled foreign arbitral award is automatically granted enforcement, it is not possible to declare that Switzerland is a less secure place to arbitrate and the parties should take heed. Accordingly, it seems that the United States is a less secure place to arbitrate, due to the deficiency found in the Federal Arbitration Act, particularly in terms of the annulment grounds which protect parties to arbitration.\(^6\) It is also a less secure place to seek enforcement of annulled foreign arbitral awards within its borders. This is because of the contradiction between the *Chromalloy* and Baker Marine decisions, which were mainly built on the use of the discretionary power. Relying on or using the discretionary power is supported, in Freyer's article. She says, however, that the United States is not a "haven for enforcement of arbitral awards that had been vacated in the place of arbitration"\(^6\) as was thought by parties in the aftermath of *Chromalloy*. This is because there is no clear guidance to clarify and direct courts in dealing with foreign arbitral awards under the Federal Arbitration Act. This Act is outdated compared to the Egyptian arbitration law or even the laws of most countries adhering to the New York Convention, such as the Arbitration Act 1996.

Therefore, it is important for the United States to bring "its law into closer alignment with the rules established by the international community if it wishes to

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\(^5\) See Section 3.2.1.4 of Chapter Three, page 120
\(^6\) See footnote infra 73
\(^6\) See footnote 97 supra, Chapter Two, page 75
\(^6\) Freyer Dana H, 'United States recognition and enforcement of annulled foreign arbitral awards: the aftermath of the *Chromalloy* case' (2000) 17 (2) Journal of international law, p 1
encourage the development of international arbitration” and encourage parties to make enforcement applications within its borders. The status quo in the United States is not helpful for parties to arbitration. Gharavi says that “the Chromalloy decision may also inhibit foreign parties from entering into arbitration agreements with American parties in the future”. In addition, he says that “inconsistent decisions would legitimize some countries’ suspicions toward the arbitral process and discredit arbitration as the preferred method of settling international commercial disputes”. Eventually, another statement made by Schwartz shows his personal or even political bias in supporting the Chromalloy decision. He remarks that “the Hilmarton case, together with a recent decision of a U.S. federal district court enforcing an Egyptian arbitration award that had been annulled in Egypt, have focused increased attention on the possibilities of enforcement of annulled awards, either on the basis of domestic law pursuant to Article VII of the New York Convention, or otherwise pursuant to the discretion that some have argued is inherent in Article V of the Convention”.

4.2.3. The Hilmarton case

Hilmarton arose out of a contract which came into force in 1980 between Hilmarton Ltd., an English consulting company, and Omnium de Traitement et de Valorisation, a French company, referred to as OTV. Hilmarton agreed to assist OTV to obtain a government contract for the sewerage system of Algiers city, Algeria. OTV agreed to pay Hilmarton a fee equal to four percent of the total contract amount.

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61 Gharavi Hamid G, Chromalloy: another view, p 23 (footnote 16 supra)
63 Ibid, p 24
65 A short diagram is appended to clarify and simplify this complex case, page 240
Furthermore, the parties agreed under Article (9) to refer all contractual disputes to the ICC Arbitration in Geneva, Switzerland, and apply the law of the Canton of Geneva.68

However, a dispute arose when OTV paid merely fifty percent of the agreed fee, two percent of the total contract amount. Thereafter, Hilmarton started arbitration proceedings in Geneva, as agreed, but on 19th August 1988 the appointed arbitrator rendered an arbitral award denying Hilmarton’s claim.69 On 17th November, Hilmarton made an application before the Court of Appeal of Geneva to set aside the rendered arbitral award. The Court of Appeal of Geneva as an appellate court annulled the arbitral award.70 The court found in favour of Hilmarton that the use of intermediaries was permitted under Swiss law, as long as no bribes were paid,71 although the court stated that the Algerian law had been violated.72

Thereafter, OTV appealed to the Swiss Tribunal and in the meantime made an application and sought enforcement of the annulled arbitral award before the Paris Court of First Instance. In February 1990, the Paris Court of First Instance gave a decision granting enforcement to the arbitral award, annulled by the Canton of Geneva,73 and this decision was affirmed by the Paris Court of Appeal in 1991.74 In April 1990, the Swiss Supreme Court affirmed the decision of the Canton of Geneva and upheld the annulment of the arbitral award.75 The Swiss Supreme Court found and stated that “the contract at issue was a brokerage contract (courtage) according to Swiss law and noted that Swiss law allows the parties to have a brokerage contract between

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68 See judgment of the Canton of Geneva of Nov. 17, 1989, p 215 (footnote 67 supra)
69 Ibid
70 Ibid
71 Ibid, p 217
72 Ibid, p 219
73 See judgment of the Paris Court of First Instance of Feb. 27, 1990 (Hilmarton Ltd v. Omnium de Traitement et de Valorisation), translated in XIX Y. B. COM. ARB. 655 (1994), p 656
75 See judgment of the Swiss Supreme Court of Apr. 17, 1990 (Hilmarton Ltd v. Omnium de Traitement et de Valorisation), translated in XIX Y. B. COM. ARB. 214 (1994), p 222

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them regulated by the law of their choice".  

It also held that “the contract is not in any case illicit, since it would be illicit only if it violated Swiss law. A contract of mere brokerage/ negotiation is in no manner contrary to Swiss law".  

After affirming the decision of the Canton of Geneva annulling the arbitral award by the Swiss Supreme Court in 1990, the dispute was resubmitted to arbitration in Switzerland before a new arbitrator. On 10th April 1992, a new arbitral award was rendered, but in favour of Hilmarton.  

Thereafter, Hilmarton sought enforcement of the Swiss Supreme Court’s decision, affirming the annulment decision of the Court of Appeal of Geneva, and the new arbitral award made in their favour in France before the Court of First Instance of Nanterre. This Court granted enforcement to the Swiss Supreme Court’s decision on 22nd September 1993 and to the new arbitral award on 25th February 1993. These decisions were appealed by OTV before the Court of Appeal of Versailles.

On the 23rd of March 1994, the decision of the Paris Court of Appeal, affirming the decision of the Paris Court of First Instance, was upheld by the Paris Supreme Court, the Court of Cassation, and thus the appeal of Hilmarton was rejected. The Paris Supreme Court held that “the lower decision correctly held that, applying Art. VII of the [1958 New York Convention], OTV could rely upon the French law on international arbitration concerning the recognition and enforcement of international arbitration awards rendered abroad, and especially upon Art. 1502 NCCP, which does not list the ground provided for in Art. V of the 1958 Convention among the grounds for refusal of recognition and enforcement”.

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76 See judgment of the Swiss Supreme Court of Apr. 17, 1990, p 221 (footnote 75 supra)
77 Ibid
78 See judgment of the Paris Supreme Court of Mar. 23, 1994 (Hilmarton Ltd v. Omnium de Traitement et de Valorisation), translated in XX Y. B. COM. ARB. 663 (1995), p 664
79 Ibid
80 Ibid, p 665
“lastly, the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy.”

On 29th June 1995, the Court of Appeal of Versailles rendered two decisions. The court in its decision number 315 upheld the decision of the Court of First Instance of Nanterre granting exequatur to the decision of the Swiss Supreme Court annulling the first arbitral award; its decision number 316 upheld the decision of the Court of First Instance of Nanterre granting enforcement to the second arbitral award made in 1992. Thus the arbitral award was granted and permitted the coexistence in France of two contradicting decisions between the same parties on the same subject matter. Thereafter, it was necessary to resolve such contradictions among the French courts.

4.2.3.1. The Contradiction between the French Courts’ Decisions

In accordance with Article 618 of the French Code of Civil Procedure, the French Supreme Court is permitted to set aside one of two contradicting decisions.

Thereafter, OTV appealed the decisions of the Court of Appeal of Versailles before the Supreme Court. The Supreme Court said that “the two decisions which are appealed against – in spite of the decision rejecting appeal [against the decision granting enforcement of the first award] rendered by the Supreme Court (Cour de Cassation) on 23 March 1994 – granted exequatur to the decision of 17 April 1990 [of

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81 See judgment of the Paris Supreme Court of Mar. 23, 1994, p 665 (footnote 78 supra)
82 See judgment of the Paris Supreme Court of Jun. 10, 1997 (Hilmarton Ltd v. Omnium de Traitement et de Valorisation), translated in XXII Y. B. COM. ARB. 696 (1997), p 697
83 Section 618 of the Code of Civil Procedure provides that “inconsistencies in a judgment may, further, as an exception to Article 605, be relied upon where two decisions, albeit not of last resort, are incompatible with each other and shall result in any of them being amenable to an ordinary review; the petition in cassation shall hence be admissible, even where one of the decisions has already been impugned by way of a previous petition in cassation which was dismissed. In the latter event, the petition may be filed even after the expiration of the time-limit provided under Article 612. It shall have to relate to the two decisions concerned; where an inconsistency has been established, the Cour de cassation shall quash one of the decisions or, where the same appears necessary, both of them” at http://lexinter.net/ENGLISH/code_of_civil_procedure.htm, obtained 5/10/2007
the Swiss Tribunal Federal annulling the first award] and the [second] arbitral award of
10 April 1992”.84 It also overturned the two decisions and stated that “in deciding in
this way, while the existence of a final French decision bearing on the same subject
between the same parties creates an obstacle to any recognition in France of court
decisions or arbitral awards rendered abroad which are incompatible with it, the Court
of Appeal violated the above-mentioned [Art. 1351 Civil Code]”.85 For these reasons,
the Supreme Court decided on 10th June 1997 to annul the decisions of the Versailles
Court of Appeal. It stated that “decisions nos. 315 and 316 regarding these parties
rendered on 29 June 1995 by the Versailles Court of Appeal are annulled and shall not
be remitted”.86

After the annulment by the Supreme Court of the decisions of the Versailles
Court of Appeal, Hilmarton made an application and sought recognition and
enforcement of the second arbitral award in England. Hilmarton used its right
guaranteed by the New York Convention concerning the enforcement of an arbitral
award in a state other than the state where it is made. In reality, this is a proof by which
denying enforcement of a foreign arbitral award in a state does not prevent a party from
seeking the enforcement in another.

84 See judgment of the Paris Supreme Court of Jun. 10, 1997, p 697 (footnote 82 supra)
85 Ibid
86 Ibid p 698
4.2.3.2. Hilmarton in England

Hilmarton made an application to enforce the second ICC arbitral award in England. Thereafter, an ex parte order was made on 3rd September 1998 giving an effect to the arbitral award and granting it an exequatur. But OTV made an application to set aside the ex parte order and sought to oppose enforcement of the arbitral award. OTV argued that the arbitral award should not be enforced in England, as it would be contrary to English public policy relying on Section 103 of the Arbitration Act 1996. In addition, OTV stated that “the agreement was unlawful in its place of performance”, Algeria.

The English court made explicit, rational and comprehensible analyses. It stated that “it is OTV’s principal case that the award should not be enforced in England because such enforcement would be contrary to public policy. That can of course only be English public policy”. The judge also stated, “I must also have in mind the precise scope of the duty of the English Court to enforce New York Convention awards. Under s. 103 of the Arbitration Act, 1996 (which is in identical terms to its predecessor s. 5 of the Arbitration Act, 1975) enforcement of a Convention award “shall not be refused” except in certain limited cases, and enforcement “may also be refused” if it would be contrary to public policy to enforce the award”.

The court also took into consideration OTV’s argument that the agreement was unlawful in its place of performance. The judge said, “I am not adjudicating upon the underlying contract. I am deciding whether or not an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of

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88 Ibid; Section 103 (3) of the Arbitration Act 1996 provides that: “recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award”
89 Ibid
90 Ibid, p 223
91 Ibid; see also footnote 88 supra in terms of Section 103
corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced".92

The judge also said that “it would be for example legitimate for a foreign tribunal to take the view (indeed consistent with the English Court’s own view if I am right on the above implication), that albeit performance was contrary to domestic public policy in its place of performance, since it was not contrary to the domestic public policy either of the country of the proper law and/or the curial law, enforcement should be allowed. It is in this context, in my view, that albeit the award is not isolated from the underlying contract, it is relevant that the English Court is considering the enforcement of an award, and not the underlying contract”.93 Furthermore, to resist enforcement in accordance with section 103 of the Arbitration Act 1996, the resisting party will have to prove, for example, corruption or international fraud. The Judge concluded that “there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view”.94 Thus, the English Court made a distinction of substance and procedure which the U.S. court failed to make in Chromalloy. This is proof that the enforcement courts have only a secondary jurisdiction whether to refuse or enforce the arbitral award.

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92 See Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd, p 224 (footnote 87 supra)
93 Ibid
94 Ibid, p 225
Thus, the decisions of France and England were mutually contradictory. The French Supreme Court declined to enforce the second arbitral award and enforced the first arbitral award set aside in its country of origin, but England enforced the second arbitral award upon the request of Hilmarton. I submit that the English court’s decision reflected the important role of the country of origin and applied Article V in a positive way. This application appeared by implementing Article V (2) of the Convention, although there is ambiguous language reflected in the word “may” in the opening paragraph.95 It was clear that the French Supreme Court resolved the contradictions between the two different judgments held by the French courts. But there is no international court to resolve contradictions among courts of states, although such contradictions should be resolved. This is because such contradictions are likely to be due, for example, to statements of the French Supreme Court. The French Supreme Court (Cour de Cassation) held that French judges have the duty, and not merely the right, to apply the “more-favorable-right” provision of Article VII (1) to enforce foreign arbitral awards, even if enforcement would be refused in accordance with Article V (1) (e) of the New York Convention.96 In addition, the French approach does not consider annulment abroad when granting or refusing the recognition or enforcement of foreign arbitral awards,97 although the French version, as one of the authentic texts of the New York Convention, does not contain the discretionary “may”.98

95 See footnote 75 supra, Chapter One, page 28
97 See footnote 77 supra, Chapter Two, page 68 in terms of Article 1502 of the New Code of Civil Procedure which does not list annulment of the arbitral awards abroad as a ground for refusal of enforcement
98 See footnote 82 supra, Chapter One, page 30
One writer comments obliquely in the aftermath of Hilmarton that there was a political issue determining the enforcement of annulled foreign arbitral awards. He goes on to say:

"Yet perhaps we should ask ourselves why, in both cases, the competent courts before which enforcement was sought decided in favour of companies registered in their own country. In Chromalloy, the arbitral award was rendered in favour of the U.S. company in the case. In Hilmarton, the first arbitral award, rejecting Hilmarton's claim, was recognised in France and as a consequence the second award, which had allowed Hilmarton to exact the payment requested, could not be enforced in France".99

I think we should ask ourselves another question; why the English court before which enforcement of the second arbitral award was sought decided in favour of Hilmarton. In other words, why did the English court dismiss OTV's request to refuse the enforcement? Was it because of the nationality of Hilmarton as an English company? If yes, this means that there is a general policy adopted by the national enforcement courts to help their nationals. A number of issues may support this possibility; on the one hand, provisions of the Swiss and Belgian laws preclude their nationals from waiving their right to seek annulment of resulting arbitral awards. In other words, these laws may favour the “protection” of the rights of parties which may have been lost during the arbitral process. On the other hand, the U.S. court’s decision in Chromalloy in which the parties’ agreement waived their right to seek annulment of the rendered arbitral award was accepted and taken into consideration, although the U.S. Federal Arbitration Act is silent and does not provide any provision in terms of waiver. In other words, the U.S. court used its discretionary power to accept the waiver

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agreement because the party who sought enforcement was American, although the arbitral award was annulled in its country of origin, Egypt. Thus, provisions of a number of national arbitration laws and the discretionary power of the national enforcement courts may support the assumption that the national enforcement courts favour help and protection for their nationals.

However, as of August 2007, there is no case to clarify the English courts' approaches concerning the enforcement of arbitral awards set aside in their country of origin. I think once more that a political issue is merely applicable to the United States. This is evidenced in the Chromalloy and Baker Marine decisions. Concerning France, it does not seem that the way in which French courts deal with annulled foreign arbitral awards is affected by parties' nationality. French courts granted enforcement to Chromalloy, although it is a U.S. company. Thus, French approach has a stable policy, because annulment abroad is not a ground to refuse enforcement.100 In France, as Paulsson states, “foreign awards are routinely enforced in France without reference to the Convention”101. To confirm Paulsson's statement, it should be mentioned that the Paris Court of Appeal granted enforcement in 2005 to a foreign arbitral award in spite of its being set aside by the highest civil court of the United Arab Emirates.102

100 See Article 1502 of the French Code of Civil Procedure under footnote 77 supra, Chapter Two, page 68
102 Polkinghorne Michael and Ioannou Leon, ‘Recent decision confirms France’s readiness to enforce international arbitral awards annulled at place of arbitration’ (2006) 19 (1) International Dispute Resolution, p 1
4.3. Academics Approaches

It was assumed that if the court at the place of origin set aside the arbitral award, that decision would be appreciated or taken into consideration by the national courts of the countries before which the applications were made and enforcement sought. According to this, the national enforcement courts should have a strong preference or tendency to respect the decisions of other courts, or the courts of origin, particularly decisions setting aside or changing the award. But several national enforcement courts, as discussed in Section One, have discredited this assumption, for example, the United States District Court (District of Columbia) which enforced an arbitral award which had been annulled in Egypt.

Legal literature has accumulated in the last few years on the question whether it is possible or desirable to enforce a foreign arbitral award under the New York Convention in spite of its being set aside in the country of origin in which or under the law of which it is made. This question is still debatable at the international level as, generally, a successful challenge of the award deprives it of its binding or legal effect, not only in the country of origin but also in other countries where recognition and enforcement are sought. Accordingly, the issue of the enforcement of annulled foreign arbitral awards has drawn the attention of legal scholars and academics at the international level. Thus, two trends are found. The first trend tends to enforce a foreign arbitral award even if it is annulled; the second trend tends to refuse enforcement of a set aside arbitral award.

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104 Petrochilos Georgios C, 'Enforcing awards annulled in their state of origin under the New York Convention' (1999) 48 International Comparative Law Quarterly, p 856
4.3.1. The Trend of Proponents for the Enforcement of an Annulled Foreign Arbitral Award

This trend tends to enforce annulled foreign arbitral awards if reasonable circumstances exist, for example, where justice and fairness are at issue. This trend is based on the ground that "the law of the seat of the arbitration is not the sole source of validity of an arbitral award, the law of the place of enforcement being equally well positioned to assess whether an award should be recognised and enforced".105

Due to the deficiencies of the New York Convention concerning the grounds for annulling the arbitral awards which are left to the national law of the country concerned, it has also been said that leaving this matter to the national law of the country concerned may give importance to or impose local requirements, such as the need to initial each page of the award, which would not be considered by judges and lawyers elsewhere as sufficient to impeach the validity of international arbitration awards.106 The allowance for local requirements made in the New York Convention has been described by a former Secretary-General of the ICC court of arbitration as:

"a hitherto rock-solid rampart against the true internationalisation of arbitration, because in the award’s country of origin all means of recourse and all grounds of nullity applicable to purely domestic awards may be used to oppose recognition abroad…"107

Another commentator says that "local standard annulments", listed under national arbitration laws, which are capable of annulling international arbitral awards should only be given local or national effect and should be disregarded at the international level.108 Even Lastenouse has said that the decisions of national courts should not be

105 Gaillard Emmanuel and Edelstein Jenny, p 42 (footnote 45 supra)
106 Redfern Alan and Hunter Martin, p 538 (footnote 4 supra)
107 Ibid
108 Ibid
recognised internationally. He says that “it is my contention that there is no justification for giving international recognition to the decision of a local court setting aside an international award and that one would do so by declaring that annulled awards may not be enforced”.109 He goes on to say that the recognition and enforcement of the arbitral awards set aside in their country of origin does not constitute a threat to the legal system of the country in which arbitral awards are made because of the nature of arbitration awards and the specificity of the arbitration process.110

In addition, Lastenouse links the ambiguous language of Article V (1) reflected in the word “may” to Article VII (1), which ensures the enforceability of foreign arbitral awards. He says that “it seems that, if ‘may’ in Article V were to be understood to mean ‘shall’, leaving no discretion, Article VII could not have been included in the New York Convention as it stands”.111 Furthermore, some legal scholars who advocate the enforcement of annulled foreign arbitral awards argue that “it should be recalled that the main goal of the New York Convention was not to harmonise solutions at the international level, but to facilitate the recognition and enforcement of foreign awards”.112 Moreover, some legal scholars even attempt to insinuate that the New York Convention of 1958 itself might breathe new life into the body of annulled arbitral awards.113

In reality, this debate has led a number of commentators to suggest solutions to the problem of enforcing annulled foreign arbitral awards. Lastenouse suggests that if the arbitral awards have been annulled for “good reasons”, it is very doubtful if other

109 Lastenouse Pierre, ‘Why setting aside an arbitral award is not enough to remove it from the international scene’ (1999) 16 (2) Journal of International Arbitration, p 38
110 Ibid
111 Ibid, p 29
112 Ibid, p 34
113 Wahl Philip, ‘Enforcement of foreign arbitral awards set aside in their country of origin, the Chromalloy case revisited’ (1999) 16 (4) Journal of International Arbitration, p 136
Signatory Countries will grant them recognition and enforcement.\textsuperscript{114} In addition, two further solutions are suggested. The first solution is to ignore Article V (1) (e) and rely instead on Article VII which allows each country to adopt a more liberal regime in favour of enforcement; the second solution is to go back to Article V and proceed on the basis that it is discretionary and thus national courts may refuse enforcement and may also enforce if the arbitral award has been set aside in the country where it was made.\textsuperscript{115} Paulsson suggests exercising the discretion (the second solution), but his suggestion is that there should be two grounds for annulling arbitral awards; “International Standard Annulment” and “Local Standard Annulment”. Paulsson proposes that “the enforcement judge should determine whether the basis of the annulment by the judge in the place of arbitration was consonant with international standards. If so, it is an International Standard Annulment, and the award should not be enforced. If the basis of the annulment was one not recognised in international practice, or if it was based on an intolerable criterion, the judge is faced with a Local Standard Annulment. He should disregard it and enforce the award”.\textsuperscript{116}

4.3.2. The Trend of Opponents to the Enforcement of an Annulled Foreign Arbitral Award

This trend refuses to enforce arbitral awards which have been annulled by a court in the country of origin: an annulled arbitral award is deprived of its legal effect and cut off at its roots and thus should not be recognised and enforced internationally. In reality, this trend is founded on the legal value of Article V (1) (e) which gives the national courts concerned an exclusive competence to annul rendered arbitral awards.

\textsuperscript{114} Lastenouse Pierre, p 44 (footnote 109 supra)
\textsuperscript{116} Ibid, p 25
Van den Berg supports this trend, stating:

"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".117

In addition, the advocates of the position that an arbitral award should be refused if it has been annulled in the country of origin argue that the court of the country of origin has exclusive authority under the New York Convention to deal with the application for setting aside an arbitral award.118 Furthermore, academics who deny the enforcement of an annulled foreign arbitral award rely on the fact that "every award has its original nationality and is integrated in the juridical system of the State in which it was made and where arbitration took place".119 Moreover, they rely on the fact that "the enforcement of the award annulled in its country of origin would be inappropriate because it would discourage countries without an arbitration culture from having recourse to it, for fear of losing all control over awards given on their territory".120

Concerning the opinions of the proponents for the enforcement of annulled foreign arbitral awards, it seems that the problem according to the commentators is the word "may" which has led to different interpretations, not the ground of setting aside as one of the refusal grounds. The commentators have concentrated and built their

119 Nazzini Renato, p 129 (footnote 49 supra)
120 Ibid
analyses on the ambiguous language of Article V (1) of the Convention without discussing the legal effect of the annulled award itself. I submit that if the place of enforcement is equally positioned to assess whether an award should be recognised and enforced, it will lead us to the earlier problem, of obtaining leave for enforcement from the court of the country where enforcement is sought, under the previous Geneva Convention, which restricted the recognition and enforcement of arbitral awards internationally.

The refusal ground (e) of Article V (1) "applies only if the award has been effectively set aside in the country of origin". Moreover, it is clear in accordance with Article V (1) (e) that the country of origin in which or under the law of which the award was rendered has the exclusive competence to set aside the rendered arbitral award. Therefore, disregarding the "local standard annulments" is not acceptable and does not conform to the purpose of the New York Convention since it abolishes the role of the court of the country of origin.

According to the New York Convention, the place of arbitration has an international effect and a legal value. The evidence is that several countries such as Germany refuse to enforce foreign arbitral awards which have been set aside in the country of origin. On this basis, an arbitral award which has been set aside has no existence in the country of origin and should have no existence in the country where enforcement is sought. It is clear that the recognition of foreign arbitral awards is one of the fundamental purposes of the New York Convention and this purpose has been reflected in the title of the New York Convention, the New York Convention on the

122 Germany does not give any consideration to any arbitral award that has been set aside, since it has expansively applied Article V (1) (e). In addition, The German domestic law exclusively refers to the New York Convention of 1958; see Weinacht Felix, p 319 (footnote 5 supra); see also Section 1061 of the German Arbitration Act under footnote 82 supra, Chapter Two, page 69
“Recognition and Enforcement of Foreign Arbitral Awards” of 1958. Furthermore, the New York Convention did not abolish the role of the national courts, but merely reduced it, since Article V (1) (e) provides that: “the award...has been set aside by a competent authority...”. Accordingly, the “competent authority” as mentioned in this article is the court of the country in which or under the law of which the award was made. Furthermore, why is the term “competent authority” mentioned in Article V (1) (e), if there is no important role for the court of the country of origin? Why was it not suggested to abolish the legal value of the decision of the local courts when seeking enforcement abroad, by the representatives of the organisations and non-governmental organisations or the participants in the conference at which the New York Convention was adopted?

Suggesting that there is no justification for giving international recognition to the decisions of local courts is against the purpose of the Convention and does not conform to its aims. In addition, in spite of reducing the role of the courts of the countries of origin by the New York Convention, giving no importance to the decisions of the local courts would violate the legal authority of the country in implementing its national provisions to set aside the arbitral awards. The national laws govern the application for setting aside the arbitral awards because the New York Convention does not contain any ground for setting aside. Also, liberalising the arbitral award from control of courts may have potential risks. For example, arbitrators could abuse their power and the most fundamental process requirements might not be safeguarded if the law of the place of arbitration were entirely disregarded.123

However, it should be noted that the ICC presented a draft convention and stipulated in Article IV, the relevant Article, that “recognition and enforcement shall be

123 Yu Hong-Lin, ‘Is the territorial link between arbitration and the country of origin established by articles I and V (1) (e) being distorted by the application of article VII of the New York Convention’ (2002), p 197
refused…”, but the ECOSOC replaced it by the word “may”. Although the reason for the replacement was to divide jurisdictions between the courts where arbitration takes place and the courts where enforcement is sought, it is not convincing. In addition, the matter of setting aside of arbitral awards is left to the national laws of the countries of origin and the provisions of national laws undoubtedly vary from country to country, as discussed.

Thus, the idea of excluding one of the Articles does not lead to a uniform implementation of the Convention. Also, excluding Article VII (1) as one of the most important articles, to facilitate and guarantee the recognition and enforcement, may narrow the discretionary power, but will not solve the problem because of Article III, which is considered to be at the heart of the Convention. In addition, excluding any article is not acceptable in the light of the present Convention to resolve the problem of enforcing an annulled foreign arbitral award.

It seems that this suggestion to exclude one of the articles is a more suitable and reasonable way to reduce the problem than the proposal to enforce the annulled arbitral awards without giving any consideration to the decision of the court of the country of origin. This is in addition to the suggestions of advocates of enforcing a nullified foreign arbitral award, such as having to construe the refusal grounds narrowly, providing “good reasons” and imposing an “International Standard Annulment”. But to what extent should the grounds for refusal be interpreted by the enforcement courts? It does not seem possible to reach a uniform interpretation of the grounds because of the word “may”, as mentioned. What, in addition, would be the criteria governing the interpretation? Moreover, what would count as “good reasons” to set an arbitral award aside and are there uniform standards at the international level to limit the reasons for

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124 See footnotes 59 and 60 supra, Chapter One, pages 23-24
setting aside? If so, this means that there are international standards to clarify the grounds for setting aside and, therefore, these would be taken into consideration when the winning party is seeking enforcement of the arbitral award annulled in its country of origin. If so, indeed, there would not be any problem concerning the enforcement of annulled foreign arbitral awards. This is because the ground upon which an arbitral award is annulled will be recognised in other states where recognition and enforcement is sought. Sampliner says, concerning Paulsson’s suggestion of an ‘International Standard Annulment’, that “although this standard would be easy to administer, it is not easily reconcilable with Article V (1) (e) of the New York Convention. The language of that Article, which permits refusal to enforce nullified awards, would hardly be necessary if the only grounds upon which nullification decisions could be honoured were the grounds already set forth in Article V (1) (a-d)”. He also goes on to say that “Paulsson’s suggested standard also could result in serious injustice, until and unless such a standard is agreed to in a multilateral amendment to the New York Convention. Without such an international agreement, the intent of contracting parties could be frustrated if they choose to agree to arbitration under a system which provides for standards of review other than those which are recognized internationally”.

125 Sampliner Gary H, p 162 (footnote 15 supra)
126 Ibid

Regarding the suggestion of “good reasons”, what would the solution be if the reason for setting aside is not good enough in the country where enforcement is sought, but it is good enough in other jurisdictions? This would mean that determining the “good reasons” for setting aside will depend on the discretionary power of the court where enforcement is sought to decide whether the reason for setting aside is good enough. Therefore, the enforcement of an annulled arbitral award would be governed by discretionary power. Further, the enforcement court will decide if the reason is good
enough by referring to the annulment grounds listed under its national law. This is because the annulment grounds depend on the differing laws upon which or the jurisdiction in which the application for annulment is made.

Finally, the suggestion to ignore or exclude the fifth ground, V (1) (e), is not helpful in resolving the issue of enforcement of an annulled foreign arbitral award. It is not even clear to say that the grounds for refusal “have to be construed narrowly” by the enforcement court, or more exclusively, as van den Berg says; “their existence should be accepted in serious cases only; obstructions by respondents on trivial grounds should not be allowed”. This is because determining the “serious cases” and interpreting the refusal grounds depends on national courts where the recognition and enforcement are sought. Accordingly, the other difficulty is correctly identifying “serious cases”. Thus, it seems that the discretionary power of the national enforcement courts will play an important role. Exclusion of the ground would violate the Convention and expand the discretionary power of the national courts, which has been given by the word “may” in Article V (1). Thus, we would have two problems. The first problem, again, is how the discretionary power should be exercised. The second one is that ignoring the fifth ground, particularly the second part, would encourage the signatory countries to enforce annulled foreign arbitral awards without giving any consideration to the country of origin, as mentioned. Furthermore, ignoring would motivate the other countries where recognition and enforcement is sought to apply the other articles automatically, without hesitation. In practice, I submit that this suggestion means that the right to seek annulment of the rendered arbitral award would be waived. But the waiver would lead to depriving the losing party of his rights if one of

\[128\] Ibid, p 268
\[129\] The issue of waiver is discussed under sections 3.2., 3.3., and 3.4. of Chapter Three
the refusal grounds is found and could encourage the arbitrators to abuse their authority or ignore some of the fundamental process. Furthermore, waiver agreements are not accepted or given legal effect by all national arbitration laws, such as the Egyptian arbitration law which dismisses waiver agreements and the Arbitration Act 1996 which gives parties the freedom to waive nothing more than the ground for annulment provided under section 69. In addition, whether it is possible to give effect to the waiver agreement depends on the discretionary power of enforcement courts, particularly the enforcement courts whose arbitration laws are silent such as the Federal Arbitration Act. This is evidenced in the Chromalloy decision, when the U.S. court relied on its discretion, because the Federal Arbitration Act is silent in terms of waiver agreements.

However, the suggestion to waive the right to set the arbitral award aside may seem to be a method of avoiding possible disputes concerning the enforcement of a set aside arbitral award, if the laws applied give an effect to waiver agreements either in advance or when a dispute arises.

Concerning the suggestion of some commentators that the 1958 Convention might breathe a new life into the body of annulled arbitral awards, it is submitted that annulled arbitral awards are deprived of their legal effects and cut off at their roots and thus not valid. Philip Wahl states that “the New York Convention cannot breathe new life into a vacated award; it deals with existing awards only”. He also goes on to say that “when the Convention speaks of awards, it necessarily refers to valid awards, not vacated in their respective home jurisdictions”.

130 Wahl Philip, p 137 (footnote 113 supra)
131 Ibid
4.4. The Deficiencies of the New York Convention and their Negative Consequences

A number of deficiencies are reflected in the New York Convention of 1958. In brief, the Convention contains ambiguous language, reflected in the word “may”, and does not set grounds upon which a rendered arbitral award can be annulled. The annulment grounds are left to national arbitration laws of countries. Leaving the issue of annulment to contracting states has led to another problematic issue. The national arbitration laws set additional provisions excluding parties’ rights to seek annulment of rendered arbitral awards either in advance or when a dispute arises. In addition, the absence of the annulment grounds under the New York Convention has encouraged parties to enter into an agreement to expand the annulment grounds listed under the national arbitration laws. In fact, the issue of expansion is found in the United States if the Federal Arbitration Act of 1925 is applied. This is due to the limited and non-comprehensive grounds for annulment listed under section 10 (a). Furthermore, the annulment grounds listed under the national arbitration laws vary from country to country. Accordingly, the issue of the annulment of arbitral awards is affected. Furthermore, it is important to note that waiver and expansion agreements, in seeking annulment of rendered arbitral awards, are not accepted by all national courts.

All these deficiencies have affected arbitral awards annulled in their country of origin and accordingly different approaches have been taken at the international level. Thus, it would not be accurate to say that the New York Convention is an open-ended text because its application scope is in the enforcement stage; no grounds for annulment are needed. See footnote 115 supra, Chapter One, page 38

132 See footnote 115 supra, Chapter One, page 38
in its country of origin. Due to the deficiencies of the Convention, the national courts’ discretionary power is not limited and it is not even clear how it should be exercised.

Gharavi says that “the roots of the problem may be found in the New York Convention. The fact that over one hundred countries have signed the Convention does not make it immune to criticism. The Convention is nearly 40 years old. Many of its Articles such as V (1) (e) are outdated while others such as Article VII (1) seem unpredictable. Moreover, the Convention is incomplete as it fails to address the grounds for setting aside awards”.

Furthermore, Paulsson concludes that “enforcement notwithstanding annulment elsewhere is a matter left to the State parties to the Convention. If such a State incorporates the rules of the Convention into its own law, the same discretionary standard is passed on to the judge”.

It is submitted that the recognition and enforcement of the arbitral award may as a consequence involve a large number of jurisdictions, but the power to set aside the arbitral award is widely and exclusively recognised as belonging to the courts of origin in which, or under the law of which, the arbitral award is issued. Thus, the seat of arbitration and the country whose law is applied are the exclusive competent authorities to set aside rendered arbitral awards. Accordingly, the enforcement of an annulled arbitral award is difficult in the country in which, or under the law of which, it was rendered. But I submit that the enforcement of annulled arbitral awards is only difficult in the country in which such arbitral awards are made and set aside. In other words, it is not difficult to seek enforcement of a nullified arbitral award in the country whose law is applied. The French Code of Civil Procedure restricts or even precludes the French courts from exercising their jurisdiction, guaranteed by the 1958

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133 Gharavi Hamid G, Chromalloy: another view, p 24 (footnote 16 supra)
134 Wahl Philip, p 136 (footnote 113 supra)
135 Gaillard Emmanuel and Edelstein Jenny, p 37 (footnote 45 supra)
Convention, to annul rendered arbitral awards. Pursuant to Article 1504 of the Code, the French courts are not competent authorities to annul arbitral awards rendered outside France even if the French law is applied there. Thus, if the arbitral award has been annulled in the country in which it is made, it will be recognised and enforced in France under Article 1502 which does not list annulment abroad as a ground for refusing enforcement. Moreover, this stipulation will lead undoubtedly to recognising and enforcing annulled arbitral awards rendered by implementing the French Code, but outside France.

The other issue is the importance of the country of origin. In reality, enforcing an arbitral award annulled in its country of origin may have a number of negative consequences on countries of origin. Meanwhile, “because the law of the *situs* country is the primary source of authority to govern the procedure and enforceability of the arbitration, it stands to reason, in the traditionalists’ view, that the nullification of an arbitral award by the *situs* country should deprive the award of force in all other countries” Enforcing a set-aside arbitral award would violate the legal effects of the country of origin, which is considered the competent authority in accordance with the New York Convention. What is the legal value of decisions of competent authorities if they are not respected or taken into consideration by other courts? What is the legal value of annulment grounds listed under national arbitration laws? Why have the contracting states amended their national arbitration laws, to list grounds for annulment, if their decisions are not recognised and enforced by other countries? Thus, ignoring the decisions of the competent authorities is a violation of the New York Convention which expressly guarantees the important role of the countries of origin. In addition, enforcing a nullified arbitral award “constitutes a violation of the implicit allocation of national

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137 See footnote 76 supra, Chapter Two, page 68
138 Sampliner Gary H, p 145 (footnote 15 supra)
court authority under international law”. Furthermore, due to the growing suspicion of the enforcement policy, for example, of the United States, it has been said that “[c]ertain countries may receive the impression of being ‘victims’ of a ‘pick and choose’ policy of US Courts regarding enforcement of foreign arbitral awards”.

Enforcement of an arbitral award annulled in its country of origin may also have a number of negative consequences on parties to arbitration. It seems that the parties will be discouraged from referring their disputes to arbitration. This is because of the ambiguity and instability reflected in the national enforcement courts’ decisions which depend on their discretionary power. In addition, enforcing a set-aside arbitral award or disregarding an annulment decision is against the parties’ intention, particularly the losing party who wishes to deprive the award of its legal effect. Gharavi says that “the practice of enforcement of annulled awards violates the intent of the parties to subject the award to annulment proceedings and deprives the parties of their right to freely organize the means of recourse against arbitral awards”. He goes on to say that “the practice of enforcement of annulled awards also violates the parties’ freedom to fix the extent of control exercised by national courts over arbitral awards”.

Eventually, as van den Berg says, “the question thus becomes: what could or should we do 40 years later for the next 40 years to come? Here, it is useful to make a distinction between interpretation and application of the Convention by the courts, on the one hand; and perceived shortcomings in the text and structure of the Convention on the other hand”.

139 Wahl Philip, p 135 (footnote 113 supra)
140 Ibid, p 134
142 Ibid, p 131
Decisions of competent authorities should be respected and given international effect as guaranteed pursuant to the New York Convention. In addition, an arbitral award set aside in its country of origin is devoid of its legal effects and should be cut off at its roots. Van den Berg supports this view and states that "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".\textsuperscript{144} Furthermore, Philip Wahl states that "a vacated award has therefore to be judged in accordance with its home jurisdiction’s decision; consequently, the award has ceased to exist".\textsuperscript{145} 

4.5. Conclusion

It is clear now that not all jurisdictions adhering to the New York Convention have come to the same conclusion when they interpret the provisions of the Convention. These different approaches are the actual result of the open-endedness of the Convention and uncertainty is a likely result. The U.S. courts made inconsistent judgments in determining the enforcement of the annulled foreign arbitral awards. The first decision was in the \textit{Chromalloy} case in which the U.S. court decided to enforce the arbitral award set aside by the Egyptian court at Cairo; the second decision related to the Baker Marine case in which the U.S. court denied the application to recognise and enforce the arbitral award set aside by the Nigerian court. The U.S. court may have enforced the annulled arbitral award in \textit{Chromalloy} because the party who sought the enforcement was an American citizen, while in Baker Marine the party who made the enforcement application was not an American. Although the decision of the U.S. court in Baker Marine was absolutely sound, the statements of the court demonstrated the

\textsuperscript{144} Van den Berg Albert Jan, ‘Annulment of awards in international arbitration’, p 161 (footnote 117 supra)
\textsuperscript{145} Wahl Philip, p 137 (footnote 113 supra)
effect of politics on the decisions of the national courts where recognition and
enforcement are sought.

The decision in Hilmarton made by the French courts was also complicated. The
French courts granted enforcement to two arbitral awards between the same parties and
in the same matter. The Hilmarton case has proved that annulled foreign arbitral awards
are routinely recognised and enforced in France, without hesitation. In addition, the
decision of the French court in Hilmarton has been linked to political issues. Some
commentators say that the French courts enforced the annulled arbitral award because
OTV was a French company. But it is important to note that the French courts also
enforced the arbitral award of Chromalloy, although Chromalloy was not a French
company. This is because it is clear that France does not consider the annulment of
arbitral awards abroad to be a ground for refusing enforcement.

The U.S. courts’ decisions, in addition to the decision of Hilmarton made by the
French courts, have proved the important role of the courts’ discretionary power.
Furthermore, they have shown the deficiencies of the New York Convention reflected
mainly in the absence of annulment grounds and the ambiguous language of the word
“may”, in the opening paragraph of Article V (1), to have affected the implementation
of the provisions. Moreover, the public policy ground is an open-ended ground and
interpreted by national enforcement courts pursuant to their desires, although it is
mentioned under Article V (2) (b) as a refusal ground. But the opening paragraph of
Article V (2) also has an ambiguity reflected in the word “may”. Accordingly, why
did the U.S. court in Chromalloy, for example, interpret the word “may” of Article V
(2) in its favour, as if it meant “must” or “shall”? Whereas it did not interpret the word
“may” of Article V (1) in favour of not enforcing an annulled foreign arbitral award.

146 See footnote 75 supra, Chapter One, page 28
What is international public policy, as mentioned by the French courts in Hilmarton? I think that the interpretation of this ground should be limited. Furthermore, the application of this ground should not rely only on the nationalities of parties to arbitration. Mayer supports this view and goes on to say that the courts “must apply the Convention in enforcement or recognition procedures, and this can cause substantial difficulties. The reasons are obvious. State courts frequently seek to protect their citizens’ interests by declaring void or unenforceable an arbitral award. Furthermore, open-ended criteria like public policy rules – Article V (2) (b) NYC – or words like “binding” – Article V (1) (e) NYC – simply invite State courts to impose their own national standards”.147

The different approaches and views concerning the issue of enforcing an arbitral award annulled in its country of origin have also given rise at the international level to debate among academics. Two trends are found: the first trend argues that the annulled arbitral award should have no existence and thus there is nothing left to be enforced. This trend relies on the idea of legal value and the effect of the country of origin or the place of arbitration. Consequently, the decision of the court at the place of arbitration should be respected and taken into consideration. The second trend argues that the annulled arbitral award should be enforced, relying on the national limits of the annulment decision. Therefore, an annulled award in the country of origin is enforceable abroad. Then rely also on the ambiguous language of Article V (1) of the Convention which has given enforcement courts the discretionary power to refuse or accept the enforcement of annulled foreign arbitral awards.

The academics have also put forward a number of suggestions. One is to waive or ignore the refusal ground V (1) (e), so as to avoid the problem. Furthermore, it has

147 Mayer Ulrich C, p 586 (footnote 99 supra)
been suggested by some commentators that the refusal grounds should be construed narrowly. In addition, it has been said that if the arbitral award has been set aside by “serious cases”, “good reasons” or “International Standard Annulment”, the decision of the court of the country of origin would be respected and taken into consideration by the court where enforcement was sought.

I submit that the decisions of the courts of the countries of origin should have a legal value at the international level and that their decisions should be respected and taken into consideration by the courts where recognition and enforcement is sought. The New York Convention has not abolished the role of the court of the country where arbitration takes place. But it has reduced the role by abolishing the need to obtain leave for enforcement or to confirm that the award has become final.\textsuperscript{148}

Enforcing a set-aside arbitral award would have a bad influence on both competent countries and parties to arbitration. The competent countries might receive the impression that they were victims if their decisions were disregarded abroad. The parties also would be discouraged from resolving their expected disputes by arbitration because the losing party would not be protected. In addition, enforcing an annulled arbitral award would be contrary to the will of the contracting parties, who look forward to getting a fair and right decision. Furthermore, the arbitration is an alternative method of resolving international commercial disputes and thus any arbitral award which has been nullified should be refused by the enforcement court.

Setting aside the arbitral award is the most important ground on which to refuse enforcement. The annulled arbitral award should have no existence, as suggested, and thus there would be nothing to recognise and enforce. An annulment action which is rendered by the court concerned should be recognised at the international level to

\textsuperscript{148} See footnotes 62 and 67 supra, Chapter One, pages 25-26
prevent arbitrators from abusing their power in applying the governing law. This is because the arbitrators may abuse their power if they feel that the rendered arbitral award will be recognised and enforced abroad even when annulled by the competent authority.
Conclusion

The international community's efforts devoted in the aftermath of the Geneva treaties to enhancing international commercial arbitration are undeniable. But although one of the aims of such efforts was to avoid the restrictions found under the Geneva treaties, a number of deficiencies emerged under the New York Convention of 1958, on the "Recognition and Enforcement of Foreign Arbitral Awards". These deficiencies have mainly affected the implementation of the enforcement refusal ground V (1) (e), dealing exclusively with arbitral awards annulled in their countries of origin.

The opening paragraph of Article V (1) contains ambiguous language reflected in the word “may”; thus, the recognition and enforcement of annulled foreign arbitral awards may be refused. Furthermore, although the only mention of annulled foreign arbitral awards is under the enforcement refusal ground V (1) (e), the 1958 Convention has failed to provide the grounds upon which rendered arbitral awards can be annulled. These major deficiencies have demonstrated and led to further deficiencies, but these are under the national arbitration laws of the Contracting States adhering to the New York Convention. These further deficiencies have constituted loopholes and expanded the gaps which should have been bridged by the adherence of the Contracting States to the New York Convention. As a result, the deficiencies of the New York Convention and those found under the national arbitration laws have affected the application of the enforcement refusal ground V (1) (e). The effects of the deficiencies and their resulted loopholes can be summarised as follows:

1. Although the authentic texts of the New York Convention of 1958 should be equal, differences have been found among these texts. All the texts provide the word “may” under the opening paragraph of Article V (1), apart from the French
version, which seems to use the word "will". In addition, even the official Arabic translation of the authentic texts does not provide the word "may". Thus, saying that the authentic texts of the 1958 Convention are applied equally is not true, although these texts should have demonstrated uniformity and conformity in terms of the meaning of the word "may".

The ambiguity arising from the word "may" has given national courts where recognition and enforcement of annulled foreign arbitral awards are sought a discretionary power and thus the interpretation of this word depends on the discretion of the national enforcement courts. This was reflected, for example, in the decision of the Queen’s Bench Division, an English commercial court, in which it was held that the word "may" leaves discretion to the courts.\(^1\) But the text of the 1958 Convention does not clarify how this discretion is to be exercised. Accordingly, the national courts before which recognition and enforcement of the annulled foreign arbitral awards are sought are free to determine this point and can interpret the word "may" extensively in ways which conform to their desires. In addition to the possible extensive interpretation of the word "may", the ambiguity has opened the door for the national enforcement courts to apply other Convention Articles such as III and VII (1). These articles have given the national enforcement courts an adequate reason to interpret the word "may" in favour of enforcing annulled foreign arbitral awards. Thus, these articles serve the national enforcement courts’ desire and expand their discretionary power to interpret the word "may". In other words, the national enforcement courts can rely on Articles III and VII (1) if they tend and desire to recognise and enforce annulled foreign arbitral awards. Moreover, the national enforcement courts can justify their decisions to enforce annulled foreign arbitral

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\(^1\) See footnote 79 supra, Chapter One, page 29
awards by Articles III and VII (1), although Article V is also essential since it assumes the validity of foreign arbitral awards.

2. The second deficiency of the 1958 Convention reflected in the absence of the grounds upon which rendered arbitral awards can be annulled has also affected the application of the enforcement refusal ground V (1) (e). A large proportion of the Contracting States adhering to the 1958 Convention have made some attempts and amended their national arbitration laws to cover this deficiency. But, unfortunately, the annulment grounds listed under the national arbitration laws are incoherent and vary from law to law, or from country to country, although such amendments should have aimed to cover the deficiency of the 1958 Convention. Accordingly, the possibility of seeking annulment of the resulting arbitral awards depends entirely on the grounds listed under the national arbitration laws of the countries of origin.

Even the deficiency of the absence of the annulment grounds has led a number of the Contracting States, such as France, to set further provisions to distinguish between the rendered arbitral awards. In other words, the annulment issue depends on the scope of the rendered arbitral awards, either national or international. In addition, the absence of the annulment grounds, under the Convention, has led the French law to set provisions which go against the Convention's purposes and principles. The French law has precluded French courts from exercising their normal jurisdiction to annul arbitral awards rendered outside France, even if the French law was applied. This stipulation is against the enforcement refusal ground V (1) (e), which provides that the country in which or under the law of which the arbitral award is made have competence to annul arbitral awards. Moreover, the Arbitration Act 1996\(^2\) has restricted the annulment proceedings by requiring, for example, the party seeking

\(^{2}\) See footnote 25 supra, Chapter Two, page 51
annulment to obtain leave from the courts. Furthermore, most of the national arbitration laws provide the word "may" under the opening paragraphs of articles listing the annulment grounds. Hence, the rendered arbitral awards may be annulled.

Accordingly, when enforcement of an annulled foreign arbitral award is sought, the national enforcement court will look at its national arbitration law to find whether or not the ground upon which the award was annulled is listed. If it is, ambiguity will be found in the opening paragraph of the article listing the annulment grounds and thus its discretion will play a vital role. If it is not, the ambiguous language of Article V (1) of the 1958 Convention supported by Articles III and VII (1) will play an important role. Even such discretion will be expanded, in particular, if, for example, the French law were applied outside France. As a result, the application of the enforcement refusal ground is affected by the absence of the annulment grounds.

Due to the absence of the annulment grounds, I submit that the discretionary power given to the national enforcement courts by the word "may" is no longer sufficient to enforce annulled foreign arbitral awards. The enforcement courts' discretion has been expanded by the courts. Such expansion has mainly appeared by the decisions of the U.S. courts. It is true that the annulment grounds listed under Section 10 (a) of the U.S. Federal Arbitration Act are narrow and not sufficient, but they are mandatory or statutory. However, although the annulment grounds are not sufficient, this does not mean that they should have been expanded by courts' decisions. Unfortunately, the U.S. Supreme Court played a further role and held that "manifest disregard of the law" can constitute a ground to annul rendered arbitral awards. This non-statutory ground is not accepted by all the U.S. courts and also is not well-defined. Thus, this ground expands the courts' discretion when annulment
applications are made and also when seeking enforcement of arbitral awards annulled on this ground. This situation is possible, in particular, in the United States Court of Appeal in its decision in *Alghanim & Sons v. Toys R Us, Inc.* This was courageous enough when it strangely held that the "manifest disregard of the law" is a ground for annulment, but the refusal grounds for enforcement are exclusively the grounds listed under Article V of the 1958 Convention.

Unfortunately, the goal of finality of the rendered arbitral awards has been affected, since this goal is promoted by producing the grounds upon which an arbitral award can be annulled. "The manifest disregard of the law" ground puts no end to judicial review and thus affects the stability and finality of the arbitration awards. Such a non-statutory ground for annulment will expand the discretionary power of the national enforcement courts, in particular because it is not taken into consideration by all the courts of the United States. Thus, there is a doubt if the annulment decisions based on this ground will be recognised beyond the United States’ borders. As a result, this will help to expand the discretionary power of the enforcement courts and undoubtedly the enforcement refusal ground V (1) (e) will be affected.

3. The effects of the deficiencies of the New York Convention of 1958 reflected, in particular, in the absence of the annulment grounds has not ended with the incoherence of grounds listed under national arbitration. Under a large number of national arbitration laws, the annulment grounds are not mandatory, since a number of laws have given private parties to arbitration the possibility of entering into an agreement to waive their right to seek annulment of the resulting arbitral awards. In other words, the parties to arbitration can waive the annulment grounds and thus the resulting arbitral awards will be binding and final and will allow no challenge or recourse to be made.
It seems that the Contracting States tend not to cover or resolve the deficiency of the 1958 Convention, although the annulment grounds should have been listed to cover the absence of annulment grounds under the Convention. However, if this is the aim of the Contracting States, this was not meant to make distinctions among the parties, relying on their nationalities, for example, under the provisions of the Swiss and Belgian laws. In addition, this was not meant to make distinctions in the scope of arbitration, such as the provisions of the French law, either national or international. Thus, whether waiver agreements are accepted and can be applied depends on the scope of arbitration and the parties' nationalities. Moreover, in the countries whose laws are silent on the subject, such as the U.S. in its Federal Arbitration Act, accepting waiver agreements depends on the national courts' discretion.

Saying that the waiver agreements will increase the finality of the rendered arbitral awards is not accurate. If such agreements increase the finality, why have a number of laws made distinction between parties, depending on their nationality, to have the right of entering into an agreement to waive the annulment grounds either in whole or in part? If such agreements, moreover, increase the finality, why have a number of national laws, such as the French law, made a distinction between national and international arbitral awards? If such agreements, furthermore, increase the finality, why has the Jordanian arbitration law, for example, given inadmissible effect to waiver agreement made either in advance or when a dispute arises? If the annulment grounds can be waived, the parties will be at the mercy of the arbitral tribunal. Thus, I submit that this is the reason for making the distinction among the parties under the Swiss and Belgian laws. Furthermore, waiving the right to seek annulment of the rendered arbitral awards does not demonstrate the integrity of the arbitration process. As a result, it is important to mention that the idea of waiving the
right is against the principles of the New York Convention, particularly the enforcement refusal ground V (1) (e) dealing exclusively with annulled foreign arbitral awards and determining the competent authorities to annul the rendered arbitral awards. Thus, the national courts’ jurisdictions should not be displaced. In addition, national courts should not be deprived from exercising their normal jurisdictions as guaranteed, in particular, by the grounds (e) of Article V (1) of the 1958 Convention. Furthermore, the goal of legality for arbitral awards, which would be advanced by allowing a party to appeal to courts, is affected by provisions allowing to the annulment grounds to be waived.

As discussed in Chapter Two, a number of U.S. courts have struggled, after the decision of the Supreme Court, to take “manifest disregard of the law” into consideration as a ground for annulling the rendered arbitral awards, although this is not expressly listed under the U.S. Federal Arbitration Act of 1925. But in accordance with the Arbitration Act 1996, Section 69, dealing with appeals on questions or points of law as a ground for annulling arbitral awards, is not mandatory and thus can be waived by the parties’ agreement. Although “manifest disregard of the law” and an appeal on a point of law mean that there is a misapplication or improper application of the provisions of the chosen law, inconsistencies of the countries’ viewpoints and their laws have appeared. As a result, whether or not waiver agreements are accepted varies from law to law and this undoubtedly will expand the national courts’ discretion where enforcement of annulled foreign arbitral awards is sought.

Due to the absence of the annulment grounds, the door is opened to parties to arbitration to enter into agreements to expand the grounds upon which the resulting arbitral awards can be annulled. Although the expansion issue has appeared in the United States, the discretionary power of the U.S. courts, before which annulment
applications are made, plays an important role in applying them on the rendered arbitral awards. Furthermore, although this issue has appeared only in the United States, it should not be forgotten that the enforcement of the rendered arbitral awards will be in another state. This has led to inconsistent judgments among the courts. Such inconsistency has been reflected even by the same court and in the same matter. For example, the Ninth Circuit rendered two inconsistent judgments in terms of accepting the expansion agreements.

It has been said that the waiver agreements will increase the finality of the arbitral awards and the integrity of the arbitration process will not be threatened, but what about the expansion agreements? There is no doubt that the expansion agreements affect the finality as the rendered arbitral awards will be attacked by a wide range of annulment grounds. The expansion agreements moreover, will allow a party back into courts for a “second bite at the apple”. However, national courts’ jurisdiction is not and should not be created by parties’ agreements. In addition, the parties cannot and should not tell the courts what to do. Furthermore, if parties can stipulate whatever they desire in their arbitration agreements, why have a large number of the Contracting States amended their national arbitration laws? What are the benefits of such amendments if the parties can waive or even expand them? Thus, the deficiency of the annulment grounds under the Convention has not been covered under a large number of national arbitration laws. The annulment grounds should be mandatory and applied strictly. Otherwise, this will expand the national enforcement courts’ discretionary power, the implementation of the refusal ground V (1) (e) will be affected and thus annulled foreign arbitral awards will be enforced. This is because the waiver or expansion agreements are not accepted by all the national arbitration laws. As a result, I submit that taking into consideration or saying that the scope of the
New York Convention of 1958 is in the enforcement stage and thus no annulment grounds are needed is not entirely true.

4. A number of international arbitration cases have reflected the vital role of the deficiencies of the New York Convention and their effects on the implementation of the enforcement refusal ground V (1) (e), reflected in the incoherent annulment grounds listed under the national arbitration laws of the Contracting States, the possibility of waiving the right to seek annulment of the resulting arbitral awards under a number of laws and the expanding of the annulment grounds,. The deficiencies of the 1958 Convention and their effects have become loopholes to avoid the application of the enforcement refusal ground (e). But the loopholes have allowed inconsistent judgments among the national enforcement courts. In other words, the national courts where recognition and enforcement of annulled foreign arbitral awards are sought have come into conflict. The Chromalloy, Baker Marine and Hilmarton cases have reflected such inconsistency and conflict. Moreover, these cases, in particular, the Chromalloy and Baker Marine cases, have reflected that the issue of enforcing annulled foreign arbitral awards or the application of the enforcement refusal ground V (1) (e) is governed by the national enforcement courts' discretionary power relying on the deficiencies of the 1958 Convention and their effects.

In Chromalloy, the arbitral award annulled in Egypt was recognised and enforced in the United States. In Baker Marine, conversely, the arbitral award annulled in Nigeria was not enforced in the United States, although the grounds and conditions upon which the award was enforced in Chromalloy have been found in Baker Marine. In reality, the Chromalloy case has reflected the deficiencies of the New York Convention and their effects on the implementation of the refusal ground V (1) (e). The United States District Court for the District of Columbia justified its
decision and relied on: the ambiguous language of Article V (1) reflected in the word "may", which has also demonstrated the extent of the extensive interpretation; the absence of the annulment grounds; the parties’ waiver agreement by which the rendered arbitral award should be final and binding and should allow no other recourses or appeal; Article VII (1) of the Convention; and the fact that the U.S. court considered that the erroneous misapplication of the Egyptian law did not rise to the level of "manifest disregard" of the law. Thus, I submit that the U.S. court in essence committed an explicit abuse of its discretionary power without restrictions.

Baker Marine, on the one hand, reflected such abuse of the discretionary power and the unjustified grounds on which the U.S. court relied in the Chromalloy decision. On the other, unfortunately, political issues played an important role and affected the decision of the United States District Court for the Northern District of New York in Baker Marine. The nationality of Baker Marine expanded the discretionary power of the U.S. court and led to a distinction being made between Chromalloy and Baker Marine as American citizens. Political bias has even been reflected in the commentators’ statements, particularly those who went on to say that the U.S. court’s decision which enforced the foreign arbitral award annulled in Egypt is a “major victory” for supporters of binding arbitral awards and sends messages to Americans to encourage them to invest abroad.

Although France is isolationist, given that annulled foreign arbitral awards are routinely enforced due to Article 1504 of the French Code of Civil Procedure, French courts have also made inconsistent judgments and come into conflict. The Hilmarton case reflected such inconsistency. Due to the inconsistency of the judgments of the French courts in terms of the two arbitral awards rendered in the Hilmarton case, the French Supreme Court refused enforcement of the second arbitral award and insisted
on enforcing the first award. In contrast, the English court, in Hilmarton, enforced the second arbitral award and indicated correctly that the country of origin in which the award was made is the competent authority and thus English courts have secondary jurisdiction whether to enforce or not.

Unfortunately, the inconsistent judgments and different approaches vary nowadays from court to court in the same country, not only from country to country. But, if the discretionary power governs the enforcement of annulled foreign arbitral awards relying on the deficiencies of the 1958 Convention and their effects, this does not mean that the countries of origin in which or under the law of which the awards were made should be accused of being less secure places to arbitrate and thus cause parties to take heed, as Schwartz says. However, it is difficult to constitute coherent grounds for annulling the resulting arbitral awards under all the national arbitration laws. In addition, it is unlikely to force the Contracting States adhering to the 1958 Convention to set or list such coherent grounds. But it is possible to list annulment grounds such as the grounds listed under, for example, the UNCITRAL Model Law and the German Law, which mirror the enforcement refusal grounds listed under Article V of the 1958 Convention and thus uniformity of the annulment grounds can be achieved under the national arbitration laws.

Moreover, it is difficult to compel the national enforcement courts to interpret the word “may” provided under Article V (1) as if it meant “must” or “shall”. But it is possible to respect and give effect to the decisions of the courts of the countries of origin and take them into consideration, particularly since these courts are the exclusively competent authorities to annul the resulting arbitral awards in accordance with the enforcement refusal ground V (1) (e). Thus, annulled foreign arbitral awards should not be recognised and enforced because they are devoid of
their legal effects and should be cut off at their root. Otherwise, the gaps between the national enforcement courts will be expanded and as a result the implementation of the refusal ground V (1) (e) will be affected, as well as its stability and the international arbitration awards.

In reality, the deficiencies of the 1958 Convention and their effects have affected or reduced the important position of the countries of origin, but Article VI can favour the case if the national enforcement courts tend to find uniformity of the application of the enforcement refusal ground V (1) (e). This Article gives the national enforcement courts discretion to adjourn the enforcement decisions if applications for seeking annulment are made before the competent authorities. But unfortunately the national enforcement courts do not activate this article; although the enforcement refusal ground V (1) (e) is the reason for providing it. If annulment decisions were routinely disregarded by the enforcement courts, this Article would not have been provided under the Convention. Thus, if this Article, Article VI, is well applied by the national enforcement courts, the ambiguous language of Article V (1) and the absence of the annulment grounds and their effects will not appear and as a result the enforcement refusal ground V (1) (e) will be implemented and in this way annulled foreign arbitral awards will not be recognised and enforced.
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The first arbitral award was made in favour of OTV in 1988.

It was annulled by Court of Appeal of Geneva in 1989.

The annulment decision was affirmed by Swiss Supreme Court in Apr. 1990.

The dispute was resubmitted to arbitration.

The second arbitral award was made in favour of Hilmarton.

Hilmarton sought enforcement of the Swiss Supreme Court's decision and the second arbitral award before Court of First Instance of Nanterre.

Nanterre Court of First Instance granted enforcement to the two decisions in 1993.

This decision was upheld by Court of Appeal of Versailles in 1995.

In 1997, Supreme Court annulled the decision of the Versailles Court and reaffirmed its first decision.

It was granted enforcement by Paris Court of First Instance in Feb. 1990.

The enforcement decision was affirmed by Paris Court of Appeal in 1991.

This decision was upheld by Supreme Court in 1994.

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