Should awards that have been annulled at the seat nevertheless be enforced by courts in other jurisdictions?

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Statistics show that a substantial part of arbitral awards is enforced voluntarily, but there are two known ways in the law to avoid the enforceability of an arbitral award: annulment of the arbitral award and refusal to recognize and enforce the arbitral award. The first may be sought in the courts of the place of arbitration and the second – in the courts of the State in which the enforcement is sought. Under the New York Convention, the annulment of an arbitral award by the court of the place of arbitration is one of the grounds for refusal to recognize and enforce the arbitral award, but the word "may" means that the annulment of an arbitral award will not necessarily lead to a refusal. This regulatory ambiguity has created a situation where the courts of one state will refuse to enforce an arbitral award because of its annulment at the place of arbitration, when the court of another state will disregard the annulment and commence enforcement. The article discusses the theoretical basis of such differences and the justification of the position of state courts in one direction or another. The article also seeks to assess a possible compromise approach, one of which is proposed in the European Convention on International Commercial Arbitration and the other in terms of assessing the problem through the prism of private international law or new instruments of international law.

"I AM NOT. AND THEN I AM.
I WONDER IF THAT WAS DEATH."
Amie Kaufman

It might so happen that an arbitral award is reborn after death, just like a phoenix rises from the ashes. The "death" in this case is the annulment proceedings and the "rebirth" – a subsequent recognition and enforcement. However lyrically that might sound, a possibility for an award to be recognized and enforced by the courts in one state after being set aside by the courts of another state, creates a certain gap and confusion in the arbitration field.

A study performed in 2008 by PricewaterhouseCoopers and the School of International Arbitration has shown that voluntary compliance with the arbitral awards in most cases reaches even 90%.[1] From the remaining 10%, only 5% of the awards are refused recognition and enforcement.[2] It might seem at first glance, that there is no practical problem as to annulment and enforcement of arbitral awards, however, even with the highly favourable statistics, arbitration awards sometimes end up unenforced (or even enforced) with some controversy.

[1] 'International Arbitration: Corporate Attitudes and Practices' (PricewaterhouseCoopers, 2008) <https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf> accessed 3 April 2021.

[2] Albert Jan van den Berg, 'The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas' (1996) The New York Convention of 1958, ASA Special Series 25. 1.

In the international scene, there are mainly only two mechanisms to deprive arbitral award of its effects: annulment or refusal to recognize and enforce (with some exceptions when the appeal is possible). However, there is no clear answer on how these two correlate and whether the annulled award "dies" forever, or may still be "reborn" elsewhere.

I. REFUSAL TO RECOGNIZE AND ENFORCE AND ANNULMENT OF ARBITRAL AWARDS: IS THERE A CORRELATION?

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**Convention**") currently ratified by 168 states,[3] was intended to facilitate the enforcement of arbitral awards,[4] which indeed is a prerequisite for an efficient and trusted system of arbitration. The Convention sets out the rules of when and how the awards, issued in the territory of one contracting state, can be recognized and enforced in another contracting state, and thus, the Convention is the principal document, describing the fate of the award once it is issued.

The Convention, as well as a vast number of the national legislation, is highly "pro-enforcement", which means that the threshold to prove that the award cannot be enforced is set high on the party resisting recognition or enforcement.[5] Hence, Article V of the Convention lists an exhaustive list of circumstances that may serve as a ground to refuse recognition and enforcement of arbitral awards: "Recognition and enforcement of the award *may be refused*, at the request of the party against whom it is invoked, *only if* <…>".

As summarized by Gary Born, grounds for refusing recognition or enforcement in essence, are: "(a) lack of a valid arbitration agreement or excess of jurisdiction; (b) procedural irregularities; (c) bias of the tribunal; (d) violation of public policy; (e) non-arbitrability; (f) lack of "binding" status of the award; and (g) annulment of the award in the arbitral seat."[6] For the purpose of this analysis, the focus shall be given to one of the mentioned grounds, set out in the Article V(1)(e) of the Convention: "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."

The annulment of the award is the only ground that requires (or suggests) the court to accept the opinion of the court of another state about the award it was asked to recognize and enforce. This raises several important questions: (i) must the court blindly follow the annulment decision of the court of another state; (ii) may the court look at the reasons of annulment and if so – what reasons are sufficient to disregard the annulment; (iii) is there a difference on whether the decision to annul the award was (or might be) recognized in the state, where the enforcement is sought.

Turning to the annulment proceedings, as a general rule, a party, seeking to challenge the arbitral award, may apply to the courts of the state, which was the seat of arbitration proceedings. As is evident from the already mentioned rules in Article V of the Convention, only the annulment in the seat of the arbitration may impact the further enforcement of the award: "The award <…> has been set aside <…> by a competent authority of the country in which, or under the law of which, that award was made", with some discussion towards the meaning of the words "under the law of which".

Contrary to the recognition and enforcement of the arbitral award, the annulment proceedings and conditions are not set out in any universally applicable international treaty. The only mention of the set-aside proceedings is in Article V of the Convention, as quoted above.

[3] The New York Convention, 'List of Contracting States' <https://www.newyorkconvention.org/list+of+contracting+states> accessed 3 April 2021.

[4] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 283.

[5] *Ibid*, 383.

[6] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 389.

Hence, the annulment proceedings are conducted under and in accordance with the rules, set out in the national legislation of the state where the annulment is sought.

An UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**")[7] describes the prevailing approach towards the annulment of the awards. Article 34 of the Model Law sets out the grounds for annulment of the award, which are, as summarized by Gary Born: "(a) the arbitration agreement was invalid; (b) a party was unable to present its case, including for lack of notice; (c) the award deals with matters outside the scope of the submission to arbitration; (d) the composition of the tribunal or arbitral procedures were not in accordance with the arbitration agreement; (e) the dispute was non-arbitrable, or (f) the award violates local public policy."[8]

One might notice that in fact, grounds for annulment of the award under Article 34 of the Model Law are mimicking grounds for a refusal to recognize and enforce arbitral awards under Article V of the Convention, which is not a coincidence, but an objective of the Model Law.[9] If one could make a full stop at this point, the question raised in this analysis would be much less important – if grounds for annulment and grounds for non-enforcement are the same, much easier is the hypothesis that what once was annulled, it cannot be enforced. Unfortunately, that is not always the truth.

As of March 2021, 85 states have adopted the Model Law[10] to incorporate or adapt its provisions to the national legislation. However, even though the national legislation through the Model Law and generally agreed principles is becoming in some ways unanimous, there are still many differences, including in the regulation of annulment of the award.

Exceptions to the approach, suggested in the Model Law, are especially evident in the common law countries. For example, in England, under Section 68 of the English Arbitration Act, an award may be annulled if the arbitral tribunal failed to comply with the general duty of the tribunal (i. e. "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined"). Moreover, the court can even look at the question of law and annul the award if, *inter alia*, the decision is "obviously wrong" or "is one of general public importance and the decision of the tribunal is at least open to serious doubt" (Section 69 of the English Arbitration Act). In the United States, the court may also look at the substance of the award and may annul the award if a manifest disregard of the law has occurred (even though it seems that this ground is losing its foundation[11]).[12] In China, the court can annul the award if the evidence in the case was not sufficient to make conclusions or if there was a truly incorrect application of the law.[13]

Thus, at least several states, some of which are indeed a popular place for an arbitral seat, have national arbitration laws that provide a broader list of annulment grounds, than listed in Model Law. It means, that in such cases grounds

[7] UNICTRAL 'Model Law on International Commercial Arbitration' (1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 3 April 2021.

[8] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 312-313.

[9] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 673.

[10] UNCITRAL 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 3 April 2021.

[11] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 338.

[12] Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 678.

[13] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 338-339.

for annulment are broader than grounds for non-enforcement of the award under the Convention.

And here we reach the main issues of this analysis. If the award is annulled at the seat, can it still be enforced in another state? What is the impact of the grounds for annulment to the answer and whether the answer might differ in a case where the court's decision of annulment is recognized in the state where the annulment is sought?

II. CAN (OR SHOULD) AN ANNULLED AWARD STILL BE ENFORCED?

As already mentioned, one of the reasons when the Convention allows national courts to refuse enforcement and recognition of the arbitral award is when "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."[14] However, the Convention does not *oblige* courts to refuse enforcement. The Convention only suggests that the court *may* refuse enforcement if conditions in Article V of the Convention are met.

Prominent writers stipulate that Article V(1)(e) of the Convention allows courts to refuse recognition of annulled awards, but the way it is drafted shows that such refusal is neither required nor mandatory. Additionally, Article VII provides that the 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 country where such award is sought to be relied upon."[15]

Hence, the language of the Convention leaves the decision on whether and when to enforce awards that have already been annulled, up to the courts' discretion.

In scholarly writings, there are various opinions on whether the annulled awards should be enforced and if so – when. Generalized, the opinions are usually categorized into three main theories, based on the main arbitration theories: The Territorial, Westphalian and Transnational Theories.

The Territorial theory suggests that the award is a part of the national legal order of the state where it was issued. Hence, if that state decides to annul the award, it then ceases to exist. Albert Jan van den Berg has stated that "if the arbitral award has been set aside in the country of origin, foreign courts are bound by that decision. In that case, they must refuse recognition and enforcement of the award."[16] Some authors propose that "*ex nihilo nil fit*" – once the award is annulled, it does not exist anymore. And what does not exist, cannot be enforced.[17] This theory is quite strict and raises the question of why does the court of the arbitral seat have such great power as to eliminate an award from an international legal order.

The Transnational theory suggests quite the opposite – the award is issued in an autonomous legal order, thus the national decision to annul the award has no bearing internationally. If an award is not part of the national legal order, a national court cannot render the award non-existent. An annulment decision, thus, is barely considered. This theory suggests that the annulment decision should be followed if grounds for annulment conform with the standards, applicable in the state where enforcement is sought.[18] In essence, the annulment decision should be followed only if the grounds for annulment

[14] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (the New York Convention) art V.

[15] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 346.

[16] Albert Jan van den Berg, 'When Is an Arbitral Award Nondomestic under the New York Convention of 1958' (1985) 6 Pace L Rev 25, 42.

[17] Clifford J. Hendel and María Antonia Pérez Nogales, 'Chapter 12: Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations', in Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges*, (Kluwer Law International 2019) 187, 189.

[18] Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) 3636-3637.

are the same as grounds for non-enforcement. This theory raises the question of why at all the annulment proceedings are relevant and why Article V(1)(e) exists if the enforcing court, in any case, looks at the existence of conditions set out in V(1)(a)-(d).

Lastly, the Westphalian (or multi-local) approach, where the enforcement of the award is mainly based on internationally recognized standards.[19] Hence, the enforcement of the annulled award may proceed if, e. g. the decision to annul the award could not in itself be recognized and enforced or the annulment was performed against the internationally accepted principles.[20]

The decisions of state courts also vary and tend to follow the three approaches.

During the years of application of the Convention, the French courts have earned a reputation of being highly pro-arbitration. In most cases, the French courts disregard the annulment decision and still enforce the award in accordance with the conditions set out in the Convention.[21] Hence, the approach of French courts is mainly Transnational.

In the famous *Cromalloy* case, the Paris Cour d'appel reasoned that "The award made in Egypt is an international award which, by definition, is not integrated in the legal order of that State so that its existence remains established despite its being annulled and its recognition in France is not in violation of international public policy."[22] Hence, the reasoning of the court is based on a specific status of the arbitral award – even though the award is issued in one state, it is still a part of the international legal system, instead of the national legal order, thus, consequences of the annulment of the award in national legal order cannot extend to the whole international domain.

Many other European courts follow a similar path to that of the French courts and one can expect the award to be enforced regardless of its annulment in another state.[23]

Some examples, resembling the multi-local approach, seem to be more clearly reasoned. In the United States, the courts are rather more conservative, than in Europe and look more stringently to enforcement of awards that have been annulled. A good example of the U. S. position and generally good reasoning advocating for enforcement of annulled awards is described in also the *Cromalloy* case (the same award, annulled in Egypt, was further enforced in France and the U.S.). The U.S. court in the *Cromalloy* case discussed that: (i) the Convention does not forbid enforcement of an annulled award; (ii) Articles VI and VII clearly show that such enforcement is possible; (iii) in the context of private international law, the court should look at both: an award and the annulment decision; (iv) if the annulment decision violates public policy (e. g. as in the *Cromalloy* case, the Egyptian court performed a detailed judicial review of the award, which is not acceptable in the U.S.), it can be disregarded and the award can be enforced. Further jurisprudence of the US courts (e. g. *Baker Marine Ltd v. Chevron Ltd; Martin I. Spier v. Calzaturificio Tecnica*) indicates that a party, seeking enforcement of the annulled award, should provide evidence that the annulment decision is flawed.[24]

The Dutch courts have previously enforced a famous *Yukos* award after it was annulled at the seat,[25] but the more recent decision of 2017 is also worth mentioning. The Netherlands Supreme Court refused recognition and en-

[19] Jan Paullson, 'Enforcing Arbitral Awards Notwithstanding Local Standard Annulments' (1998) 6 Asia Pacific Law Review 1.

[20] Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) 3637.

[21] Gary B. Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) 346.

[22] *Ibid,* 346-347.

[23] Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) 3628-3629.

[24] Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) 3631.

[25] Hans Smit, Annulment of an Arbitral Award and its Subsequent Enforcement: Two Recent Decisions (2008) The American Review of International Arbitration 190.

forcement of an arbitral award, issued in Russia, and subsequently annulled by Russian courts. The decision of the Netherlands Supreme Court gave some sound guidance for enforcement of an annulled award. The court described that the courts have a certain margin of appreciation to enforce an annulled award, but this discretion shall be enjoyed within certain boundaries. Special circumstances, allowing enforcement of an annulled award may exist when: the award was annulled in accordance with national laws, that are not listed in Article V of the Convention *and* those grounds are also not in accordance with international standards. Enforcement can also be allowed if annulment decision would not reach a threshold of standards of recognition of foreign judgments.[26]

There have indeed been also examples of court decisions, implementing a Territorial approach and refusing to enforce an annulled award simply because it is 'no longer binding".[27] For example, Spanish courts would probably tend to refuse enforcement of an annulled award.[28] However, as Gary Born has put it, "[t] hese decisions have generally contained little analysis, but apparently rest on the (mistaken) notion that an award ceases to exist when it has been annulled in the arbitral seat."[29]

It is evident, that there certainly is some confusion towards the enforcement of an annulled award. If an annulment is not relevant – why such a notion exists and why is it included in Article V(1)(e) of the Convention? If an annulment is enough to strike the award out from the legal order everywhere in the world, how does it withstand the importance of the initial will of the parties and a notion of arbitration as a special legal regime, not tied to any of the national legal orders? And should the more balancing approach be adopted?

III. A LEAN TOWARDS THE COMPROMISE

It is commonly agreed that the finality of an arbitral award is an important or even vital feature of international arbitration.[30] Some of the reasons why parties choose arbitration are the efficiency, effectiveness, and in a certain way – resistance to some negative features of national courts, e. g. bias, based on nationality. Parties, choosing international arbitration may want to avoid their dispute being handled by national courts. That is also the reason why a further review of the arbitral awards should be strictly limited – it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances. Thus, a subsequent annulment of the award, if given an *erga omnes* effect, might deprive parties of their initial intention to avoid interference by national courts.

On the other hand, a possibility to annul the award was mentioned in the Convention not coincidentally. Some authors point out that the preparatory documents of the Convention do not suggest that the intention of the word *may* in Article V of the Contention allows for a complete discretion of the national courts.[31] Some authors even suggest that when the Convention was drafted, "it was clear that an award annulled by the court of the seat could not be

[26] Mathieu Raas and Robert J. van Agteren, 'The Netherlands: Enforcement of Annulled Awards', (*Global Arbitration News*, 4 April 2018) <https://globalarbitrationnews.com/the-netherlands-enforcement-of-annulled-awards/> accessed 3 April 2021.

[27] Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) 3635.

[28] Clifford J. Hendel and María Antonia Pérez Nogales, 'Chapter 12: Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations', in Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges*, (Kluwer Law International 2019) 187, 188.

[29] Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) 3635.

[30] Clifford J. Hendel and María Antonia Pérez Nogales, 'Chapter 12: Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations', in Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges*, (Kluwer Law International 2019) 187.

[31] *Ibid*, 192.

enforced in another country as, once vacated, it no longer exists and its enforcement would be against the public policy of the country of the seat"[32]. The Territorial approach indeed allows for certain predictability of the international arbitration framework.[33] What relevance does the annulment have if it only has power in the state, where an annulment occurred? Complete discretion of the enforcing courts creates a situation, where the award creditor may go around the world fishing for a place where the award is enforced, creating lengthy and costly litigation for the award debtor, who has already achieved an annulment of that award.

Thus, both main approaches have significant flaws. Some authors suggest that this clash might even cast doubt over the attractiveness of arbitration or shake the principles of the very nature of arbitration.[34] The disapproval and the confusion in the interpretation of the Convention call for a more balanced solution, or some more brave decisions, suggested by various scholars.

It shall be noted that the relationship between the annulment decision and enforcement decision also has to be looked at from the perspective of the private international law provisions. First of all, the question is whether the annulment decision is binding on the court where the enforcement is sought. A positive answer to this dilemma would mean that a foreign court's decision has some precedence over the court of another state, which "would run against the sovereign power of this court to rule on the efficacy of the arbitral award."[35] Every state has a sovereign power to decide the matter on its own terms.[36] As a general rule, the domestic court's decision has no legal power in another state, unless it undergoes a procedure of recognition, based on the rules of international law (multilateral of bilateral agreements between the states) or national law (applicable national private international law rules). There are some exceptions to this general rule, e. g. towards the mutual recognition of judgments within the EU, however, this mutual recognition is not relevant to decisions on annulment or enforcement of an arbitral award (the EU Brussels I *bis* regulation "should not apply <…> to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.")[37]. In fact, "most international legal instruments specifically exclude the recognition and enforcement of court judgments related to arbitration".[38]

It is argued, in comparison, that the enforcement decision has no power over the courts of other states, thus why the annulment decision then should carry a much broader international effect.[39]

Because the decision to annul an arbitral award, as a general rule, is not automatically binding (or even has no legal power) in another state, does not mean, though, that it should not be respected. Some authors suggest that annul-

[32] *Ibid*, 190.

[33] Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?' (2014) 31 Journal of International Arbitration 575, 596.

[34] Clifford J. Hendel and María Antonia Pérez Nogales, 'Chapter 12: Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations', in Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges*, (Kluwer Law International 2019) 187, 188.

[35] Clifford J. Hendel and María Antonia Pérez Nogales, 'Chapter 12: Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations', in Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges*, (Kluwer Law International 2019) 187, 192.

[36] Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?' (2014) 31 Journal of International Arbitration 575, 607.

[37] Regulation of the European Parliament and of the Council (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351 1 recital 12.

[38] Dinis Braz Teixeira, 'Recognition and Enforcement of Annulled Arbitral Awards under the New York Convention' (2019) VIII Indian Journal of Arbitration Law 1, 33.

[39] *Ibid,* 8.

ment decisions can be categorized into local and international: if the annulment decision is based on grounds set out in Article V of the Convention of the Model Law, it conforms with international standards and thus be respected. On the other hand, if the annulment is based on exceptionally local norms, such a decision can be looked at more carefully, before given an effect in another state.[40]

While the Convention left a confusion between the annulment and enforcement proceedings, which by some authors is expressed as a regret that the awards are not protected from "unjustified annulments by defining the grounds upon which an award may be set aside in the home jurisdiction",[41] the question was intended to be resolved by the European Convention on International Commercial Arbitration ("**European Convention**"). There are currently 31 parties to the European Convention[42] and has much less significance in the world of arbitration, compared to the Convention. However, the guidance in the European Convention might work as a good foundation for a more unified approach. Article IX of the European Convention sets limits on the power of the annulment decision and states that the enforcement may be refused only if the annulment was based on these reasons: (i) invalid arbitration agreement; (ii) proceedings in breach of a right to be heard; (iii) award deals with matters outside the scope of the arbitration agreement; (iv) tribunal's composition or proceedings not in accordance with the parties' agreement. Under the European Convention, enforcement may be refused solely in the listed cases of setting aside, which are, in fact, the same as grounds to refuse enforcement, regardless of the existence of an annulment award. Such an approach is supported by some scholars in the arbitration field.[43]

Thus, while the approach of the European Convention might set some guidance, it is flawed in the sense that the annulment decision becomes irrelevant. If an annulment is only relevant on grounds when enforcement can be denied, then the enforcement court should reach the same decision whether an annulment decision exists or not (presuming that the analysis and reasoning conform).

A truly balancing approach might be the one, accepted by the Netherlands Supreme Court, as discussed above. The annulment decision should be respected if the annulment decision could withstand internationally accepted grounds for recognition of foreign decisions (e. g. fundamental rules of the procedure were followed) and reasons for the annulment are internationally acceptable (even though outside the scope of Article V(a)-(d) of the Convention).

While the balancing approach must be searched for, the differing opinions may confuse until they are resolved by unanimous international rules. Some authors are arguing for the amendment of the Convention "to adapt to the needs and wishes of the international community".[44] A thorough review of the Convention might contribute to discuss various approaches and propose a balanced international mechanism.[45] Other authors suggest that the best solution is to establish an international body

[40] Dinis Braz Teixeira, 'Recognition and Enforcement of Annulled Arbitral Awards under the New York Convention' (2019) VIII Indian Journal of Arbitration Law 1, 29-30.

[41] Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin. The French and U.S. Experience' (2009) 26(2) Journal of International Arbitration 267, 269.

[42] 'Status of Treaties' (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en> accessed 3 April 2021.

[43] Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin. The French and U.S. Experience' (2009) 26(2) Journal of International Arbitration 267, 290.

[44] Dinis Braz Teixeira, 'Recognition and Enforcement of Annulled Arbitral Awards under the New York Convention' (2019) VIII Indian Journal of Arbitration Law 1, 26.

[45] Nadia Darwazeh, 'Article V(1)(e)', in Herbert Kronke, Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 301, 344.

that would be assigned to deal with the annulment of arbitral awards, based on internationally accepted standards and thus, binding on national courts, asked to enforce an annulled award.[46] However, an international standard can be reached only if enough stage for elaborated discussions is given.

CONCLUSION

Unfortunately, as of today, the destiny of an arbitral award, annulled at the seat, is still not clear. In some states, such an award might still be enforced, but in others – the award is considered non-existent.

This discrepancy not only may cause some mistrust in the effectiveness of arbitration, but also might cost much time and money to the parties. An award debtor will invest its resources in the annulment proceedings, which may be irrelevant and have no practical effects in another state, where the award is enforced. An award creditor might face a bizarre annulment decision, which might interfere with the proper enforcement of an arbitral award. No one is completely satisfied with such a situation.

There are authors who argue that annulment should be the end of the award. Others argue that annulment is only relevant if based on the same grounds and reasons for non-enforcement. However, the balancing approach might be the solution: the annulment decision is not automatically given effect, but also not automatically disregarded. The annulment decision should be analyzed at the same time as the award and looked at from the perspective of international grounds for a refusal to enforce an award and standards for proper adjudication in private international law. The balanced approach would still need to be unanimously accepted, whether it is an international treaty (e. g. amendment to the Convention), or an establishment of a new international body for annulment of arbitral awards.

[46] Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?' (2014) 31 Journal of International Arbitration 575, 604-607.