Department of Law
Fall Term 2017

Master’s Thesis in Arbitration Law
30 ECTS

Enforcement of Annulled Arbitral Awards

A Study on the Enforcement of Annulled Foreign Arbitral Awards under the 1958 New York Convention from a Swedish Perspective

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Abstract

Different interpretations of the New York Convention’s Article V(1)(e) have caused inconsistencies regarding how courts deal with applications for enforcement of annulled foreign arbitral awards. Court cases from various Contracting States display that the courts have adopted different approaches to this matter. With the rising number of challenges of awards, the issue has become increasingly important. The author examines international case law to analyze the issue of enforcement of annulled arbitral awards with the purpose of suggesting a possible Swedish approach. A number of aspects support the view that national courts have discretion when deciding whether to enforce a foreign arbitral award notwithstanding that has been annulled in the country of origin. Both the New York Convention and the Swedish Arbitration Act leaves narrow room for the court to exercise this discretion. The author suggests that enforcement of an annulled foreign arbitral award should be possible in Sweden under certain exceptional circumstances. If the competent authority in the country where the award was made annuls the award for reasons totally unacceptable from a Swedish point of view, the option to enforce the foreign arbitral award in Sweden should still be available. This approach is in line with the wording and purpose of both the New York Convention and the Swedish Arbitration Act. The suggested Swedish approach would not cause any serious uncertainty for the parties to the arbitration, but would create a necessary safety-valve for the courts to avoid having to refuse enforcement of a foreign arbitral award when it has been set aside for obscure reasons or by a corrupt court. As is evident from international case law, the interpretation and application of Article V(1)(e) of the New York Convention varies depending on what country enforcement is sought. To avoid contributing to further inconsistencies, it is necessary for Swedish authorities and practitioners to consider the issues addressed in the study.
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# Abbreviations

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<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
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<td>ECA</td>
<td>European Convention on International Commercial Arbitration</td>
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<td>FAA</td>
<td>Federal Arbitration Act</td>
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<td>Geneva Convention</td>
<td>Convention on the Execution of Foreign Arbitral Awards (1927)</td>
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<td>Geneva Protocol</td>
<td>Protocol on Arbitration Clauses (1923)</td>
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<td>Govt. bill</td>
<td>Government bill (Sw: Proposition)</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ISA</td>
<td>International Standard Annulments</td>
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<tr>
<td>LSA</td>
<td>Local Standard Annulments</td>
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<tr>
<td>NCCP</td>
<td>New Code of Civil Procedure</td>
</tr>
<tr>
<td>NJA</td>
<td>Nytt Judridiskt Arkiv</td>
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<tr>
<td>NYC</td>
<td>Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)</td>
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<td>SAA</td>
<td>Swedish Arbitration Act (Sw: Lag (1999:116) om skiljeförfarande)</td>
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<td>SCC</td>
<td>Arbitration Institute of the Stockholm Chamber of Commerce</td>
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<td>SOU</td>
<td>Statens offentliga utredningar</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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1 Introduction

1.1 Background

Over the past decade, international arbitration in Sweden has become increasingly popular. Thanks to a number of brilliant Swedish and international legal scholars, and the work of the Arbitration Institute of the Stockholm Chamber of Commerce, arbitration has become the preferred method of solving international commercial disputes in Sweden.\(^1\) Sweden has a long history of handling international disputes, especially cases involving Eastern and Western States. Sweden has also long been an active participant in the work of developing and advancing international commercial arbitration. As an example, during the second half of the 1900s, the Swedish pioneer Judge Gunnar Lagergren, was one of the world's top international arbitrators and he helped develop the field of international arbitration both in Sweden and internationally.\(^2\) One of the most active participants in the debate regarding the topic of this study, enforcement of annulled arbitral awards, is also of Swedish descent: Professor Jan Paulsson. His views and contributions to the development of international arbitration has been a great inspiration in writing this thesis. As the field of international arbitration evolves, Sweden must continue to pay close attention to the developments in the rest of the world in order to be prepared when issues arise in our own jurisdiction.

It is often difficult to close a major international commercial agreement without a provision stipulating arbitration.\(^3\) This is much thanks to the neutrality and confidentiality of the arbitral proceedings, the possibility for the parties to choose arbitrators who are experts in a specific field and more importantly, the possibility to, without difficulties, enforce arbitral awards in

\(^2\) Gunnar Lagergren was active in the international arbitration arena 1949-2006 and is considered to be one of the most highly regarded international arbitrators in modern history. One of the most memorable cases in which Lagergren was involved was a commercial dispute in Argentina where he refused to render an award because both parties in the dispute had taken part in bribery of Argentinian officials, ICC Case No. 1110 (See Hobér (2011). *International commercial arbitration in Sweden*, p. 59 for further comments on the case). For a comprehensive bibliography of Gunnar Lagergrens life, see Johnson (2017). *Skiljedomens ädla konst: Gunnar Lagergren - internationell domare för handel, fred och mänskliga rättigheter*.

Generally, recognition and enforcement of a foreign arbitral award is a rather painless and uncomplicated matter. Internationally, very few cases where a party seeks enforcement or recognition of a foreign arbitral award have been rejected by the courts. In fact, more times than not, international arbitral awards are voluntarily complied with. If the losing party in an arbitration proceeding voluntarily complies with the arbitral award, there is no need for the winning party to seek to enforce the award. However, as will be discussed below, enforcement and recognition of foreign arbitral awards can occasionally cause problems internationally.

The focus of this study is on the international discussion and case law on enforcement of annulled foreign arbitral awards. The question of whether or not the setting aside of an award is a mandatory ground for refusal of enforcement under the New York Convention has caused a lively debate between legal scholars in the arbitration field. Courts in various countries have come to different solutions on this matter and this has caused inconsistencies on the international arbitration scene. However, the problems arising from this issue have yet to be dealt with by Swedish courts. In this study, the author will examine the history and purpose of international arbitration and the New York Convention, the case law concerning enforcement of annulled foreign arbitral awards and analyze the issues from a Swedish perspective.

The issue of enforcement of annulled arbitral awards may not be the most common item on a national court's agenda. Nevertheless, it is an important issue that raises questions about some of the core objectives of the New York Convention and the harmonization of international arbitration law. As the issue of enforcement of annulled foreign arbitral awards has been actualized in courts in a number of countries, it is important to also analyze the issue

from a Swedish perspective. When the day comes that a Swedish court is faced with the question of whether or not to grant enforcement of a foreign arbitral award that has been annulled in the place of origin, the issues discussed in this study needs to be considered.

1.2 Aim of the Study

International commercial arbitration is, and has been for a long time, an important part of the mechanics of making international trade function efficiently. Every contract of importance, especially ones concerning international relations, should include a dispute resolution clause that decides what will happens if a dispute arises out of or in connection to the contract. If the parties choose to settle their dispute by arbitration it is essential that there is a system in place to handle all aspects of this process. One of the most important aspects of this system is the enforcement of the arbitral award. With the increasing number of challenges of awards, the situations in which a party will try to enforce an annulled arbitral award may become more common.

The aim of this study is to examine how the drafting history and purpose of the New York Convention has affected its interpretation in different ways in various Contracting States. By analyzing how cases regarding enforcement of annulled foreign arbitral awards have been dealt with by courts in various countries, the author aims to map out the two main approaches that have arisen concerning this matter. Furthermore, the aim of the study is to examine how Swedish courts could, and should, handle an application to enforce an award set aside in the seat of arbitration.

The reason for conducting an international outlook is that the history and development of arbitration in Sweden is much influenced by international instruments and the case law concerning them. It is important for Swedish practitioners and authorities to understand the complex questions raised by this issue and how they have been answered in other Contracting States to the New York Convention. In order to not undermine the system for enforcement of foreign arbitral awards and cause uncertainty regarding the interpretation of the New York Convention, each Contracting State, including Sweden, must consider these issues.
The questions this study aim to answer are firstly: How have courts in other Contracting States handled cases regarding enforcement of annulled arbitral awards, and how have the courts reasoned when deciding on the matter? The answer to this question might, at first glance, appear to be a mere descriptive one. However, the New York Convention is an instrument ratified by over 150 different States that all have their own judicial history and legal order. This in turn means that the interpretation of the New York Convention will inevitably differ in some degree depending on the jurisdictions. These differences are of great interest as they concern the very heart and purpose of the New York Convention.

Secondly, this study will analyze the question of how a Swedish court should decide when faced with an application of enforcement of an annulled foreign arbitral award in Sweden. Are the grounds for non-enforcement of foreign arbitral awards mandatory or permissive under the Swedish Arbitration Act? Based on international case law and the interpretation of the Swedish Arbitration Act, is there a possible Swedish approach?

Lastly, the identifying of problems and inconsistencies caused by differing approaches to the enforcement of annulled arbitral awards also calls for a discussion regarding the possible solutions to these problems. Legal scholars have given their view on how to deal with these issues and some have proposed alternative ways of handling them in the future. What are these proposals and how could this help to further improve the facilitation of fast and efficient enforcement of foreign arbitral awards?

1.3 Delimitations

Recognition and enforcement of foreign arbitral awards is a deceivingly big and complex area of arbitration law. Consequently, not all aspects of this field will be covered in this study. For example, issues regarding sovereign immunity in relation to enforcement of arbitral awards is an interesting topic, but will not be dealt with within the frames of this study. In this study the author will limit the discussion to the issues surrounding Article V(1)(e) of the New York Convention and Section 54(5) of the Swedish Arbitration Act (“SAA”).
These provisions regulate under what conditions enforcement may be refused due to a decision of a court setting aside an award. Naturally, the award has to have been set aside by a competent authority in the country where it was made for the provisions to come into play. The various conditions under which an award may be set aside is, however, not the focus for this study. The discussion is instead limited to the effects of the decision to set aside rather than the procedure leading up to the annulment-decision.

To illustrate the two main approaches on the issue of enforcement of annulled arbitral awards, international case law will be used as examples. The issue has been dealt with in a number of jurisdictions, but the cases that have given rise to the most attention are ones from the US and France. Therefore, the focus for the analyze will primarily be on the more frequently debated cases from these two countries.

1.4 Methodology and Materials

1.4.1 General Remarks

Throughout law school, law students in Sweden are mainly taught to approach legal issues by using the so called legal dogmatic method (Sw: Rättsdogmatisk metod). This is a method focusing on trying to find a solution or alternative approach to a legal problem by searching for the answer in the law, case law, preparatory works and legal writings. The method most commonly starts with finding an existing problem, and then analyzing it to find a practical solution to it. This is the method applied in this study.

However, in international commercial arbitration the legal dogmatic method is no entirely applied in the same way as when conducting research on the Swedish legal system. It is made clear from the name that international commercial arbitration is “of international nature”. Every nation has their own provisions and views regarding arbitration which in turn means

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that the content of different national laws on arbitration can look very different.\textsuperscript{7} Another aspect causing research on international commercial arbitration to be extra difficult is the existence of a vast variety of private arbitration institutes and arbitration rules. For example, the International Chamber of Commerce (“ICC”), the American Arbitration Association (“AAA”) and the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) all have their own arbitration rules. The parties to international arbitration are free to refer their dispute to any of these institutions, or agree on ad hoc arbitration.

Furthermore, one of the fundamental principles of arbitration is party autonomy. The legislation and treaties governing the arbitral proceedings are very much structured to enable the parties to shape the procedure themselves. This means that international instruments and national legislation very rarely provide all the answers. Every arbitration procedure will look different and the parties may shape the process to fit their preferences. The parties may agree on what law that shall be applicable and decide where the arbitration proceedings will take place. Clearly, arbitration is a very complex area of law and when studying it, one may need to examine several different legal orders and institutional rules. As this study will examine how issues regarding annulled arbitral awards could be approached by Swedish courts, soft law, international treaties and case law from primarily France and the US will play an important role.

When applying legal dogmatic method, much knowledge can be found by examining other countries ways of solving legal problems. There might not be just one solution to a problem. Analyzing how other jurisdictions have handled these problems will enable Sweden to improve its own legal system by learning from these different solutions. The issue of enforcement of annulled foreign arbitral awards is very much a theoretical problem for Sweden. It has yet to become a real issue in practice. However, one cannot disregard the possibility of the problem arising in the future. By analyzing the arguments put forth by courts in other jurisdictions, the chances of finding the most suitable solution for Sweden increases.

When Sweden adopts new private law legislation of importance it will often be preceded by a thorough review of how the relevant questions have been addressed and handled by other countries and foreign legal systems. Furthermore, modern Swedish arbitration literature contains extensive references to international materials. By analyzing international doctrine and case law, Swedish authorities can evaluate the pros and cons of solutions to problems found in foreign law and thereby cherry-pick the best of those approaches to create more efficient legislation and produce more well-reasoned court decisions.

International commercial arbitration has a long history in the world. It has evolved from being a way of dispute settlement available for only the elite groups in society to an easy accessible private dispute mechanism available to both small business owners and the general public. To understand international commercial arbitration, it is important to understand how it came to be what it is today. The importance of history in the field of international commercial arbitration is reflected in this study in the chapters on the history and purpose of both Swedish arbitration legislation and the New York Convention.

1.4.2 Material

When discussing the topic of enforcement of foreign arbitral awards in international commercial arbitration, the New York Convention, the case law concerning it and the international discussion amongst practitioners and legal scholars are the main sources of knowledge and inspiration.

Two other important international instruments are the UNCITRAL Arbitration Rules and the UNCITRAL Model Law. These instruments provide some of the basic principles of arbitration law and were created with the intention to try and harmonize international arbitration around the world. In this study, the UNCITRAL Model Law is occasionally used to shed light on, and provide assistance when going about interpreting Swedish arbitration legislation and the New York Convention.

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In international commercial arbitration, scholarly legal articles are considered to carry weight of high regard.\textsuperscript{10} Many of the articles used in this study are written by legal writers who are current or former practitioners in international commercial arbitration. Some of them are even occasionally referred to as the founding fathers of the New York Convention, as they were key figures in the drafting of the New York Convention.\textsuperscript{11} Their opinions and view on issues discussed in this study are valuable as they give detailed information on specific issues.

As there are no Swedish precedents regarding the issue discussed in this study, international case law becomes more important. However, some of the most highly regarded Swedish legal scholars have discussed the issue of enforcement of annulled awards in Sweden briefly. Naturally, their opinions are considered important in this study.

### 1.5 Terminology

#### 1.5.1 Enforcement v. Recognition

After an arbitral award has been rendered, a party to the arbitration may wish to seek either enforcement or recognition of the award. In international arbitration, a distinction is made between the recognition of an award on the one hand, and the enforcement of an award on the other. However, if an award is declared enforceable, this also generally entails that the award is recognized.\textsuperscript{12}

Recognition of an award is exactly what it sounds like. It is simply the matter of acknowledging the existence of the arbitration and recognizing an arbitral award as having legal effect in the jurisdiction where recognition is sought.\textsuperscript{13} After an award has been granted recognition, enforcement may be sought separately. Furthermore, if an award is recognized, the award gains \textit{res judicata} effect for subsequent claims regarding the same issue ruled

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\textsuperscript{11} See e.g., Professor Pieter Sanders.


\textsuperscript{13} Lew, Mistelis & Kröll (2003). \textit{Comparative international commercial arbitration}, p. 690.
If a party chooses to seek only recognition of an award, this may generally be perceived as a defensive action.\textsuperscript{15}

If recognition is described as a defensive action, enforcement could be described as an offensive action. If the losing party to an arbitration refuses to voluntarily perform in accordance with the award, the winning party may then seek to enforce the award in a national court. This basically means that the winning party will ask the court to declare the award enforceable, which will allow the Enforcement authority to apply the available legal sanctions to compel the losing party to comply with the award. Enforcement may often include seizure of property, bank accounts and other assets.\textsuperscript{16} When an award is granted enforcement by a Swedish national court, this entails that the award is given the same legal effect as a final judgement of a national court, thus authorizing the Enforcement Authority to carry out the enforcement.\textsuperscript{17} As stated in Section 56 of the SAA, applications for recognition and enforcement of arbitral awards are to be made to the Svea Court of Appeal.

1.5.2 Domestic v. Foreign Arbitral Awards

As this study concerns enforcement of foreign arbitral awards, it is important to understand the difference between a domestic and a foreign arbitral award. Under the SAA, a distinction is made between domestic (Swedish) and foreign arbitral awards with respect to their recognition and enforcement. The SAA does not contain any provisions regarding the recognition and enforcement of domestic arbitral awards. Instead, it is stipulated in the Enforcement Code\textsuperscript{18} that a valid arbitral award may be enforced as a final and binding judgement from the court.\textsuperscript{19} Foreign arbitral awards, however, are enforced in accordance with the New York Convention, as incorporated into Sections 52-60 of the SAA.

\textsuperscript{15} Blackaby & Redfern (2015). Redfern and Hunter on international arbitration, p. 611.
\textsuperscript{17} Lew, Mistelis & Kröll (2003). Comparative international commercial arbitration, p. 690
\textsuperscript{18} Sw: Utsökningsbalk (1981:774).
\textsuperscript{19} Enforcement Code, Chapter 3, sections 15 and 18.
As set out in Section 52(1) of the SAA, the determining prerequisite for a foreign arbitral award is that it is “made abroad". This corresponds to Article I(1) of the NYC, which states that the New York Convention applies to awards that are “made” outside of the country where enforcement is sought. The questions as to where an award is considered made is answered in Section 52(2) of the SAA. It states that an award is considered to have been made in the country where the place of arbitration is situated. Additionally, the dominant criterion for where an award is considered to have been made is internationally recognized as the location or the place of arbitration.

1.5.3 Annulled v. Set Aside

In this study, the use of the words annul, set aside or vacate are used interchangeably to describe the process in which an arbitral award has been successfully challenged in court. However, as this study's focus is on the enforcement of "annulled" arbitral awards, this is the most frequently used word describe a nullified award.

Most jurisdictions provide limited conditions under which an award can be challenged. In Sweden an award may only be set aside or declared invalid under the conditions set out in Section 33 and 34 of the Swedish Arbitration Act. Due to the fact that most arbitration legislation treats awards as presumptively valid, only exceptional circumstances may legitimate the setting aside of an award.

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20 Sw: ”En skiljedom som meddelas utomlands anses som utländsk.”
21 According to the travaux préparatoires to the SAA, the determining factor is where the arbitral proceedings have taken place, see Govt. Bill 1998/99:34, p. 198. In cases where the place of arbitration cannot be determined, some legal scholars, and also the travaux préparatoires, suggest a presumption that the locality of the arbitral proceedings stated in the arbitral award should determine the nationality of the award, unless particular circumstances point to another locality, see Lindskog (2012). Skiljeförfarande: En kommentar, p. 1156.
22 Lew, Mistelis & Kröll (2003). Comparative international commercial arbitration, p. 690. See also Article 18(1) of the UNCITRAL Arbitration Rules: “The award shall be deemed to have been made at the place of arbitration”. For an in-depth analysis of the issue of determining the place where an award is made, see Born (2001). International commercial arbitration: Commentary and Materials, p. 760 et seq., and F.A. Mann, Where is an award "made”? 1 Arb. Int'l (1985) pp. 107-108.
The consequence of an award being annulled or set aside is that it loses its legal effect in its forum. It is important to understand that the legal effects of an award being annulled is different to when an award is denied recognition or enforcement. The action of seeking recognition or enforcement of an award is a process concerned with giving legal effect to the award in the country where it is sought.\textsuperscript{24} When an award is denied recognition or enforcement in one jurisdiction, it may continue to be final and binding upon the parties, and enforcement and recognition can thus be sought elsewhere.\textsuperscript{25} However, as will be discussed below, there are different views as to whether or not a properly vacated award completely ceases to exist internationally, meaning that the award cannot (or should not) be recognized and enforced in another country after its annulment in the country where it was made.

### 1.6 Outline

The reader will initially be given a historical overview of international commercial arbitration in Sweden and the events during the 1900s leading up to the 1999 Swedish Arbitration Act and the incorporation of the New York Convention are discussed. The basic structure and purpose of the New York Convention is discussed in chapter 3. In chapter 4 the discussion narrows down to focus on Article V(1)(e) of the New York Convention and the matter of whether or not the setting aside of an award should be seen as an action eliminating the award from the international scene. The core of the issue revolves around the language of Article V(1) of the New York Convention and more specifically, the use of the term "may".

Chapter 5 maps out the two different approaches to the enforcement of annulled arbitral awards: the delocalized approach and the territorial approach. Five cases from the US and France are discussed to illustrate the reasoning behind the two approaches. Following this discussion, the author compares the Swedish Arbitration Act with the New York Convention and discusses if the relevant Section of the SAA should be read as permissive or mandatory. A possible Swedish approach to the issue of enforcement of annulled arbitral awards is suggested and discussed.

The last two chapters of the study are dedicated to a discussion on the possible future developments of the system for enforcement of foreign arbitral awards, and a summary of the discussions and conclusions made in the study.
2 International Commercial Arbitration in Sweden

2.1 A Brief Historical Overview

In Sweden, arbitration has long been the preferred way of solving commercial disputes. As a matter of fact, arbitration as a method of solving commercial disputes was used long before state courts were introduced. References to arbitration, or more correctly, provisions allowing parties to refer their dispute to "entrusted persons", can be found in legislation dating back to the 14th century. When taking an even broader perspective and looking at the old cultures in Europe, mentions of arbitration can be found in ancient Greek and Roman history dating as far back as approximately 800-700 B.C.

In the early years of arbitration there were no provisions governing the arbitral proceedings. However, as the interest from private parties and the State grew stronger, the work towards establishing a legal framework for arbitration began. In the 19th century a number of steps were taken towards creating a Swedish act on arbitration. Consequently, in 1887 a proposal for such an act was approved by the Parliament. On 28 October that same year, the 1887 Arbitration Act saw the light of day. By recognizing the legitimacy of arbitration, and allowing a valid arbitration agreement to act as a bar to court proceedings, the Swedish State began to expand its trust in parties to settle their own disputes in a private matter.

The rise of a number of practical problems with the 1887 Arbitration Act eventually led to a process where the Parliament adopted a new arbitration act: the 1929 Arbitration Act. The Act survived for 70 years before it was replaced by a new, more comprehensive and

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27 Visby Town Law, established in the mid-1300s (Sw: Visby stadsflag). See also, SOU 1994:81, p. 55.
28 For a more comprehensive overview of the history of arbitration in connection to Sweden, see Madsen (2006). *Commercial arbitration in Sweden*, pp. 5-16.
29 See NJA II 1887 No. 4.
31 Sw: Lag (1929:145) om skiljemän. See also the travaux préparatoires: NJA II 1929.
internationally suitable legislative act: the 1999 Swedish Arbitration Act ("SAA").\textsuperscript{32} The 1929 Arbitration Act was considered to have worked well, but over the 70 years that had passed, international trade and the global economy had advanced and become more complex. It became apparent that this called for a new legislative act that could handle the new types of international and domestic disputes arising from this development.\textsuperscript{33} At the time of writing, the SAA remains the governing act on arbitration in Sweden.\textsuperscript{34}

During the preparations for establishing the SAA, deliberations were held regarding the extent to which the new legislation should build on the UNCITRAL Model law.\textsuperscript{35} The conclusion was that the Model law was to serve as an important source of inspiration, but it was not to be implemented as a whole.\textsuperscript{36} Accordingly, the SAA is much inspired by the Model law, but it also perpetuates many of the features of the 1929 Arbitration Act which gives it a special character. However, when going about understanding the SAA, especially provisions dealing with international commercial arbitration, the Model law can serve as a great tool as the provisions of the Model law were paid great attention when drafting the SAA.

As for the enforcement of arbitral awards, the Enforcement Code of 1734 contained a provision stating that if parties had referred their dispute to entrusted persons and renounced the option to appeal the decision, the decision rendered by those entrusted persons could be enforced.\textsuperscript{37} The issue of enforcement of foreign arbitral awards was not dealt with in the early legislation on arbitration. It was not until Sweden's accession to the Geneva Protocol of

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32 & Sw: Lag (1999:116) om skiljeförfarande. \\
33 & Govt. Bill 1998/99:35, p. 43. \\
34 & In 2015, a committee of experts in the field of arbitration were commissioned by the Government to undertake a closer review of certain issues in connection to the SAA. One of the primary interests was to examine how to make Swedish arbitration more attractive for both domestic and foreign parties and arbitrators. The report suggested a number of amendments to the SAA, e.g. that English could be used as the language of proceedings in applications for setting aside awards, and for consolidation of several arbitral proceedings to be possible in certain circumstances. It was proposed that the new legislation should enter into force on 1 July 2016. However, the report has not lead to the drafting of a government bill and the proposed amendments to the SAA has yet to enter into force. For an English summary of the report, see SOU 2015:37, pp. 25-38. \\
36 & Govt. Bill 1998/99:35, p. 44 et seq. \\
37 & 1734 Enforcement Code, Chapter 4, Section 15. \\
\end{tabular}
\end{flushright}
1923\textsuperscript{38} and the Geneva Convention of 1927\textsuperscript{39} that this changed. The Protocol and the Convention were adopted by the League of Nations\textsuperscript{40} to make arbitral awards internationally enforceable.\textsuperscript{41} These two international instruments imposed, inter alia, an obligation to recognize the validity of arbitral agreements and laid down certain conditions for the enforcement of an arbitral award abroad. As a consequence of the obligations arising from the two treaties, Sweden adopted the 1929 Foreign Arbitration Agreements and Arbitral Awards Act.\textsuperscript{42} The Act laid down the conditions under which an award was to be classified as a "foreign award", and under Section 6 of the Act, such foreign arbitral award was to be recognized in Sweden under certain conditions set out in Section 7 of the Act. This was a breakthrough for the idea that arbitral agreements and arbitral awards in international disputes were to gain international recognition.\textsuperscript{43} This shift in the attitude towards international arbitration was an important step towards making arbitration more effective and internationalized.

During the 1950s, Sweden participated in the work towards drafting a new international convention regarding the recognition and enforcement of foreign arbitral awards. The dissatisfaction with the two Geneva treaties had grown, and a need for a more efficient treaty had become apparent. Many States were involved in this process and finally, in 1958, the immensely celebrated Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "NYC" or "New York Convention") entered into force. The New York Convention was ratified by Sweden in 1972 and was incorporated into the 1929 Foreign Arbitration Agreements and Arbitral Awards Act.\textsuperscript{44}

When the SAA entered into force on 1 April 1999 it replaced both the 1929 Arbitration Act and the 1929 Foreign Arbitration Agreements and Arbitral Awards Act. Instead of having

\textsuperscript{39} Convention on the Execution of Foreign Arbitral Awards. Geneva, 26 September 1927.
\textsuperscript{40} After the end of the First World War, the League of Nations was founded as an intergovernmental organization with the objective to maintain universal peace. After demonstrably failing to maintain the world peace, the League of Nations was later superseded by the United Nations after the end of the Second World War.
\textsuperscript{42} Sw: Lag (1929:147) om utländska skiljeavtal och skiljedomar.
\textsuperscript{43} Kvart & Olsson (2012). \textit{Tvistlösning genom skiljeförfarande}, p. 28.
\textsuperscript{44} Govt. Bill 1971:131. For a more detail discussion on the New York Convention, see para 3.1-4.
two separate acts on arbitration, the SAA simplified matters and applies equally to domestic and international arbitrations. The New York Convention is incorporated into the SAA through the provisions governing the recognition and enforcement of foreign arbitral awards in sections 52-60 of the SAA. As will be discussed below, the New York Convention was not incorporated word by word and thus, there are some differences in the wording of the provisions in the SAA compared to the New York Convention.45

The internationalization of arbitration law in Sweden is much thanks to the ratification of the New York Convention in 1972. By ratifying the New York Convention, all foreign arbitral awards are enforceable in Sweden. As Sweden ratified the New York Convention without reservations, the place where the awards are rendered and whether the awards are of a commercial nature or not has no significance in regard to their enforceability.46 This has led to an increase in the number of cases dealing with recognition and enforcement of foreign arbitral awards.47

As is evident from the discussion above, Sweden has come a long way from the 14th century's ways of arbitration and is always looking to further improve the efficiency and development of international commercial arbitration. With the increasing interest in arbitration and the growing complexity of international disputes, there is a constant need for review and improvement of treaties and legislation in the field of arbitration. As more and more international disputes are settled by arbitration, the greater the importance of a well-functioning and efficient mechanism for recognition and enforcement of foreign arbitral awards becomes. In the following chapters the purpose and structure of the New York Convention will be examined closer.

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45 See, para 6.2.2.
46 Sweden ratified the New York Convention without exercising the "reciprocity" or the "commercial nature" reservation available for the signatories. See also, Hobér (2011). International commercial arbitration in Sweden, p. 358.
3 The New York Convention

3.1 Purpose of the New York Convention

As briefly mentioned above, the New York Convention is considered to be one of the most successful international treaties in the history of commercial law. A total number of 157 States are currently parties to the Convention, and the number of signatories is still rising. The main objective of the New York Convention is to provide common legislative standards of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards, and most importantly, to facilitate the fast and efficient enforcement of arbitral awards. This purpose and the essence of the New York Convention is enshrined in Article III which states:

"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 of 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."  

Article III of the New York Convention sets out a clear obligation for the courts to recognize and enforce awards if the requirements under Article IV are met. It also follows from Article III, that courts may only refuse enforcement on the basis of the grounds listed exhaustively under Article V. These articles, together with the principal purpose of the New York

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48 The New York Convention has been praised by many legal scholars over the years. See e.g., Michael Mustill, Arbitration: History and background, 6 J. Int'l. Arb. (1989) pp. 43-56, at page 49.
50 See, Born (2014). International commercial arbitration, p. 3411 et seq., with references in notes 79-83.
Convention, embodies the general pro-enforcement regime of the Convention. After all, the convention is mainly a product of the work towards making it easier to enforce foreign arbitral awards, and thereby making international arbitration more effective. As Paulsson describes it: "Courts cannot violate the Convention by enforcing awards, only by failing to do so." This pro-enforcement approach has been adopted by courts and authorities in most jurisdictions, including Sweden. The pro-enforcement bias of the New York Convention is also made evident through Article VII. This article allows parties seeking enforcement of a foreign arbitral award to rely on more favourable law or treaties of the country where such award is sought to be relied upon. This matter will be discussed further below.

To obtain recognition and enforcement under the New York Convention, the party applying must meet the basic requirements set out in Article IV. According to this article, the applicant must supply the competent authority with: (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in Article II or a duly certified copy thereof. These are minimum formal conditions with the purpose of making the application process for the enforcement of foreign arbitral awards as simple as possible. Furthermore, Article IV prevails over any stricter national legislation regarding the formal requirements of foreign awards.

Another central objective of the New York Convention was to eliminate the so called "double exequatur" requirement. In the Geneva Convention, the double exequatur requirement had

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56 See, Société Planavergne SA v. KB I Stockholm AB (NJA 2003 p. 379), in which the Swedish Supreme Court stated that the Swedish provisions on enforcement of foreign arbitral awards should be interpreted in the light of "[…] the general efforts to facilitate enforcement which [is] the main objective of the [New York] Convention" (As translated in, Hobér (2011). *International commercial arbitration in Sweden*, p. 359).

57 For an in-depth commentary on Article IV see, Kronke (edit.) (2010). *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York Convention*, pp. 143-204.

the effect that an award, to be enforceable abroad, had to be "final" in the country where it was rendered. The consequence of this requirement was that the award, for it to be enforceable under the Geneva Convention, first had to be confirmed in the arbitral seat. Only after the award had been confirmed in the country of origin could a party to the arbitration seek to enforce the award abroad. Clearly, this caused the enforcement process to slow, difficult and uncertain.\textsuperscript{59} So, how did the New York Convention eliminate this requirement? The drafters simply chose the term "binding" in Article III, instead of "final" and thereby made it clear that the need for confirmation of the award in the arbitral seat was no longer necessary.\textsuperscript{60} This was a major achievement in the field of international arbitration and the elimination of the double \textit{exequatur} has even been claimed to be the single most important effect of the New York Convention.\textsuperscript{61} However, although it must be considered internationally accepted that the term "binding" has this effect, the true meaning of the term, and the issue of at what point an award becomes binding, has raised some controversy and discussion.\textsuperscript{62}

Why the elimination of the double \textit{exequatur} plays such an important role in international commercial arbitration is not hard to understand. When big commercial disputes are settled by arbitration, the winning party needs to be certain that, if the losing party does not voluntarily comply with the award, it can still enforce the award in any of the signatory states to the New York Convention without a long and arduous process. For the international commercial trade to work smoothly, the system for enforcing arbitral awards abroad must be effective. Today, it is not uncommon for big companies to have assets in more than one country. Furthermore, as party autonomy is one of the fundamental principles of international arbitration, the arbitral proceedings may take place basically anywhere in the world. The value of disputes can be high, and the losing party might not have many assets, if any, in the

\begin{itemize}
  \item \textsuperscript{59} Born (2014). \textit{International commercial arbitration}, p. 3424.
  \item \textsuperscript{61} See e.g., Van den Berg (1981). \textit{The New York arbitration convention of 1958: Towards a uniform judicial interpretation}, p. 266 et seq.
\end{itemize}
country in which the arbitration took place. Hence, the possibility to effectively enforce an arbitral award outside of the country in which it was made is of great importance in the field of international arbitration and trade.

To conclude, nothing in the New York Convention, nor to the basic structure and purpose of the New York Convention, imposes an obligation not to recognize an award.\textsuperscript{63} In short, the New York Convention sets out minimum formal requirements for the enforcement of awards and maximum standards on which enforcement may be refused.\textsuperscript{64} The exceptions to the general obligation to enforce foreign arbitral awards set out in Article III, are exclusively regulated in Article V. As will be discussed below, it is important to bear in mind that the exceptions in Article V are limited and exhaustive exceptions. The \textit{prima facie} presumption that a foreign arbitral award is valid and binding, is precisely what the drafters of the New York Convention discussed as the intended function of Articles III and IV.\textsuperscript{65} The reason for this structure is to fulfill the main purpose of the New York Convention: to facilitate fast and efficient enforcement of arbitral awards.

\section*{3.2 Article V of the NYC in General}

As discussed above, the main rule is that there is a general obligation for the Contracting States to enforce foreign arbitral awards under the New York Convention. However, every rule has its exceptions. Such is the case with Article III of the NYC. The exceptions are set out in Article V of the NYC.

The grounds for refusing recognition or enforcement of foreign arbitral awards in the New York Convention are in short: Article V(1)(a), lack of a valid arbitration agreement or no capacity; Article V(1)(b), party denied opportunity to present his case; Article V(1)(c), the award deals with matters outside the scope of submission to arbitration; Article V(1)(d), the

\begin{footnotes}
\item[65] See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), \textit{Travaux préparatoires: E/CONF.26/3/Add.1}, at page 5. Available at: http://www.uncitral.org/uncitr/en/uncitr_text/arbitration/NYConvention_travaux.html. This is sometimes referred to as "the Dutch proposal", as it was proposed by the Dutch delegate Professor Pieter Sanders.
\end{footnotes}
composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement; Article V(1)(e), the award is not binding or has been annulled at the seat of arbitration; Article V(2)(a), the dispute or the claims were non-arbitrable and Article V(2)(b), the award violates public policy.

All of these grounds set out in Article V of the NYC are to be construed narrowly and as exclusive exceptions applicable in only serious cases.\(^{66}\) Accordingly, when an applicant has supplied the competent authority with the necessary documents defined in Article IV, the foreign award shall be granted recognition and enforcement as is set out in Article III. The only grounds for refusal of recognition and enforcement of the award are those in Article V. Furthermore, if a party opposes recognition and enforcement of the award, the enforcing authority may not conduct a review on the merits.\(^{67}\) This is quite understandable, as the whole point of the New York Convention is to simplify the enforcement proceedings. If the enforcement authority was to conduct a full re-examination of the case it could lead to a long and complicated operation.

The first five grounds, V(1)(a-e), are the only grounds on which the party opposing recognition and enforcement can rely, and it is up to that party to prove the existence of one or more of these grounds.\(^{68}\) The grounds set out in V(2)(a-b), however, may be considered by the court ex officio: that is, on its own motion. Placing the burden of proof on the party resisting recognition and enforcement is a major change from the old Geneva Convention in which the petitioner was the one having to prove the absence of any circumstances tainting the award.\(^{69}\) Shifting the burden of proof to the resisting party is yet another clear example of the New York Convention's pro-enforcement bias and the drafters' attempts to facilitate fast and efficient enforcement of foreign arbitral awards.


\(^{67}\) See e.g., Paulsson (2016). The 1958 New York Convention in action, p. 168 et seq.


\(^{69}\) Blackaby & Redfern (2015). Redfern and Hunter on international arbitration, p. 623, at note 64.
Even though the New York Convention has been celebrated as a great success, some of the grounds in Article V have caused problems for the enforcement authorities in practice. This can mostly be seen as a consequence of inconsistent interpretation of the New York Convention in different Contracting States. However, moving forward, this study will limit the discussion and focus on the fifth ground: Article V(1)(e).
4 Article V(1)(e) of the NYC

4.1 General

Article V(1)(e):

"1. 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:
(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" (emphasis added).

This particular article of the New York Convention has caused the most debate and controversy out of the grounds for refusing recognition and enforcement in Article V. It is a frequently debated topic amongst legal scholars and has given rise to a number of complex questions about the purpose and intention of the New York Convention.

Article V(1)(e) actually sets out three different grounds on which the competent authority may refuse recognition and enforcement, namely: 1. the award has not yet become binding; 2. the award has been set aside; 3. the award has been suspended. The focus of this study is on the second ground, according to which the recognition and enforcement of an award may be refused if it has been set aside by a competent authority in the country of origin. This ground is particularly interesting as the issue of what effect the setting aside of an award in the country of origin has in other jurisdictions has been dealt with in different ways by the courts in some of the Contracting States.

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4.2 Discretion to Refuse the Enforcement of Awards?

4.2.1 The Continued Legal Existence of Awards

Most countries’ national arbitration legislation, Sweden amongst them, contain provisions allowing for national courts to set aside awards made within their own jurisdiction. Additionally, the UNCITRAL Model Law allows for courts to set aside an award rendered within their jurisdiction. The grounds for setting aside awards are set out in Article 34 and are parallel to the grounds for refusal of recognition and enforcement in the New York Convention, with exception to Article V(1)(e) of the New York Convention. However, even though the possibility is there, it is quite rare for international arbitral awards to be vacated.71 If and when it does happen, an important and much debated issue arises regarding the award's continuing legal existence.

The exclusive competence to set aside an award lies with the domestic courts in the country where the award was made.72 This is sometimes referred to as the courts in the country where the award was made having primary jurisdiction. The competent authorities in other Contracting States have secondary jurisdiction and can thus only decide whether or not to enforce the award within their own jurisdiction.73 This leads to the question: What is the actual consequence of a judgement by a court of primary jurisdiction annulling an arbitral award? Does the award completely cease to exist in every secondary jurisdiction or could it still be enforced abroad?

For many years following the New York Convention entering into force, the prevailing view was that when an award was annulled, it ceased to exist.74 Thus, it could not be enforced in

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73 For case law on the issue, see e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negra, in which the the US Court of Appeals for the Fifth Circuit stated that the country in which award was made has primary jurisdiction over the award and all other Contracting States have secondary jurisdiction. In the secondary jurisdiction the parties can only contest whether that State should enforce the arbitral award, albeit only on the limited grounds specified in Article V of the New York Convention. For a full report of the facts of the case, see, Yearbook Commercial Arbitration 2004 – Volume XXIX, pp. 1262-1297.
any other secondary jurisdictions. This was a logical solution stemming from the notion that nothing can follow out of nothing – *ex nihilo nil fit*. As explained by one of the leading figures in the work towards drafting the New York Convention, Professor Pieter Sanders: if an award is annulled, "there does no longer exist an arbitral award and enforcing a non-existing award would be an impossibility or even go against the public policy of the country of enforcement" (emphasis added). Taking this view, nothing, not even the New York Convention, can breathe new life into an annulled award, as the New York Convention is only concerned with existing and valid arbitral awards.

However, following the development of case law related to the New York Convention's Article V(1)(e), the topic of enforceability of annulled arbitral awards has sparked debate amongst legal scholars. The debate mainly springs from the different interpretations of the term "may" used in Article V(1) and the "more-favourable-right" provision in Article VII of the New York Convention. Different views have been submitted as to if the use of the word "may" entails that the enforcing courts have discretion when deciding whether to refuse enforcement of foreign arbitral awards.

### 4.2.2 May or Must under the New York Convention

If one, or more, of the grounds in Article V(1) are present, are the enforcing courts mandatorily required to refuse the enforcement of the arbitral award? To answer this question, one must take a closer look at the language of the provisions in the New York Convention. The difficulty in determining the correct interpretation of the New York Convention is a consequence of it being drafted in five different languages which, pursuant to Article XVI, are equally authentic. The five languages are Chinese, English, French, Russian and Spanish. All of these are thus presumably correct. However, out of the five, it

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has been held that four indicate that recognition and enforcement "may" be denied. The exception is the French text, which by some legal writers has been suggested to establish an obligation to deny recognition and enforcement if an award falls within one of the grounds set out in Article V.

The well renowned authors, Gary Born and Jan Paulsson, both support the view that the enforcing courts have discretion by claiming that the language of Article V, by virtue of the word may, clearly means that it is permissive, not mandatory. They claim that enforcing courts have discretion when deciding whether to recognize and enforce foreign arbitral awards notwithstanding that the award falls under one of the grounds for refusal under Article V(1). This view, especially in cases regarding Article V(1)(e), has also been confirmed by national courts in a number of contracting states. Furthermore, some legal writers claim that it must be considered internationally accepted that Article V is discretionary, notwithstanding the slightly different French text.

The view that Article V is permissive makes the most sense. Without claiming to be an expert in the English language, there appears to be a difference between the mandatory word "shall" and the permissive word "may". The word "shall" occur in many places in the New York Convention when a clear obligation is laid down. For example, Article II of the New York Convention sets out an obligation to recognize an arbitration agreement in writing by stating that "Each Contracting State shall recognize…". The use of the word "shall" reoccur in both Article III and IV. It is hard to imagine why the drafter would change

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81 An example of when a national court has relied on the judicial discretion can, inter alia, be seen in the case *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.* (Supreme Court of Hongkong 1994), in Yearbook Commercial Arbitration 1995 – Volume XX, pp. 671-680. In that case the court held that: "[…] even if a ground of opposition is proved, there is still a residual discretion left for the enforcing court to enforce nonetheless". For further case law supporting this view, see references in note 179 in Born (2014). *International commercial arbitration*, p. 3430.

the wording and choose to use the term "may" in Article V if the aim was to set out an obligation to refuse recognition and enforcement if one of the grounds is present. The only reasonable explanation as to why the drafters chose to use the word "may" in Article V, and its equivalent term in the other three languages, must be that the intention was to make it non-mandatory. This is also in line with the purpose of the New York Convention, that is: to facilitate fast and efficient enforcement of foreign arbitral awards. Allowing the enforcing courts to exercise discretion is more in line with this purpose and also with the above mentioned pro-enforcement bias of the New York Convention.

Furthermore, when going about interpreting international treaties, the 1969 Vienna Convention on the law of treaties (“Vienna Convention”), gives guidance as to how this should be done. In Article 33(3) of the Vienna Convention, it is prescribed that the terms of a treaty are presumed to have the same meaning in each authentic text.\(^83\) However, Article 33(4) of the Vienna Convention states that if there is a difference of meaning in the authentic texts, “the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted”. It is the author’s opinion that treating the grounds in Article V(1) as permissive better serves the purpose and objective of the New York Convention.\(^84\)

The conclusion that can be drawn from the above discussion is that the language and purpose of the New York Convention implies that the grounds for refusal of recognition and enforcement of foreign arbitral awards set out in Article V(1) are permissive. However, when it comes to Article V(1)(e) of the New York Convention, no guidance is given as to when an enforcement court may grant enforcement of an award notwithstanding that it has been annulled by a court in the country where it was made. The right to refuse enforcement of such an award is clearly there, although, the use of the term “may” opens the door for the enforcement of annulled foreign arbitral awards. The question is when an annulled award

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\(^83\) Even though the Vienna Convention entered into force in 1980, 21 years after the New York Convention, it is still relevant for the interpretation of the New York Convention as Article 31-33 of the Vienna Convention codify pre-existing international customary law. See, Paulsson (2016). *The 1958 New York Convention in action*, p. 43.

could, or rather should, still be enforced. In the following chapter, the study shifts its’ focus to the two different approaches to the enforcement of annulled arbitral awards evolved through case law in primarily France and the US.
Different Approaches on Enforcement of Annulled Arbitral Awards

5.1 A Brief Introduction

As is evident from the previous chapter, the interpretation and application of the New York Convention may sometimes vary depending on in which Contracting State enforcement is sought. Over the years, two contrasting approaches have evolved regarding the enforcement of annulled arbitral awards, viz. “the territorial approach” and “the delocalized approach”.

According to the territorial approach, which has long been the dominant one, “the seat anchors the arbitration to the legal order of the State in which it takes place.” This approach stems from Article V(1)(e) of the New York Convention and recognizes the annulment of an award as a universal ground for non-enforcement. If an award has been annulled, it can no longer be enforced because it does no longer exist.

The delocalized approach on the other hand, stems from Article VII of the New York Convention under which the party seeking enforcement may rely on a more favorable provision in the country where enforcement is sought. Under this approach, the enforcing courts are free to ignore a decision setting aside an award by a court in the seat of arbitration. This is an approach taken by French courts in a number of cases. The French courts have shown that they will only deny enforcement of an annulled award if a ground to refuse exists under French domestic law. The decision of another national court to vacate the award has

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85 Legal writers have described the two approaches using slightly different terms. The terms used in this study are the same as those used in, Kronke (edit.) (2010). Recognition and enforcement of foreign arbitral awards: a global commentary on the New York Convention.
no bearing. According to supporters of the delocalized approach, Article VII is mandatory in the way that if a more favorable provision exists in the country where enforcement is sought, the enforcing court must grant the application even if a ground to refuse exists under the New York Convention. By adopting this approach, courts in France have enforced annulled arbitral awards under French domestic law, under which the setting-aside of an award is not a ground for refusal. They have done so by "opting out" of the New York Convention via Article VII.90

The following sections will further discuss the two approaches with examples of how courts primarily in the US and France have reasoned in cases regarding enforcement of annulled awards.

5.2 The Territorial Approach

5.2.1 Baker Marine v Danos v Chevron91

In the Baker Marine case, the US Court of Appeals for the Second Circuit decided to refuse to enforce an arbitral award set aside in Nigeria, referencing Article V(1)(e) of the New York Convention. The facts leading up to this decision were that in 1992, Baker Marine and Danos had jointly contracted with Chevron to provide certain services in relation to Chevron’s activities in the oil industry in Nigeria. When a dispute later arose, it was settled by arbitration in Nigeria, under Nigerian law. The outcome of the arbitration was that Baker Marine was awarded USD 2.23 million against Danos and USD 750,000 against Chevron. However, the awards were challenged, and by May 1997 both awards had been set aside by Nigerian courts.

Notwithstanding the decisions to set aside the awards, Baker Marine sought to enforce the awards in the US. Enforcement was first denied by the New York District Court, which stated that under the New York Convention and principles of comity the court could not “[…]

enforce a foreign arbitral award under the [New York] Convention when such an award has been set aside by the Nigerian courts.”

This decision was later upheld by the Court of Appeals. In the Court of Appeals, Baker Marine argued that the awards were set aside by the Nigerian courts for reasons that would not be recognized under US law as valid grounds for vacating an award. Referencing Article VII of the New York Convention, Baker Marine argued that the US Court of Appeals may enforce the award notwithstanding the decisions by the Nigerian courts. This argument was rejected by the US court as the parties had agreed that the dispute was to be settled by arbitration in Nigeria and under Nigerian law. Thus, US arbitration law could not be invoked to justify enforcement.

Furthermore, the US Court of Appeals made an interesting statement in reply to Baker Marine's argument that the language of Article V(1)(e) of the New York Convention implies that the court may enforce the awards notwithstanding the annulment. The court stated that "It is sufficient answer that Baker Marine has shown no adequate reason for refusing to recognize the judgements of the Nigerian court." The argument put forth by Baker Marine was probably inspired by the arguments in the below discussed case Chromalloy in which an award was enforced by a US court regardless of the fact that it had been set aside in the seat of arbitration. In the Baker Marine case however, the US Court of Appeals made a clear statement that the rule of thumb for enforcement of annulled awards was that according to the territorial approach.

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94 See below, section 5.3.3.
5.2.2 TermoRio v Electranta\textsuperscript{95}

Some years after the Baker Marine case, the US Court of Appeals affirmed the decision in a distinct way in the TermoRio case. In its decision the court referenced the Baker Marine case a number of times and elaborated on the reasons behind the approach established in that case.

In 1997 TermoRio and Electranta, two Colombian companies, entered into an agreement regarding the construction of a power plant in Colombia and the sale of the power generated by the plant. After a certain chain of events, a dispute arose and TermoRio subsequently commenced arbitration in Colombia under the rules of the ICC, as provided for in parties' agreement. On 21 December 2000 the ICC tribunal awarded TermoRio USD 60.3 million due to breach of contract by Electranta.

Electranta applied to the Colombian courts to have the award set aside and the award was eventually annulled by the Consejo de Estado (Colombian Council of State). The grounds for vacating the award was that Colombian law did not permit the use of ICC procedural rules in arbitration, which thus meant that the arbitration was in violation with Colombian law.

TermoRio was not satisfied and turned to the US courts to have the annulled award enforced. The US District Court for the District of Columbia dismissed the application to enforce the award by applying Article V(1)(e) of the New York Convention. The award had been properly vacated by the court in Colombia and thus, could not be enforced in the US.

After appeal, the US Court of Appeals of the District of Columbia Circuit affirmed the district court's decision to refuse enforcement. The Court of Appeals held that the Colombian courts had primary jurisdiction over the award and were thus the competent authority to set aside the award. The court further stated that "because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgement of that

court is other than authentic, appellees contend that appellants have no cause of action under the FAA or the New York Convention to enforce the award in a Contracting State outside of Colombia."\textsuperscript{96} The court also noted that if the court was to enforce the annulled award this would seriously undermine a principal precept of the New York Convention, viz. that an arbitration award cannot be enforced in another country when it has been properly set aside in the seat of arbitration.

5.2.3 Conclusions

Authors have described the decision in the Baker Marine case as "a classic use of Article V(1)(e) and the theory ex nihilo nil fit: if the award has been set aside by the competent authority in the country where it was rendered, the award ceased to exist: out of nothing follows nothing."\textsuperscript{97} The rationale behind these illustrative cases is that enforcing courts should defer to decisions to set aside an award made by the competent court in the country of origin. If the annulment-decision of an award was not recognized by courts in secondary jurisdictions, but instead habitually second-guessed, this could cause considerable uncertainty for the parties to the arbitration. The winning party in a process to set aside an award would not be able to continue its business with the certainty that the court's decision would stand.

The territorial approach is appealing in the way that it requires mutual respect and trust between the courts of primary and secondary jurisdiction. It is also in line with the view that when an award is annulled, it ceases to exist. This creates certainty for the parties and avoids inconsistent results depending on in what country enforcement is sought. However, a blanket rule requiring enforcement courts to always, without exception, refuse enforcement of annulled awards is not entirely flawless.

\textsuperscript{96} TermoRio S.A. E.S.P. (Colombia), LeaseCo Group and others v. Electranta S.P. (Colombia), et al. in Yearbook Commercial Arbitration 2008 – Volume XXXIII, p. 962.

Such a rule would somewhat contradict the language of Article V(1)(e), under which an award "may" be refused if it has been set aside.\(^98\) As discussed above, this indicates that the enforcing courts have some discretion in deciding whether to enforce an award. Say for example, that an award has been set aside because the court in the seat had been bribed or threatened to do so. Or, that the award was set aside because not all members of the tribunal were male, straight or of a certain religious belief.\(^99\) In situations as such, would it really be improper to enforce the award regardless of the annulment-decision of the court of primary jurisdiction?\(^100\)

The need for a safety-valve in such circumstances has been supported by some legal writers.\(^101\) It is the author's opinion that allowing enforcing courts to enforce annulled awards under certain special circumstances would not be in violation with the New York Convention. Rather, it is a necessary aspect in fulfilling the objective and purpose of the New York Convention. A corrupt national court should not be allowed to arbitrarily set aside awards for any obscure reason. If such decisions were given deference it could seriously harm the whole field of international commercial arbitration.

Furthermore, the confidence and trust in the New York Convention requires the existence of such a safety-valve. The possibility to enforce an annulled award under certain circumstances was briefly discussed in the TermoRio case. The reasoning by the court in that case has been claimed to create a new doctrine providing a safeguard for courts to not apply Article V(1)(e) if the decision to set aside the award would be tainted or if it contradicts fundamental notions of justice in the US.\(^102\) The problem, however, lays in mapping out what those special

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\(^98\) See e.g., Newman & Hill (edit.) (2014). *The Leading Arbitrators' Guide to International Arbitration*, p. 917. The author of the chapter, Hans Smit, also submits that this view also "lacks support in reason and fairness".

\(^99\) This scenario is discussed further in, Pierre Lastenouse, *Why setting aside an arbitral award is not enough to remove it from the international scene*, 16 J. Int'l Arb. (1999) pp. 25-47, at p. 45.

\(^100\) Van den Berg has submitted that the fact that an award may be annulled on some "outlandish" ground may be viewed as a rare side effect which is the price to be paid for simplicity and predictability. See, Albert Jan van den Berg, *Enforcement of annulled awards?* 9 ICC Int'l Court of Arb. Bulletin (1998) pp. 15-21, at p. 15.


circumstances may be, and how to harmonize the application of such an approach. This matter is discussed further in chapter 7.

As parties are free to agree to arbitrate in any jurisdiction, one cannot rule out the possibility that their choice of venue is influenced, or even specifically chosen, because of the particular legal order of that country. The parties might choose the seat because of that jurisdiction's provisions regarding the possibility to have an award set aside. However, opponents of the territorial approach have submitted that the choice to arbitrate in a certain country is many times merely done because of convenience, without giving much thought to the possible influence of the state courts at the seat. This argument is not overly convincing. Even if it cannot be expected that all parties are well informed and make the choice of venue after considerable consideration, the will of the parties may not be so easily dismissed. Even if the choice of the place of arbitration is made merely because of convenience, the country in which the arbitration takes place still has the judicial control over the arbitration procedure. By allowing arbitration to take place in its jurisdiction, the State also has the authority to govern the procedure and set aside the award if the courts of that country finds it defective.

The parties might therefore expect that enforcing courts in other States will honor their choice of venue and give deference to the judgements of the courts of primary jurisdiction. As shown by the Baker Marine and TermoRio cases, courts in jurisdictions that follow the territorial approach do.

Although the territorial approach is not crystal clear and can sometimes be applied in different ways, the main idea of the approach is that a decision of a court of primary jurisdiction to annul an award should generally be respected in secondary jurisdictions. The approach stems from the position of fundamental respect for party autonomy, the principles of comity and the respect for other judicial systems. Today, parties should expect that when

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seeking to enforce an annulled award, at least in the US, the courts will stick to the approach taken in Baker Marine and TermoRio.\textsuperscript{106} However, parties cannot be certain that the territorial approach is the reigning view in all Contracting States to the New York Convention.

\section*{5.3 The Delocalized Approach}

\subsection*{5.3.1 Pabalk v Norsolor\textsuperscript{107}}

The first time a court opened up the possibility to enforce an annulled award was in the case \textit{Pabalk v Norsolor}.

In 1971, the French company Norsolor concluded an agency agreement with the Turkish company Pabalk. A few years later, Norsolor terminated the contract, which then led to a dispute. Pursuant to the dispute resolution clause in the parties' agreement, the dispute was referred to arbitration at the International Chamber of Commerce (“ICC”). On 26 October 1979, the tribunal rendered an award ordering Norsolor to pay Pabalk certain amounts. Norsolor was unhappy with the award and subsequently filed an action to set aside the award to the Commercial Court of First Instance of Vienna. This action was dismissed on 29 June 1981. Some three months before this judgement, on 4 March 1981, the Court of First Instance of Paris had granted leave for enforcement of the award.

On 29 January 1982, after appeal, the Vienna Court of Appeals partially set aside the award. This subsequently led the Paris Court of Appeals to refuse enforcement of the award on 19 November 1982. The reasoning behind this decision was that the setting-aside of the award in Vienna should lead to refusal pursuant to Article V(1)(e) of the New York Convention. However, only one day before the decision to refuse enforcement by the court in Paris, the Swiss Supreme Court had reversed the decision of the Vienna Court of Appeals and upheld

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\textsuperscript{107} Pabalk Ticaret Ltd. Sirketi (Turkey) v. Norsolor SA (France). Judgement of the \textit{Cour de Cassation} (French Supreme Court) and \textit{Cour d’Appel} (Paris Court of Appeal) in Yearbook Commercial Arbitration 1986 - Volume XI, pp. 484-491.
\end{flushright}
the validity of the award. With the arbitral award declared valid, the Paris Court of First Instance again granted leave for enforcement in June 1983.

However, on 1 October 1984, the French Supreme Court did something that would cause much debate in the arbitration world. Even though the award had already been declared valid and had been enforced by the lower courts in France, the French Supreme Court overturned the decision of the Paris Court of Appeals, refusing enforcement of the award. In practice, the decision of the Paris Court of Appeals was no longer in existence. Still, the French Supreme Court saw its chance to address the issue of enforcement of annulled awards.

In its reasoning, the French Supreme Court held that under Article VII of the New York Convention, the court could grant enforcement of the award in France under French domestic law, notwithstanding that the award had been annulled in the seat of arbitration. The court stated that: “[T]he judge cannot refuse enforcement when his own national legal system permits it, and, by virtue of Art. 12 of the New Code of Civil Procedure, he should, even ex officio, research the matter if such is the case.”108 Consequently, the validity of the award under the law of the seat of arbitration was not of concern when deciding if the award is enforceable in France. However, it should be noted that the Supreme Court did not end up ruling on the conditions under which an award may be recognized under French law notwithstanding its annulment, it merely opened the door to doing so.109

5.3.2 OTV v Hilmarton110

The decision in the Norsolor case was followed by another controversial decision of the French Supreme Court in the Hilmarton case. This case has been described as "a classic
example of the mechanical application of the internationalist (delocalized) approach”\textsuperscript{111} (parentheses omitted). The facts of the case were as follows.

In 1980, the English company Hilmarton agreed to act as a consultant to the French company OTV to help obtain a certain contract in Algeria. The agreement contained an ICC arbitration clause. After the Algerian contract was obtained, a dispute arose concerning the payment to Hilmarton. The dispute was referred to arbitration in Geneva. The result was that Hilmarton's claim of payment was denied due to the underlying contract's violations of Algerian anti-corruption law and Swiss public policy.

The award was annulled by the Geneva Court of Appeals in April 1989. This decision was later confirmed by the Swiss Supreme Court one year later.\textsuperscript{112} However, several months before the Swiss Supreme Court's decision, the Paris Court of First Instance had granted leave for enforcement in France. This enforcement-decision was appealed by Hilmarton to the Paris Court of Appeals. On 19 December 1991 the Paris Court of Appeals upheld the enforcement-decision, notwithstanding that the award had been set aside by the Swiss Supreme Court in the country of origin.\textsuperscript{113} The court held that OTV could rely on Article VII of the New York Convention to have the award enforced, regardless of that the ground in Article V(1)(e) was present. The court noted that Article 1502 of the French New Code of Civil Procedure ("NCCP") does not include a ground to refuse enforcement of an award if it has been set aside in the country of origin. Thus, when applying the more favourable French domestic law, the court could not refuse enforcement of the annulled award.

The enforcement-decision of the Paris Court of Appeals was confirmed by the French Supreme Court in 1994. In doing so, the court stated that the international award was not integrated into the Swiss legal order and "its existence continued in spite of its being set aside

and that its recognition in France was not contrary to international public policy.”

Consequently, the award was considered to remain in existence in France despite that it had been annulled in Switzerland.

The story does not end here. Years before the decision to enforce the first award, as a consequence of the first award being set aside, the matter was arbitrated again. This led to a second award which was rendered in favor of Hilmarton in April 1992. This second award was then granted leave for enforcement by the Nanterre Court of First Instance, which was subsequently confirmed by the Versailles Court of Appeals. However, on appeal by OTV, the French Supreme Court reversed the findings by the lower courts. It held that the second award could not be enforced in France as the first award creates an obstacle for enforcement due to its res judicata effect. So, the story ended with the first arbitral award, having been set aside, prevailing over the second award which was final and binding. The reason why: the first award was presented for enforcement in France first, and was granted leave for enforcement notwithstanding its annulment in the country of origin.

Luckily for Hilmarton, the second award was enforced in the United Kingdom in 1999. However, one can imagine the confusion and frustration of Hilmarton and OTV, having two different awards regarding the same dispute enforced in two different countries.

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5.3.3 Chromalloy v Egypt\textsuperscript{119}

The last illustrative example to the delocalized approach is the *Chromalloy* case(s), in which an annulled arbitral award was nevertheless enforced in both France and the US. The French decision is further proof of France's dedication to the delocalized approach.\textsuperscript{120} However, the enforcement-decision in the US is more of a peculiarity, which was later somewhat contradicted in the *Baker Marine* and *TermoRío* cases. The focus of this section will be on the reasoning of the US court.

In 1988, Chromalloy and the Air Force of Egypt ("Egypt") entered into a contract regarding the supply of parts, maintenance and repair for helicopters belonging to Egypt. In 1991 the contract was terminated by Egypt which led Chromalloy to commence arbitration in Egypt. On 24 August 1994 the tribunal rendered its award ordering Egypt to pay a large sum to Chromalloy due to breach of contract. In December 1995, on appeal by Egypt, the Egyptian Court of Appeal set aside the award.

Sometime before the annulment decision of the Egyptian court, Chromalloy had sought enforcement of the award in the US. The decision of the US District Court for the District of Columbia was issued in July 1996, a couple of months after the annulment-decision. The district court, by recognizing the discretionary power of the court under Article V(1)(e) and by applying the more-favorable-right provision in Article VII, granted enforcement of the award.

The reasoning of the court is rather complex. In short, the court held that in the absence of the New York Convention, Chromalloy was entitled to enforce the award under US domestic law, under which enforcement could not be denied on the basis relied upon by the Egyptian


\textsuperscript{120} *The Arab Republic of Egypt v. Chromalloy Aeroservices Inc*. Judgement of the Paris Court of Appeals in Yearbook Commercial Arbitration 1997 – Volume XXII, pp. 691-695. The Paris Court of Appeal, as in the previous cases, applied Article VII of the New York Convention when granting enforcement of the annulled arbitral award.
court when setting aside the award. Hence, the district court enforced the award notwithstanding its annulment at the seat of arbitration as it found it to be valid under US domestic law.

### 5.3.4 Conclusions

Article VII provides that nothing in the New York Convention shall "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 is the provision relied upon by the French courts in the Norsolor and Hilmarton cases.122

In the US Chromalloy case, the court reasoned that the Egyptian annulment-decision violated US public policy by relying on US arbitration law via Article VII of the New York Convention. Thus, the annulment-decision was not entitled recognition. As Article V(1)(e) provides a permissive standard, the US court held that it was not required to refuse the enforcement and went on to grant enforcement. The Chromalloy case, and also the Hilmarton case, have both been heavily criticized by some,123 and supported by others.124 The discussion has mostly revolved around the discretionary power of the courts under Article V(1)(e), the principles of comity, respect for decisions by courts of primary jurisdiction and the problems of inconsistency and uncertainty.

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The supporters of the delocalized approach view international awards as detached from any specific legal order. One author explains it as the root of an arbitration lies in the agreement of the parties and the fact that an award is rendered in a specific jurisdiction does not mean that that State can give international effect to an annulment-decision of its courts. By virtue of Article V(1)(e) of the New York Convention, the enforcing courts may, but must not, refuse enforcement of an award that has been set aside in the country where it was made. However, if the laws of the country in which enforcement is sought contain a more favourable provision on which the party can rely on, the enforcing court has not just a right, but a duty, to enforce the award under its domestic law.

This view might be accurate considering the New York Convention was intended to make it easier to enforce foreign arbitral awards. As mentioned earlier, there is nothing in the New York Convention preventing Contracting States to apply more liberal laws on the enforcement of awards: "Courts cannot violate the [New York] Convention by enforcing a foreign award."

Under French domestic law, namely the NCCP, specific grounds to refuse enforcement are set out. The NCCP does not, however, contain a provision allowing non-enforcement of an award if it has been set aside. This means that the NCCP is more liberal than the New York Convention. It is the author's opinion that by opting out of the New York Convention, the French courts do not violate it. It does, however, cause uncertainty for the parties. A party to an international arbitration that has successfully managed to set aside an award cannot be sure that the decision of the court will be honored by courts in other jurisdictions. If that party has assets in any other country, it will stand the risk of having those assets seized even though the award has been annulled.

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128 Article 1502 of the NCCP.
However, US domestic law, the FAA\textsuperscript{129}, makes a direct reference to the grounds for refusal in the New York Convention. Clearly, US domestic law does not contain a more favourable provision concerning enforcement of arbitral awards.\textsuperscript{130} Therefore, it would not make sense to grant enforcement under US domestic law, as it corresponds to the New York Convention. Thus, the only way for the US courts to enforce an annulled award is to rely on the discretionary power under Article(1)(e). However, the circumstances under which enforcement of an award may be granted notwithstanding its annulment, must be clear and such action should only be allowed in the most serious of cases.

For supporters of the territorial approach, the *Hilmarton* case has been used as an example of just how confusing the approach taken by the French courts can be. Critics have argued that the implications of such an approach can seriously undermine the purpose of the New York Convention and create uncertainty and confusion. However, Jan Paulsson, one of the more devoted supporters of a delocalized approach has dismissed this critique and has stated that: "Hilmarton, for example, is a two-headed white rhinoceros which might give us a thrill in the cinema but does not really endanger our daily walk to work."\textsuperscript{131} So the case may be, but considering the amount of attention the *Hilmarton* and *Chromalloy* cases have received, the "two-headed white rhinoceros" has caused considerable confusion in the system for enforcement of awards and could, even if such cases seldom occur, damage the confidence in the New York Convention itself.

However, the delocalized approach illustrated by the cases has been continuously followed by French courts,\textsuperscript{132} though in slightly different ways. Furthermore, there are no signs indicating that either the supporters of the territorial or the delocalized approach will unify

\textsuperscript{129} Section 207 of the FAA.
\textsuperscript{132} See e.g., Putrabali Adyamulia (Indonesia) v. Rena Holding, *et al.* Judgement of the French Supreme Court in Yearbook Commercial Arbitration 2007 – Volume XXXII, pp. 299-302. An award rendered in London in favor of Rena Holding was subsequently set aside. This award was replaced by a new award in which Rena Holding was ordered to pay a certain sum to Putrabali. However, Rena Holding sought enforcement of the first award in France, which was granted notwithstanding its annulment. This led the second, revised, award being denied enforcement due to *res judicata*. 
in one interpretation. Today, when parties seek to enforce an arbitral award set aside in the seat abroad, the results will be different depending on which jurisdiction the application is filed. In the following chapter, the discussion will continue by examining the possible ways of handling cases regarding enforcement of annulled arbitral awards in Sweden.
6  Enforcement of Foreign Arbitral Awards in Sweden

6.1  The Application of the New York Convention in Sweden

6.1.1  Sections 52-55 of the SAA in General

The New York Convention's provisions regarding recognition and enforcement of foreign arbitral awards are incorporated into Sections 52-60 of the Swedish Arbitration Act ("SAA"). When Sweden ratified the New York Convention in 1972, the treaty provisions were transformed and incorporated into domestic law instead of being incorporated by direct reference as in, e.g. the US through the FAA. Consequently, there are some differences of wording in the SAA compared to the New York Convention. However, Swedish legal scholars and the Swedish Supreme Court have held that the Swedish provisions concerning recognition and enforcement of foreign arbitral awards are to be interpreted in the light of the New York Convention's desire and general efforts to facilitate enforcement. Additionally, international case law and international legal publications on international commercial arbitration should be used as guidelines when interpreting the SAA.

The SAA adopts the same structure as the New York Convention. Section 52 states that an award made abroad is considered foreign. The following Section 53 sets out the main rule, corresponding to Article III of the New York Convention, viz. foreign arbitral awards are recognized and enforced in Sweden if the conditions set out in Sections 54-60 are met. The Swedish provisions regarding grounds for non-enforcement in Sections 54 and 55 are

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135 See e.g., Lenmorniproekt OAO v. Arne Larsson & Partner Leasing AB, Decision of the Swedish Supreme Court (NJA 2010 p. 219). The court stated that Swedish provisions regarding enforcement of foreign arbitral awards should be interpreted in the light of international case law, international legal writings and the purpose of the New York Convention.
intended to fully correspond to Article V(1) and Article V(2) of the New York Convention.\textsuperscript{136} The grounds for refusal also generally correspond to Article 36 of the UNCITRAL Model Law.\textsuperscript{137} Furthermore, even though Sweden did not fully incorporate the UNCITRAL Model Law, both the text and the \textit{travaux préparatoires} of the Model Law should be used when interpreting the SAA.\textsuperscript{138}

The Swedish approach is seemingly enforcement-friendly, and the Swedish courts have shown that there is a rather high bar that an opposing party must reach in order to have the award refused recognition and enforcement.\textsuperscript{139} Although not common, applications for enforcement of foreign arbitral awards have in fact been refused in Sweden on a few occasions.\textsuperscript{140} However, the pro-enforcement bias enshrined in the New York Convention is reflected in the language of the SAA and the case law surrounding it.

Moving on, the author will again address the topic of enforcement of annulled foreign arbitral awards, although this time from a Swedish perspective.

### 6.2 Enforcement of Annulled Foreign Arbitral Awards in Sweden?

#### 6.2.1 Section 54(5) of the SAA

Article V(1)(e) of the New York Convention has its corresponding provision in Section 54(5) of the SAA. The second part of Section 54(5) of the SAA is where it is laid down that


\textsuperscript{139} See e.g., \textit{Subway International B.V. v. A.E}, Decision of the Swedish Supreme Court regarding Section 54(2) (NJA 2015 p. 315); \textit{PKC GmbH v. FMS AB}, Judgement of the Svea Court of Appeals in case Ö 8930-15; \textit{Hammemeum International v. Adelina Gross AB}, Judgement of the Svea Court of Appeals regarding Section 54(3) in case Ö 6418-15.

\textsuperscript{140} See eg., \textit{Finants collect OU v. Heino Kumpula}, Judgement of the Svea Court of Appeal in Case Ö 7419-15. The court stated that there were circumstances raising considerable doubts regarding the matter of enforcement of the award and its compatibility with public policy and subsequently refused enforcement under Section 55(2).
recognition and enforcement may be refused if the award has been set aside in the country of origin. Regarding the first part of Section 54(5), it should be noted that the Swedish Supreme Court has made clear that Swedish courts consider an award "binding" from the moment it is rendered and the fact that a challenge proceeding is pending is not a ground for non-enforcement under the SAA.\textsuperscript{141} Consequently, for the relevant ground to be present, the party opposing recognition or enforcement must furnish proof of a valid decision of a competent authority having annulled the award.

To the author's knowledge, Swedish courts have not yet been faced with a case in which an applicant has sought enforcement of a foreign arbitral award notwithstanding its annulment in the country where the award was made. It is the purpose of the following sections to examine, with consideration to the discussion in chapters 3-5 of this study, the possibilities of having an annulled award enforced in Sweden.

\section*{6.2.2 May or Must Under the SAA}

The question of whether Article V(1)(e) of the New York Convention is mandatory or permissive has been discussed above. Even though there are different views regarding this, it is the author's opinion, and internationally generally accepted, that the language, drafting history, case law and other aspects point towards the view that it is in fact permissive. However, as mentioned above, the SAA and the New York Convention demonstrates a slight difference in wording. Whereas the New York Convention states that recognition and enforcement of the award may be refused, Section 54 of the SAA states that: "A foreign arbitral award is not recognized and enforced in Sweden, if the party against whom it is invoked furnishes proof that […]"\textsuperscript{142} (author's translation, emphasis added). The question is thus: Notwithstanding this variation in wording, does the enforcing court in Sweden have discretion when deciding whether or not to refuse recognition and enforcement of a foreign arbitral award if one, or more, of the grounds in Section 54 of the SAA are present? Swedish

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\textsuperscript{142} Sw: "En utländsk skiljedom erkännas och verkställs inte i Sverige, om den part mot vilken skiljedomen åberopas visar […]."
\end{footnotesize}
legal scholars have expressed different views regarding this question. These views will be examined in the following.

In the preparatory work leading up to the incorporation of the New York Convention's provisions into Swedish domestic law, not much attention was paid to this issue. However, the Department Chief did submit that: "It would seem less appealing that a party who has succeeded in obtaining such [annulment] decision would have to accept that the award is enforced in this country. This considered, a decision annulling or suspending enforcement in the country under the law of which that award was made, should be respected"\(^\text{143}\) (author's translation). Hobér has submitted that because of the language of Section 54 of the SAA, and as no other view was expressed in the preparatory works, the Swedish legal order should be deemed to have taken the standpoint that if an award has been set aside by a court in the country in which the award was made, it cannot be enforced in Sweden.\(^\text{144}\) A similar view has been expressed by Madsen, who states that "Swedish law adopts the position that an arbitral award which is set aside by a court in the country in which the award is made cannot be enforced in Sweden".\(^\text{145}\)

However, a number of Swedish legal scholars have expressed slightly different views, opening the door for a different interpretation of Section 54 of the SAA. Lindskog notes that the corresponding articles in the New York Convention should be considered non-mandatory. This, even though the SAA gives the impression of the grounds for refusal being mandatory, entails that an award under certain circumstances may be enforced in Sweden notwithstanding its annulment.\(^\text{146}\) Lindskog further submits that: "[I]f a foreign arbitral award is invalidated in the country of origin for reasons totally unacceptable from a Swedish point

\(^{143}\) See, Govt. Bill 1971:131, p. 34. Sw: "Det synes föga tilltalande, om part som lyckats utverka sådant beslut skulle behöva finna sig i att skiljedomen verkställs här i landet. Mot denna bakgrund bör beslut om undanröjande eller uppskov med verkställighet i land, enligt vars regler skiljedomen tillkommit, också respekteras."


of view, it should be possible for the award to be enforced in Sweden notwithstanding the fact that it lacks legal effect in the State of its origin”147 (author's translation).

Heuman also supports the view that Article V(1) of the New York Convention is non-mandatory and that this means that an enforcing authority may grant enforcement notwithstanding that one of the grounds for refusal is present. He notes that Sections 54 and 55 of the SAA are intended to fully correspond to Article V(1) and V(2) of the New York Convention.148 Thus, the purpose and objective of the New York Convention should be considered when interpreting the SAA. Heuman further submits that it is uncertain whether the text of Section 54 of the SAA should be read as being mandatory, or, if it should be interpreted in the light of the New York Convention and thus be considered as non-mandatory.149 Heuman arrives to the conclusion that one cannot rule out the possibility to interpret Section 54 of the SAA as permissive: "If a national court annuls an arbitral award for reasons that appear entirely outlandish from an international point of view, one can envisage that the award notwithstanding this could be enforced in Sweden and other countries than the State in which the proceedings took place”150 (author's translation). The views expressed by Heuman and Lindskog have been further supported by other authors, holding that "the difference in wording between the Act [SAA] and the New York Convention would as a rule not imply any critical differences in the possibilities to enforce an award.”151

It has been noted a number of times in this study that the text and travaux préparatoires of the UNCITRAL Model Law should be used to shed light on the interpretation of the SAA. The Model Law was created to facilitate uniformity and harmonization in international

151 Franke et al. (edit.) (2013). International arbitration in Sweden: A practitioner's guide, pp. 279-280. The author further states that: "[…] it may be argued that section 54 of the Act [SAA], notwithstanding its wording, would still leave narrow room for Swedish courts not to refuse recognition and enforcement of an award if it is reasonably clear that the relevant error had no effect on the outcome of the case."
commercial arbitration and has been adopted by a number of jurisdictions.\textsuperscript{152} The grounds for refusal of recognition and enforcement are set out in Article 36 of the Model Law. The article states that an award "\textit{may} be refused \textit{only}" if one of the grounds in Articles 36(1)(a) and (b) are present. Enforcement may be refused if the award has been set aside under Article 36(1)(a)(v) of the Model Law, which mirrors Article V(1)(e) of the New York Convention. In the \textit{travaux préparatoires} of Article 36, the matter of court discretion was briefly discussed. It was suggested that the wording "shall be refused" should be used to clarify that enforcing courts should not have discretion under Article 36.\textsuperscript{153} However, as evident from the final text this suggestion was not adopted. As it stands, Article 36 of the Model Law rather gives the same impression as Article V(1)(e) of the New York Convention. The grounds are exclusive and exhaustive and should thus be seen as maximum standards, and the use of the term “\textit{may}” suggest the existence of discretion. Reading Article 36 of the Model Law as non-mandatory would therefore be in line with the interpretation of the New York Convention.

On the basis of the discussion above, the possibility to enforce annulled foreign arbitral awards in Sweden would not be entirely impossible under the SAA. In the author's opinion, the language of the SAA does not eliminate the possibility for an enforcing court to exercise its discretion when deciding whether to enforce an annulled foreign arbitral award. Additionally, the fact that the New York Convention is the basis for the Swedish provisions regarding the grounds for non-enforcement suggest that Section 54 of the SAA should be perceived as non-mandatory. It is hard to imagine that Sweden, when incorporating the New York Convention, wanted to purposely alter the wording of Section 54 of the SAA with the intention to deviate from the interpretation of Article V(1) of the New York Convention.

As Sweden has ratified the New York Convention, and is a popular forum for international commercial arbitration, it would be undesirable for Sweden to create a separate doctrine according to which annulled arbitral awards will always be refused recognition, no matter

the reasons or circumstances under which the award has been set aside. If courts had no discretion under Section 54 of the SAA, awards which have been annulled by courts because of corruption, fraud or other totally unacceptable reasons would nevertheless not be enforceable in Sweden. It must be submitted that this approach could undermine the trust in international commercial arbitration in general and also in Sweden as a commercial center.

A more appropriate approach would be to interpret Section 54 of the SAA in the light of the New York Convention and read it as giving narrow discretion to the enforcing court. This would be more in line with the international trend and the general pro-enforcement bias in international commercial arbitration. However, if the enforcing court in Sweden is entitled to exercise its discretion when deciding whether to enforce foreign arbitral awards, it must be clear under what circumstances enforcement may be granted notwithstanding an annulment-decision in the country of origin.

6.3 A Possible Swedish Approach

Unlike the French NCCP, the SAA do contain a provision stating that the setting aside of an award may be a ground for non-enforcement of an award. Hence, the SAA is not more liberal than the New York Convention in regard to the grounds under which an award may be refused. Consequently, a party cannot opt out of the New York Convention via Article VII and rely on a more favourable law or provision under Swedish domestic law. Therefore, it is highly unlikely that a judgement like the ones in the Chromalloy and Hilmarton cases would be rendered by a Swedish court.

A "die-hard territorial approach" is not optimal either. It is true that the view that an annulled arbitral award ceases to exist and can never subsequently be enforced anywhere in the world is appealing in the way that it creates certainty and predictability. The flaws have been discussed in various places in this study, and the main argument against this approach is that "the international community cannot accept the judicial action that vacated the award when it was tarnished by fundamental procedural impropriety."154 A blanket rule of mandatory

non-enforcement of annulled awards could encourage courts to vacate awards for any obscure reason if they found it to be in their interest. The winning party in the arbitration would then be deprived of its right because of a wrongful annulment-decision of a corrupt court. It would not be a bold statement to say that such regime would seriously harm the trust in international commercial arbitration.

A more appropriate way of treating enforcement of foreign arbitral awards that has been set aside by the court at the seat of arbitration would be to follow an approach indicated in the TermoRio case. In that case, the court refused enforcement under Article V(1)(e) of the New York Convention as the award had been set aside in the country in which it was made. The court did, however, suggest that enforcement notwithstanding the awards annulment could be possible if the annulment-decision was tainted or would contradict fundamental notions of justice. However, the court did not specify under which circumstances enforcement may be granted.

A similar reasoning can also be seen by the courts in The Netherlands. However, the Dutch courts have taken what can be seen as a middle road between the territorial and delocalized approach. In the cases Yukos, Kompan, and Maximov, the Dutch courts have shown that they will enforce an annulled foreign arbitral award if the judgement vacating the award would violate Dutch public policy. In the Yukos case, the annulled award was enforced due to suspicion of impartiality of the Russian court vacating the decision. In the two latter cases, the approach taken in the Yukos case was confirmed, but the courts refused enforcement under Article V(1)(e) of the New York Convention as they found that the circumstances did not justify enforcement of the annulled awards.

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155 Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation). Judgement of the Amsterdam Court of Appeals in Yearbook Commercial Arbitration 2009 – Volume XXXIV, pp. 703-714. The Dutch court granted enforcement of awards that had been set aside in Russia. The court stated that the Russian annulment-decisions would violate Dutch public policy. The judgments could not be seen as proof, under Article V(1)(e), that the award had been set aside. Hence, the annulment-decisions did not warrant the refusal of the awards.


The claimant in the Dutch *Maximov* case subsequently tried to enforce the award again in the United Kingdom. The attempt failed again when the English court refused enforcement as recently as in July 2017. In doing so, the court held that the applicable test for the court was whether the Russian courts’ decisions were so extreme an incorrect that the Russian courts could not have been acting in good faith.\(^{158}\) If an annulment-decision is found to be contrary to basic principles of honesty, natural justice and domestic concepts of public policy, this would then justify enforcement notwithstanding the annulment. The decision shows that it is possible to enforce annulled awards in the United Kingdom, but the bar is set very high.

The approach taken by the English and Dutch courts is appealing. It clearly shows that under some circumstances, it would be justifiable to enforce foreign arbitral awards set aside in the place of arbitration. It is the author's opinion that this approach could be followed by Swedish courts as well. Furthermore, this approach would not be contrary to the New York Convention, nor the SAA, as the SAA should be read in a way that gives discretion to the enforcing court when deciding to enforce a foreign arbitral award.

The rule of thumb in Sweden should be that a decision of a competent court in the place of origin vacating an award shall be respected. No one would want Sweden to be a safe-haven where parties can come to enforce annulled arbitral awards. It might be a far-fetched fear, but if Swedish courts were too liberal when enforcing annulled arbitral awards, that could lead to companies being more reluctant to keep assets in Sweden. Constantly ignoring annulment-decisions by courts of primary jurisdiction would also undermine the principle of party autonomy and show a lack of respect for the courts which set aside the award. The parties are free to choose the place of arbitration, and sometimes that choice might be done because of the possibilities offered by that jurisdiction to set aside an award. However, if an annulment-decision of a court of primary jurisdiction is so obscure and unacceptable from a Swedish point of view, the possibility to enforce such award must be available. It must be up

to the Swedish courts to determine what situations would qualify as unacceptable from a Swedish perspective.

Following such approach would not cause any considerable uncertainty for the parties. The reigning view would still be that if any of the grounds in Section 54 of the SAA are present, recognition and enforcement will be refused. Enforcement of a foreign arbitral award notwithstanding its annulment would only be considered in the most serious of cases.
7  Looking to the Future

7.1  International Arbitration Court

As is evident from the discussion above, the different approaches on enforcing annulled arbitral awards have caused some inconsistencies on the arbitration scene. There have been several proposals for different solutions to this issue. One of them is the proposal for the establishment of an International Arbitration Court ("IAC").\textsuperscript{159} The IAC would serve as a supranational body for arbitration, "having the sole function of confirming the international validity of arbitral awards from the contracting states."\textsuperscript{160} The IAC would be the only court with the power to annul an international arbitral award. If the IAC annuls the award, it would then become non-existent in all other Contracting States.

The proposal could be a good way of avoiding the inconsistencies caused by the different approaches to enforcement of annulled arbitral awards. The problem lies in convincing all Contracting States to the New York Convention to surrender their powers to set aside international arbitral awards. Some countries might not be so keen on doing so. However, by establishing an IAC, a uniform interpretation of the New York Convention could be achieved. The problem with "outlandish" annulment-decisions would probably be eliminated and the IAC could create a more predictable system for the parties. The establishing of an International Arbitration Court could be a good solution but would call for amendments to the New York Convention. This would require a long and complicated process.

Considering that the New York Convention has been working well for the past 60 years, and that over 150 States have ratified it, it would be hard to convince all Contracting States to go along with the establishment of an IAC. The IAC would surely benefit uniformity, predictability and consistency of the New York Convention. However, the likelihood of reaching consensus regarding the establishment of the IAC is slim.


7.2 ISA and LSA

"I propose that the annulment of an award by the courts in the country where it was rendered should not be a bar to enforcement elsewhere unless the grounds of that annulment were ones that are internationally recognized."161

This proposal was made by Jan Paulsson almost 20 years ago and has been supported by other authors over the years.162 Paulsson argues that if an award is set aside on the basis of an internationally unacceptable local rule, local standard annulments ("LSAs"), it should not be a bar to enforcement in other jurisdictions. Only decisions based on international standard annulments ("ISAs") should be entitled to obtain international recognition. Paulsson suggests that ISAs are circumstances falling within the scope of Article V(1)(a-d). Everything else, such as a rule saying that all arbitrators must be male etc., would be LSAs and therefore not be entitled international effect. According to Paulsson, the possibility to disregard LSAs is already there: Article V(1) is discretionary and the courts could therefore ignore a decision to set aside an award if it is based on a LSA.163

This approach is consistent with the 1961 European Convention on International Commercial Arbitration ("ECA"). The ECA has been ratified by 31 States, including e.g. France, Germany and The Russian Federation. However, Sweden has not ratified the ECA. Under Article IX of the ECA, an annulment-decision of a court in a Contracting State is only a ground for refusal of enforcement in another Contracting State if the award was set aside on one of the grounds set out in Article IX of the ECA. Consequently, under the ECA, an award can only be refused enforcement if it has been set aside for reasons explicitly listed in Article IX. Awards set aside in the country where it was made due to that country's public policy or other local grounds for annulment will still be enforced notwithstanding the annulment. In the States in which the ECA is applicable, the international effect of an international award

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162 See e.g., Pierre Lastenouse, Why setting aside an arbitral award is not enough to remove it from the international scene, 16 J. Int'l Arb. (1999) pp. 25-47.
being set aside on grounds other than those in the ECA is thus limited. This regime contradicts the view than an arbitral award ceases to exist if it is annulled. Clearly, if an international arbitral award is set aside on the basis of an obscure local rule, it may still be enforced under the ECA when it is applicable.

However, the idea of ISAs and LSAs could cause confusion. Refusal under Article V(1)(e) does not require that the award has been set aside on any specific grounds. It merely states that recognition and enforcement may be refused if the award has been set aside by a competent authority in the country in which, or under the law of which, that award was made. It does not limit the grounds on which an award may be set aside. As it reads today, it does not allow for the approach suggested by Paulsson. The drafting history and the language of the New York Convention cannot simply be disregarded. The intended effect of Article V(1)(e) was not to only allow refusal if the setting aside of the award was based on an ISA. To fully adopt the view that LSAs should be disregarded would require an amendment to Article V(1)(e), to make it correspond to Article IX of the ECA. However, to adopt the suggested approach that only annulment-decisions based on ISAs would be internationally recognized could help reach a uniform interpretation of the New York Convention. On the other hand, it should be noted that, in general, arbitral awards are seldom annulled. Awards being set aside on LSAs are even more rare.\textsuperscript{164} The problem is thus seemingly small in reality.

### 7.3 Revision of the New York Convention

Some authors have submitted that the New York Convention is in need of revision. The New York Convention is now almost 60 years old and it has been held that a number of provisions are outdated and unclear, which has led to different interpretations of the New York Convention.\textsuperscript{165} By amending the New York Convention a more uniform interpretation could be achieved. It is true that a number of issues have arisen in the past 60 years that the drafters did not anticipate when the New York Convention was created. Some of the provisions,

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especially Article V(1)(e) of the New York Convention, could use clarification to avoid uncertainty.

The main argument against a revision of the New York Convention is that it would most likely be impossible to get all the Contracting States to agree on eventual amendments. It would take a lot of time and effort to produce amendments that all Contracting States can accept. Furthermore, despite the issues concerning some of the articles, the New York Convention has been celebrated as a success and the issues surrounding it has not caused any major problems in practice. The best solution would be to strive for a uniform interpretation of the New York Convention as it stands.
8 Summary and Conclusions

Sweden has a long history of being a popular forum for international commercial arbitration. The Swedish Arbitration Act has evolved with time and the Swedish legislator is constantly looking for ways to make Sweden more efficient and attractive for international commercial businesses and State entities. International trade is growing rapidly and businesses are becoming more and more international. As arbitration is one of the factors enabling international trade to go beyond boarders, the system for enforcement of foreign arbitral awards must be working in a way to help create efficiency and predictability.

The New York Convention has been a success and a key to fast and efficient enforcement of foreign arbitral awards. However, nothing is perfect. As the New York Convention has been ratified by over 150 States, with different legal orders, culture and history, it is inevitable that the interpretation of it will differ. As a result, different approaches to the enforcement of annulled foreign arbitral awards have evolved. The use of the term "may" in Article V(1) gives the courts of secondary jurisdiction discretionary power to enforce awards notwithstanding that one of the grounds in Article V(1) is present. Furthermore, under Article VII a party may rely on a “more-favourable-right” of the country in which enforcement is sought.

Despite the differences in the territorial approach and the delocalized approach, there is a strong presumption in favor of refusing enforcement of annulled arbitral awards. Cases like *Hilmarton* and *Chromalloy* are rare, and most jurisdictions will not enforce an award that has been set aside by courts of primary jurisdiction. The reasoning by the courts in the *TermoRio*, *Baker Marine* and many other cases show that party autonomy and international comity are important aspects of international commercial arbitration.

As for Sweden, Section 54 of the SAA can be read to leave narrow room for the Swedish courts to enforce a foreign arbitral award, notwithstanding that it has been set aside. The Swedish provisions must be read in the light of the New York Convention and its general pro-enforcement bias. Awards that have been set aside by corrupt courts, or for obscure or
otherwise unacceptable reasons, should not be barred from enforcement in all other jurisdictions. There may be special circumstances under which it must be considered appropriate, or even necessary, for a Swedish court to enforce an award regardless of the fact that it has been set aside by a court in the country where the award was made.

Leaving room to the courts to decide, at their own discretion, to enforce a foreign arbitral award notwithstanding that it has been set aside would not cause any considerable uncertainty for the parties. Only if the circumstances under which an award has been set aside are so severe, or the court being manifestly corrupt or biased, would a court consider enforcing the award. If it would be unacceptable for a Swedish court to recognize the annulment-decision, the award should be enforceable in Sweden nonetheless. Under this regime, the parties to an arbitration can still expect that if the award is set aside in the seat of the arbitration proceedings, it will not be enforceable in Sweden. However, if the winning party to an arbitration is deprived of its right due to a "bad" annulment-decision, it should still have a possibility to furnish proof of the wrongfulness of the annulment-decision and have it enforced in Sweden.

When a Swedish court is faced with an application to enforce an annulled foreign arbitral award, it should not automatically refuse the application if the applicant claims that the decision setting aside the award is tainted. However, the court should not enforce the award solely because a Swedish court might not have set aside the award for the same reason. Clearly, Swedish courts must respect the decision made by a court of primary jurisdiction. That court is best fit to assess the validity of the award under the rules of that country. The parties are free to choose the forum for their arbitration and that choice must be respected. The reasoning behind the annulment-decision might appear unfair or be open for criticism, but such circumstances alone should not justify the enforcement of an annulled award. Only proof of actual bias, corruption, fraud etc. should lead to the court considering enforcement of the award notwithstanding its annulment.
List of Cited Works

Official publications

1958 New York Convention

UNCITRAL Model Law

Sweden
NJA II 1887 No. 4 – Lagarne om skiljemän samt angående förändrad lydelse af 46 § utsökningslagen

NJA II 1929 No. 1 – Ny lagstiftning om skiljemän

Govt. bill 1971:131 - Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i lagen (1929: 147) om utländska skiljeavtal och skiljedomar m.m. given Stockholms slott den 1 oktober 1971.

SOU 1994:81 – Ny lag om skiljeförfarande

Govt. bill 1998/99:35 – Ny lag om skiljeförfarande

SOU 2015:37 – Översyn av lagen om skiljeförfarande
Literature


Articles


**Other**

About the SCC:


ICCA’s guide to the interpretation of the 1958 New York Convention: A handbook for judges:


Up-to-date status of the New York Convention:

Table of Cases

France


*Hilmarton Ltd. v. Omnium de Traitement et de Valorisation – OTV*, Tribunal de Grande Instance [Court of First Instance], Nanterre, 22 September 1993

*Omnium de Traitement et de Valorisation – OTV v. Hilmarton Ltd.*, Cour d'Appel [Court of Appeal], Versailles, 315; 316, 29 June 1995

*Omnium de Traitement et de Valorisation – OTV v. Hilmarton Ltd.*, Cour de Cassation [Supreme Court], 10 June 1997

*Pabalk Ticaret Ltd. Sirketi (Turkey) v. Norsolor SA (France)*, Cour de Cassation [Supreme Court], 9 October 1984

*Pabalk Ticaret Ltd. Sirketi (Turkey) v. Norsolor SA (France)*, Cour d'Appel, Paris [Court of Appeals], 19 November 1982

*Pltrabali Adyamuila (Indonesia) v. Rena Holding, et al.*, Cour de Cassation [Supreme Court], First Civil Chamber, 29 June 2007


Hong Kong

*China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.* (Supreme Court of Hong Kong, 1994)
ICC

ICC Case No. 1110 (Gunnar Lagergren's case)

United Kingdom

*Dowans Holding S.A. et al. V. Tanzania Electric Supply Co. Ltd* (High Court of Justice, Queen's Bench Division, Commercial Court, 2011)

*Nikolai Viktorovich Maximov v. OJSC Novolopetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm) on 27 July 2017

United States

*Chromalloy Aeroservices, Inc. v. The Arab Republic of Egypt*, United States District Court, District of Columbia, Civil No. 94-2339 (JGL), 31 July 1996


*Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc. and TRU(HK) Limited*, United States Court of Appeals, Second Circuit, 1757; Docket 96-9692, 10 September 1997
Sweden

*Finants Collect OU v. Heino kumpala*, decision of the Svea Court of Appeals on 31 October 2016 in case No. Ö 7419-15

*Forenede Cresco AS v. Datema AB*, decision of the Supreme Court made on 23 November 1992, NJA 1992 p. 733

*Götaverken Arendal AB v. General National Marine Transport Company*, decision of the Supreme Court made on 13 August 1979, NJA 1979 p. 527

*Hammeum International v. Adelina Gross AB*, decision of the Svea Court of Appeals made on 23 December 2016 in case Ö 6418-15

*Lenmorniproekt OAO v. Arne Larsson & Partners AB*, decision of the Supreme Court made on 16 April 2010 in case No. Ö 13-09, NJA 2010 p. 219

*PKC Patroun Korrosionsschutz Consulting GmbH v. Fagerdala Marine Systems AB*, decision of the Svea Court of Appeals made on 13 January 2016 in case Ö 8930-15

*Société Planavergne SA v. KB I Stockholm AB*, decision of the Supreme Court made on 30 September 2003 in case No. Ö 3390-01, NJA 2003 p. 379

*Subway International B.V. v. Anders Eldebrant*, decision of the Swedish Supreme Court made on 02 June 2015 in case No. Ö 6354-13, NJA 2015 p. 315

Switzerland

*Omnium de Traitement et de Valorisation – OTV v. Hilmarton Ltd.*, Tribunal Fédéral [Supreme Court], 17 April 1990
The Netherlands


Northern River Shipping Lines v. Kompas Overseas Inc. Voorzieningenrechter, Rechtbank, Middelburg [Court of First Instance], 3 September 2010

Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation), Gerechtshof [Court of Appeals], Amsterdam, 200,005,269, 28 April 2009