The New York Convention and A-National Awards

TvA 2024/72

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JCDI	JCDI:ADS980570:1
Vakgebied(en)	Burgerlijk procesrecht (V)

Authors discuss the status of so-called a-national arbitral awards under the New York Convention. These are awards that are not subject to the laws of and the possibility of annulment by (courts of) any state. Authors argue that the New York Convention does not expressly exclude such awards from its scope and that there are several policy arguments for recognising and enforcing such awards within the Convention system.

1. Introduction

In his Triptych published in this Special Edition, Professor Albert Jan van den Berg discusses a number of decisions of the Netherlands Supreme Court (NSC) applying the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).[2] This contribution focuses on his comments on the SEEE decisions of the NSC in relation to Article I NYC and in particular on the question whether arbitral awards necessarily need to be subject to the laws of the place arbitration or whether they can be detached from such laws (often called “a-national awards”, denationalized of floating awards) and still qualify for enforcement under the NYC.

2. The Idea and Definition of an A-National Award

Van den Berg uses - both in his 1981 dissertation[3] and in his Triptych - a very specific definition of an a-national award, namely being “an award resulting from an arbitration which is detached from the ambit of a national arbitration law on the basis of a specific agreement of the parties”.[4]

Van den Berg states that “such a specific agreement for de-nationalized arbitration is extremely rare”, and indeed we see hardly any examples in case law. Even the SEEE case that triggered the NSC’s rulings and Van den Berg’s criticism may not in fact meet the definition, as there do not seem to be indications that parties thereto had intended to detach their arbitration from any national legal sphere. Also, the NSC did not treat it as such and its proclamation on a-national awards was in fact an *obiter dictum*.

Nevertheless, the concept of a-national arbitration is not as extravagant as its rarity seems to suggest. In fact, there may be good reasons to want to detach an arbitration from a national jurisdiction. As Van den Berg himself notes in NYAC 1:[5]
“*The exclusion of the applicability of a national arbitration law may also have the effect that it excludes, in principle, the supervision or interference of the national courts over or with the arbitration.*

This type of arbitration may be especially appropriate for the settlement of disputes between States and foreign enterprises, as foreign enterprises do not like to arbitrate under the arbitration law of the State concerned, and States do not like to be subjected to the (procedural) law and courts of other States."

Even if parties desire to resort to this type of a-national arbitration, it should be kept in mind that, as Redfern and Hunter note, "the reality is that the delocalisation of arbitrations-other than those, like those of ICSID, which are governed directly by international law-is possible only if the local law (the *lex arbitri*) permits it".[6]

We know no arbitration laws that explicitly allow for full delocalization of arbitrations and that do not impose application of (at least the mandatory elements of) the law of the place of arbitration. However, various countries allow parties to opt out (*ex ante*) of local annulment proceedings in international cases;[7] if delocalization implies - as Van den Berg stated - detachment from both local law and local court oversight, this could be considered a *partial* delocalization. Thus, the debate on a-national awards is certainly still relevant.

Van den Berg and the late Professor Piet Sanders both deem(ed) a-national awards ineligible for enforcement under the NYC.

Below, we will primarily engage in a dialogue with Van den Berg about the reasons why such awards ought or ought not to be deemed eligible for enforcement under the NYC.

3. Van den Berg's Views on A-National Awards

We understand the reasoning of Van den Berg for rejecting the applicability of the NYC to a-national awards as follows.[8]

1. The *text* of the NYC, read in light of its drafting history, implies that any award eligible for enforcement under the convention must be anchored in a national legal system;

2. The system of the NYC is based on a division of 'jurisdiction', whereby the courts in the primary jurisdiction exercise control over the arbitral procedure and the ensuing award on the basis of local grounds, with the potential of annulling the award, and the courts of the enforcement jurisdiction(s) having the limited task to enforce the award or to refuse the enforcement only on limited and narrowly defined grounds ('secondary jurisdiction').

3. In connection with point 2, the NYC is based on a system of 'central attack' against awards with (if the challenge succeeds) worldwide effect in foreign enforcement proceedings, thus relieving the aggrieved party of the necessity to raise the problematic nature of the award in every single state where the winning party might seek to enforce it.

4. Textual Interpretation and Drafting History[9]

On several occasions Sanders has stated that:
"*The idea of a truly international award was too progressive for the times. ECOSOC* [the UN committee in charge of the Conference, addition by the authors] *modified this concept* [which had been proposed by the ICC, addition by the authors]. *Its draft, which provided the basis of the New York Conference, envisioned foreign arbitral awards whose enforcement is requested in a State other than that where it was made. The Convention was concluded on the basis of this more limited notion.*"[10]

This quote seems to suggest that a-national awards were not meant to be covered by the NYC. To what extent does the text of the NYC reflect this?

We note that both the textual arguments that have been advanced *for* allowing enforcement of a-national awards and the textual arguments *against*, are largely based not on Article I NYC, which defines its scope, but on Article V, which describes the permissible grounds for refusing the enforcement of foreign arbitral awards.

Article I(1) NYC provides:

> "1. *This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."*

It appears that this concept of 'arbitral awards' literally does not impose any specific requirements in terms of the applicability (to the award or the arbitral proceedings that preceded it) of any national law. The NYC does not even refer to the legal concept of the 'seat' of the arbitration (which is generally assumed to determine also the applicable arbitration law) but seems to refer only to the factual criterion whether an award was made "in the territory of a State other than the State where the recognition and enforcement of such award are sought". Neither do Articles IV and V NYC, which describe the criteria for recognition and enforcement of an arbitral award, provide any explicit requirement that the award must have been subject to either a national law or must have been subject to judicial control in the place where it was made.

Specifically, as to the text of Article V NYC, dealing with the permitted refusal grounds, neither the arguments for nor against a-national awards are convincing. On the one hand (as to the NSC's argumentation in SEEE), [11] the fact that 'national law' is being referred to under Article V(1)(a) NYC only as a subsidiary set of rules where the parties' agreement is silent, does not prove that parties can exclude the applicability of any national law altogether.[12] On the other hand (as to Sanders' and Van den Berg's argumentation),[13] the fact that two of the refusal grounds refer to something that may have occurred under national law of the primary jurisdiction (namely invalidity of the arbitral agreement or setting aside) does not prove that arbitral awards *must* necessarily be subject to such national laws; it could also simply mean that such refusal grounds will simply not apply where no national laws are applicable to the award. Even if we were to agree with Sanders and Van den Berg that the NYC *presumes* that national law and judicial control apply to any arbitral award at the place of arbitration, that does not necessarily mean that the NYC *requires* this for purposes of determining its scope.

Van den Berg said in 1981 in NYAC 1 that: "[a]*lthough the extensive debates at the New York Conference are not entirely clear on this point, it can be assumed that the idea* [of including a-national awards, addition by the authors] *was also rejected by the majority of the delegates. The legislative history would indicate that the Convention is not to apply to an "a-national" award".*"[14] Saliently, however, when discussing a potential second edition of NYAC 1 in 1998, he identified points on which his views would differ from the first edition and said:
"(…) *in the first (1981) edition of my book and in subsequent publications, I maintained the view that an "a-national" award could not be enforced under the Convention. Having reflected further on this question, I have come to the conclusion that I should revise my opinion. It can indeed be argued that the Convention confers upon a court the discretionary power to recognize and enforce an "a-national" award under the Convention.*"[15]

It is not clear how Van den Berg construes this "*discretionary power to recognize and enforce*": if an award falls within the scope of the NYC, there is a non-discretionary *duty* to enforce it save where a ground for refusal can be accepted. In any case, Van den Berg apparently - at least on one occasion - thought that the recognition and enforcement of a-national awards under the NYC is not a (textual) impossibility.

Our interim conclusion is that the NYC does not have any provisions clearly indicating whether a-national awards are or are not included.

5. Necessity/Benefits of Local Law and Judicial Control

Let us now turn to the contextual and more policy-based arguments advanced by Sanders and Van den Berg against the inclusion of a-national awards. The first argument is that the NYC relies on and requires a system in which control is divided between the primary and secondary jurisdictions and that both are necessary.

Sanders is most explicit about this division of control where it concerns the role of the judiciary:
"*One therefore finds in the Convention a division of control between the national court (the court in the country where the arbitral award was rendered) and the enforcement court (the court in the country where recognition and enforcement is sought). The first assesses whether there are grounds for annulment; has the award been annulled on the basis of the applicable national arbitration law in the country of origin, then it is no longer eligible for enforcement.*"[16]

As is implied in this quote, it is also for the *national law* of the primary jurisdiction to provide the grounds for annulment. It appears that Van den Berg considers it a part of the NYC system that the national law of the primary jurisdiction is to supply the criteria for (i) (potential) invalidity of the arbitration agreement (absent a choice of law by the parties; Article V(1)(a) NYC); (ii) the rules for "the composition of the arbitral authority [and] the arbitral procedure" (Article V(1)(d) NYC); and (iii) the procedure and criteria for annulment under Article V(1)(e) NYC.[17]

5.1 None of this Presumed Regime is Reflected in the NYC

What is remarkable in this line of thinking, is that it is based on an *assumption* about the role that the primary jurisdiction will take, viz. that the primary jurisdiction will in fact provide a legal framework for the arbitration and an avenue to challenge the award (in court) if one believes the arbitration was somehow invalid: the NYC itself does not set any explicit requirements as to what legal framework (including annulment avenues) should exist in the primary jurisdiction,[18] nor does one in practice ever look into the existence or adequacy of that framework.

An award could technically originate in a country that does not even have an (adequate) arbitration law and/or does not provide for any judicial review of arbitral awards as some countries have done by providing parties in international cases with an opportunity to opt out of local setting aside proceedings. Nothing in the NYC indicates that such circumstance in and of itself would make an arbitral award ineligible for enforcement under the convention.[19]

Moreover, we note that one of the main inventions in the NYC compared to the prior 1923 Geneva Convention was that it would no longer be a positive requirement that the award be enforceable in the primary jurisdiction. Although this change was made largely for reasons of expediency, it seems to confirm that the operation of the NYC does not in fact depend on the operation of the arbitration law in the primary jurisdiction and, in this respect, is detached from that law.

5.2 This Reliance on Local Law and Judiciary is Not Necessary

As we have seen, it appears that under the NYC system, *national law* only serves as a backup, in case (i) the parties have not made a choice of law for their arbitration agreement, or (ii) in case parties have not agreed on a method for composing the arbitral tribunal or regulating the arbitral process.

The first role could easily be fulfilled by another legal framework than the law of the primary jurisdiction. First, the NYC does not contain a uniform conflicts rule in relation to the arbitration agreement but limits that role to its application in enforcement proceedings and does not oblige the *primary jurisdiction* to apply such rule. Second, in enforcement proceedings, in the absence of a choice of law by the parties, normal conflict of law rules could be applied to assess the validity of the arbitration agreement. Why would the system of Article V(1)(a) NYC work better if the validity of the arbitration agreement is assessed in accordance with the law of the primary jurisdiction (whose law does not even necessarily apply), compared to e.g. in accordance with the

law that materially governs the contractual relationship between the parties? The only benefit of the reference to the national law of the primary jurisdiction in Article V(1)(a) NYC is that it creates a uniform (subsidiary) conflict-of-laws rule, so that different enforcement courts do not end up applying various conflict-of-laws rules with different results.

Also, the role of the primary jurisdiction to supply supplemental rules of composition of the tribunal or of arbitral procedure does not seem particularly key to the working of the NYC. How useful is it that there is an additional refusal ground where the composition/procedure was contrary to the national law of the primary jurisdiction, while the award has not been annulled in the primary jurisdiction? As far as we can see, the application of this rule is very rare and where it does get invoked, it forces the enforcement court to make assessments under the law of another country. Also, in terms of the objectives of the NYC as a pro-enforcement treaty, how often would we want to refuse enforcement on the basis of a national-law composition/procedural problem if that problem does not amount to a breach of fundamental concepts of fairness and due process (which would already be covered by the public order exception)?

As to reliance on the *local judiciary*, this has two perceived functions: to provide some form of legal recourse in case things go (very) wrong and to promote efficiency creating a division of tasks between the (judiciary of) the primary and secondary jurisdictions.

However, in a development that started with the UNCITRAL Model Law of 1985 - implemented (in that or subsequent versions) (in whole or in part) in 93 countries[20] - the standards for annulment are in many countries almost an exact copy of the tests for refusal of recognition and enforcement under Article V NYC.

This means on the one hand that protection against injustice is already provided by the enforcement judge and that the annulment judge, and any enforcement judge, are not so much dividing the work, but carrying out (largely) the same checks.

The only scenario where one would arguably avoid such double control, is where the courts in the primary jurisdiction *annul* the award. In Sanders and Van den Berg's view, that relieves all other potential enforcement courts from their tasks, as such annulment has 'universal effect'.

We therefore investigate the additional argument of Sanders and Van den Berg regarding the need to involve the judiciary in the primary jurisdiction to create the possibility of a *central attack* to the award, with worldwide effect.

6. Necessity/Benefits of Central (and Universally Dispositive) Judicial Control

The possibility to get an errant arbitral award annulled once and for all is an important safeguard to the parties to an arbitration, because it provides a centralized and coordinated mechanism in case of a successful challenge to an award. Arbitration is almost always (although not inherently) a single-instance form of adjudication, and the lack of appeal possibilities should be compensated by limited but effective judicial recourse.

In the interest of the integrity of the arbitral process and a fair balance between the interests of finality on the one hand and protection against excesses on the other hand, there certainly is much to be said for such centralized control.

However, the question is whether the NYC is built on this principle. As mentioned, there is no explicit or implied requirement in the NYC that the award must be or have been subject to any judicial review in any jurisdiction. As already indicated, there has been a shift towards an international common understanding that annulment proceedings should involve not more than a test against the same grounds that are included in Article V(1) NYC and ought not to include local standards of annulment.

So, if the test performed by the primary jurisdiction is by and large the same test that the various enforcement jurisdictions are performing, the question arises as to the added value of that double test.

Van den Berg could answer that the availability of a *central* route of attack is more efficient than decentralizing challenges in countries where enforcement is sought and avoids enforcement shopping. Moreover, Van den Berg has argued in response to Paulsson,[21] that the court in the primary jurisdiction may be best suited to review the regularity of the arbitral award, as it will often be its arbitration law that has been applied to it.

While all this is true, there are several counterpoints to this.

6.1 The NYC Does Not Either De Jure or De Facto Provide a Central Dispositive Route of Attack

The assumption that a central attack, if successful, is automatically dispositive for all further enforcement attempts abroad ("game over", as Van den Berg called it in 1998), itself certainly is not uncontroversial.[22] At least the Netherlands Supreme Court has left room for successful enforcement in the Netherlands despite an annulment at the seat.[23] Also, 31 countries are members of the 1961 European Convention on Commercial Arbitration[24] and have committed to ignore a foreign annulment if it has not been made on one of the grounds stated in that convention. Also in that context, the annulment of an award abroad is therefore not ipso facto dispositive. We refer to the contribution of Paulsson and Paulsson in this Special Edition for more on the issue of the enforcement of annulled awards in the context of the NYC system.

6.2 Automatically Dispositive Annulment Risks Accepting Annulments on Unacceptable Grounds

The (main) reason why countries do not accept an automatic no-questions-asked dispositive effect of central annulment, is that that system risks accepting annulments that were obtained fraudulently or are otherwise based on grounds that do not merit annulment or are (otherwise) internationally unacceptable.

Such a system makes the actual deference to the parties' agreement to arbitrate and the arbitrator's decision - both protected by the NYC - subject to a local law regime and local judiciary - over which the NYC has absolutely no control and for which the convention does not set any standards or requirements. Absolute deference to the primary jurisdiction then thwarts the NYC's objectives of facilitating the international enforcement of foreign arbitral awards.

6.3 Automatically Dispositive Annulment Runs the Risk of Doing More Harm Than Good

A mechanism of automatically dispositive annulment has a high risk of suffering from the so-called 'false positive paradox'.[25] This effect occurs when a selection mechanism to find the problematic cases (in this case: the judicial review of arbitral awards) is not perfect and the actual incidence of the problem (awards that are so defective that they need to be annulled) is low. Concretely speaking: if we assume that the percentage of awards that *actually* deserve to be annulled is low, say 2% and we also assume that annulment courts get it wrong sometimes (due to incomplete information, incompetence, corruption, etc.), say in 5% of the cases brought, then the following happens. If 1000 awards are challenged, statistically 20 of those deserve to be annulled and 980 do not.[26] If the annulment courts get it wrong in 5% of the cases, then they will *correctly* annul 19 awards (95% of the 20 that deserved it) but *erroneously* annul 49 awards (5% of the 980 that did not deserve it). So, the net effect of a dispositive central attack is that we (correctly) protect 19 awards against duplicative litigation, but for every award that we so protect, we also (incorrectly) deprive 2.5 others (the group of 49) of their 'valid' award in the whole world.

6.4 The Effectiveness of a 'Central Attack System' is Limited if the Attack Does Not Block Enforcement in the Meantime

A dispositive central annulment decision only operates truly effectively if, pending the annulment proceedings,

no enforcement proceedings can be pursued or must be stayed. This is not how the NYC system is set up, as Articles V and VI NYC only provide for a possibility (with or without security) but not an obligation to stay enforcement.[27] As annulment proceedings can take between some nine months in Switzerland and more than a decade in some other jurisdictions, the benefits of a central line of attack depend upon the country of the arbitral seat.

6.5 The Effectiveness of a 'Central Attack System' is Limited if it Serves Only the Party Challenging the Award

The dispositive central attack system as envisaged by Van den Berg is asymmetrical. If the annulment proceedings are successful, that is the end of the story and the party which had prevailed in the arbitration is done everywhere. However, if the award is upheld, many countries (save for common law countries under issue estoppel rules) and certainly the NYC itself do not attach preclusive effect to the judgment upholding the award in the primary jurisdiction. Thus, the losing party in the arbitration may repeat his objections in every enforcement forum in the world, thus severely limiting the idea of an efficient and single central adjudication.

In sum, we may question the importance of a system of central attack and whether it is an integral element of the NYC system.

Finally, we recall that - at least in Van den Berg's definition - an a-national award is always the product of *a deliberate choice by the parties*. In that sense, the a-national award is not much different from the scenario whereby parties have contractually agreed to waive (ex ante) their possibility to seek the annulment of an award. As indicated above, this is possible in a number of countries, and it has hardly been argued - nor could it be in our view - that that choice makes the ensuing award ineligible for enforcement under the NYC as no central attack against the award is possible. If parties are able to exclude the annulment review by specific contract, then why not by a contract that provides for the 'a-nationalization' of their arbitration?

7. Broader Context/Wider Implications

Arbitration, and certainly international commercial arbitration, has come of age in the nearly 70 years since the New York Convention was conceived. In his hypothetical proposal for a revised NYC, the so-called 'Miami Draft',[28] Van den Berg has acknowledged this by suggesting a system of recognition and enforcement not of 'foreign arbitral awards' but of 'international arbitral awards', thus further loosening the ties between the arbitral award and any underlying national law.[29]

As described above, we do not necessarily think that this approach requires a revision of the New York Convention.[30]

Where a country decides - for whatever reason - that it will not attach the force of government-backed enforcement to an arbitral award made in its territory, it is free to do so. But if that award meets the autonomous criteria for being an 'arbitral award' in the sense of the NYC,[31] based on an arbitral agreement in the sense of the Convention, why would it not be eligible for international recognition and enforcement under the NYC?

We would - as others have - argue that the NYC is not concerned with local-law defects in the arbitration agreement, the arbitral proceedings or the arbitral award. What it is concerned with is on the one hand a pro-enforcement system of recognition and enforcement and on the other hand appropriate safeguards in the rare case that something has gone seriously wrong. But those safeguards can be found in the autonomous norms embedded in Article V NYC and do not need to be supplied by the local law of the seat and do not warrant excluding a-national awards by a restrictive interpretation of Article I NYC. Moreover, relying on the law and the courts of the seat may have important downside, as we discussed above.

In SEEE, the enforcement of the award was eventually refused in the Netherlands on the basis that the Swiss court had ruled that the award did not meet the criteria for a Swiss arbitration award. We question whether this fact *as such* ought to have been dispositive. Without knowing exactly why the Swiss court came to this conclusion, we suggest that it would have been fully in line with the NYC and its objectives to give the award the benefit of the doubt unless the arbitration agreement, the award or the procedure leading up to it has such clear errors that recognition should be refused.

Voetnoten

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[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 3.

[3] A.J. van den Berg, *The New York Arbitration Convention of 1958*, The Hague: Kluwer, 1981 (hereafter to be referred to as NYAC 1).

[4] Lecture, pp. 1-2, NYAC 1 *TvA* 2024/71, p. 212.

[5] Pp. 29-30.

[6] N. Blackaby, C. Partasides & A. Redfern, *Redfern and Hunter on International Arbitration*, Oxford: Oxford University Press 2022, para 3.97.

[7] Switzerland was the first to propose such a model which led to Art. 192 of the 1987 Private International Law Act (as amended) and was followed by Belgium in a Statute of March 27, 1985. For a discussion and analysis of the Belgian Statute in relation to the NYC, see F. De Ly, 'De liberalisering van de internationale arbitrage', *T.P.R.* 1986, pp. 1025-1050.

[8] Some of these objections were first formulated by Piet Sanders. In the Triptych, Van den Berg refers to Sanders' 1977 commentary in *WPNR* (*Weekblad voor het Privaatrecht, Notariaat en Registratie*), no. 5394 (1977), pp. 362-366 and indicates that he is in agreement with Sanders.

[9] It is beyond the scope of this contribution to deal with the interpretation methods in relation to the NYC including the (retrospective) application of Art. 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331).

[10] P. Sanders, 'The History of the New York Convention', in: A.J. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series No. 9 (Paris 1998)), Kluwer Law International 1999, pp. 11-14.

[11] Quoted in the Triptych, *TvA* 2024/71, p. 213-214.

[12] See also Van den Berg's analysis of the drafting history of section (d), which suggests that the national law was made subordinate to the parties' agreement was in response to the experiences under the 1923 Geneva Convention which required (always) compliance with the national law as a positive requirement, which lead to inefficiencies and complex arguments at the enforcement stage (NYAC 1, pp. 38-39 and pp. 325-327).

[13] See Sanders, *WPNR* no. 5394 (1977), p. 365, NYAC 1, p. 37 and Triptych, *TvA* 2024/71, p. 214.

[14] NYAC 1, p. 34.

[15] A.J. van den Berg, 'The Application of the New York Convention by the Courts', in: *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* ICCA

Congress Series No. 9 (Paris 1998), Kluwer Law International 1999, pp. 25-35.

[16] P. Sanders, *WPNR* no. 5394 (1977), p. 365 (our translation). The translated quote reads as follows in Dutch: "*Men vindt derhalve in het Verdrag een verdeling van de controle over de nationale rechter (de rechter van het land waar het arbitrale vonnis is gewezen) en de exequatur rechter (de rechter in het land waar erkenning en tenuitvoerlegging wordt gevraagd). De eerste beoordeelt of er gronden zijn voor vernietiging; is het vonnis op grond van de toepasselijke nationale arbitragewet in het land van herkomst vernietigd, dan komt het voor tenuitvoerlegging niet meer in aanmerking.*"

[17] See NYAC 1, p. 37: "*The argument that for the "anational" award Article V(1)(a) and (e) can be considered as non-written would be an interpretation which goes squarely against the text of the Convention.*"

[18] In this respect, it is worth noting that the NYC does not require that an award originates in a NYC Member State. Different from other judgment conventions, the NYC itself is not based on principles of reciprocity or comity. States can make a reservation under Art. I(3) for reciprocity, but this is not an inherent element of the NYC system.

[19] We do not believe that Art. V(1)(e)'s wording - allowing refusal if the award "*has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*" requires that the award has a certain status under the laws of the primary jurisdiction.

[20] See www.uncitral.org.

[21] A.J. van den Berg, 'Enforcement of annulled awards?', *The ICC International Court of Arbitration Bulletin*, Vol. 9, No. 2, 1998, p. 15.

[22] In fact, one could say it is almost certainly not fully dispositive due the operation of Art. VII(1) which - briefly stated - allows states to have more favourable treatment than the NYC prescribes. As Van den Berg describes (inter alia in A.J. van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?' (Böckstiegel Lecture 2013), *ICSID Review*, Vol. 29, No. 2 (2014), pp. 263-288), France uses this provision to allow enforcement of awards that have been annulled in the primary jurisdiction.

[23] NSC 24 November 2017, ECLI:NL:HR:2017:2992, with commentary from J.K. van Hezewijk in *TvA* 2019/48.

[24] Geneva, 21 April 1961, 484 UNTS 349.

[25] Part of the 'base rate fallacy'; see https://en.wikipedia.org/wiki/Base_rate_fallacy for a general introduction.

[26] This assumes that awards submitted for annulment are a more or less random sample of all awards rendered. One could challenge this assumption, but the low percentage of successful annulment attempts all over the world seems to suggest that at least there is not a very strong correlation between actual defectiveness and seeking annulment. It also assumes that the error rate of the courts is random (i.e. the percentage of false positives is the same as the percentage of false negatives). We have no empirical data to support this, but it may well be that the percentage of erroneous (often corrupt/not independent) annulments is higher than the percentage of erroneous confirmations.

[27] More extensively, see: F. De Ly, J.K. van Hezewijk & A.E. Coelen, 'In dubio pro executione. Foreign Setting Aside Proceedings as a Ground to Stay Enforcement Proceedings under Article VI New York Convention' (in Dutch), *TvA* 2017, pp. 85-92.

[28] A.J. van den Berg, 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards', in: A.J. van den Berg (ed.), *50 Years of the New York Convention: ICCA*

International Arbitration Conference (ICCA Congress Series No. 14 (Dublin 2009)), Kluwer Law International 2009, p. 649.

[29] Except that the Draft Convention proposes - presumably for reasons of legal certainty - to make refusal compulsory in case the award has been annulled at the seat.

[30] Similarly: E. Gaillard, 'The Urgency of Not Revising the New York Convention', in: *50 Years of the New York Convention: ICCA International Arbitration Conference* (ICCA Congress Series No. 14 (Dublin 2009)), Kluwer Law International 2009, pp. 694-695.

[31] A further discussion as to the definition of NYC awards is beyond the scope of this contribution.