

# WHERE ON EARTH DOES CYBER-ARBITRATION OCCUR?: INTERNATIONAL REVIEW OF ARBITRAL AWARDS RENDERED ONLINE

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## I. INTRODUCTION

As international commerce continues to increase in online volume, so to will disputes arising out of that online commerce. Since arbitration, over litigation in a national court, is the preferred method to resolve international commercial disputes,<sup>1</sup> online arbitration could be an alternative dispute resolution norm in the near future. National courts simply might not have the ability, the capacity, or the authority to effectively resolve the potentially numerous disputes that could arise.

Arbitration has become a legitimate dispute resolution method virtually everywhere in the world with varying degrees of scope and application.<sup>2</sup> For

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1. Camille A. Laturno, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 *TRANSNAT'L L.* 357, 370 (1996).

2. YASUHEI TANIGUCHI, *Is There a Growing International Arbitration Culture? An Observation from Asia*, in *INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE* 33 (International Council for Commercial Arbitration Congress Series No. 8, Albert Jan van den Berg, ed. 1996).

example, the World Intellectual Property Organization (WIPO) has recently recommended online arbitration to resolve domain name disputes.<sup>3</sup> However, before online arbitration can be readily accepted, it must be determined which basic rules will govern matters of proper administration, choice of law, jurisdiction, enforcement, and review.

International arbitration law and national law can provide guidance in determining the necessary basic rules. The national law of the country where the arbitration takes place generally provides the rules for conducting the arbitration. However, because online arbitration has only a virtual presence, a question arises as to where, or in what country, the online arbitration has taken place. Typically, the parties will either determine the place via contract, or an arbitral tribunal will determine the place of an online arbitration.

The topic of this paper is limited to problems arising out of judicial review of online arbitral awards. Judicial review is an important aspect of all arbitrations. The losing party of the arbitration invokes judicial review. In an online arbitration, the country where the arbitration takes place could affect the judicial review of an arbitral award, because national law determines the scope of judicial review. Problems arise because different countries follow different models of judicial review. Sometimes peculiarities can develop when local rules are applied to international arbitration. The scope of this paper is to determine whether the national courts of the arbitration situs have the authority to review the arbitral award, and if that authority is established, the effect the country's national law might have on the award's review.

## II. ONLINE ARBITRATION SITUS: WHY IS IT SO IMPORTANT?

The situs of the arbitration is the locale where the arbitration has taken place, or its legal seat.<sup>4</sup> The importance of the place of the arbitration can not be overestimated. The role of the arbitral situs is vital in supporting international commercial arbitration.<sup>5</sup> Parties will likely agree to an arbitral situs in the arbitration clause of the relevant commerce contract. However, if the parties fail to agree to the arbitration situs, then the arbitral tribunal may fix the location.<sup>6</sup> The arbitration situs determines the mandatory procedural rules that will have to be adhered to while conducting the arbitration.<sup>7</sup> The place of

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3. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, FINAL REPORT, PUB. NO. 92-805-0779-6 (forthcoming Apr. 1999), available at <http://www.wipo.wipo2.int> [hereinafter WIPO FINAL REPORT].

4. YVES DERAIS & ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 201 (1998).

5. W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION 156 (1997).

6. DERAIS & SCHWARTZ, *supra* note 4, at 200.

7. REISMAN, *supra* note 5, at 156.

the arbitration may literally determine the outcome of the case.<sup>8</sup> The laws of the arbitration situs will also determine the likelihood and extent of the national court's involvement in conducting the arbitration through judicial assistance and/or judicial interference. If the country's national law deems the place of the award to be the place where the award was signed, then the arbitration situs may or may not be determined as the place of the award. Overlooking these considerations when determining the arbitration situs could be critical.

### III. GOVERNING ONLINE ARBITRATION: WHO WILL BE RESPONSIBLE?

Two general theories exist regarding regulating commerce on the Internet. One theory suggests that since laws that govern international commerce already exists, those laws should be applied to online commerce, thereby treating the Internet merely as a new medium. A second theory suggests that basic regulations should be developed to deal with the particularities and uniqueness of the Internet.

The most optimal solution may evolve by combining existing international law while drafting flexible new laws to supplement, adapt, or clarify the existing laws. This combination may produce the least-restrictive regulation necessary while providing parties with some certainty as to rules, procedures, and possible outcomes. Perhaps a similar combination can be applied to create some certainty as to which laws to apply to online arbitration. The adversarial participation in the arbitration process is more meaningful when the decision-maker is bound by a set of procedural rules.<sup>9</sup>

International law can be used to help resolve online commerce conflicts. International law binds all nations and arises through tradition, practice, and treaty.<sup>10</sup> Two subsets of international law are public and private international law.<sup>11</sup> Public international law addresses issues of state recognition, treaties, and war.<sup>12</sup> Private international law is concerned exclusively with private disputes among individuals and/or corporations. Private international law is also referred to as conflicts of law.<sup>13</sup> When the law of more than one jurisdiction can apply, conflicts rules determine whether a court should apply the laws of its own jurisdiction or the law of another jurisdiction.<sup>14</sup>

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8. London was selected as the arbitration situs in the arbitration clause in an ICC arbitration between Finnish and Australian corporations. Because of the situs, the arbitrator applied the United Kingdom Statute of Limitations Act that effectively barred the claim.

9. TANIGUCHI, *supra* note 2, at 33.

10. MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 48 (3d ed. 1999).

11. *Id.*

12. ANDREAS F. LOWENFELD, *CONFLICT OF LAWS* 853-54 (1986).

13. JANIS, *supra* note 10, at 234-35.

14. Lionel S. Sobel, *The Framework of International Copyright*, 8 CARDOZO ARTS & ENT. L. J. 1 (1989).

Both substantive and procedural laws also regulate arbitration. Often, the arbitral tribunal has the power to determine which substantive and procedural laws to apply.<sup>15</sup> Substantive law governs a contractual arbitration agreement between parties. The substantive law determines the validity, scope, and effect of the arbitration clause.<sup>16</sup> It is widely believed that an arbitrator must apply the rules of substantive law rather than decide a case by his sense of justice, unless the parties otherwise agree.<sup>17</sup>

Typically, parties agree on which procedural law will apply in the arbitration agreement. Procedural law governs arbitral procedures such as the appointment and challenge of arbitrators, pleadings, discovery, hearings, and the form of the final award.<sup>18</sup> If the parties contractually agree to an arbitration location, then the parties' choice will be upheld. The choice of law is imperative when the contract does not specify what to do in a particular situation. The parties are also likely to agree, or they may only have one choice, as to which arbitral tribunal they will be submitted. One arbitral tribunal may be more suitable for a particular online transaction than another. There are currently six arbitral tribunals to which an arbitration can submit: International Chamber of Commerce (ICC), American Arbitration Association (AAA), LCIA Arbitration International (LCIA), International Center for the Settlement of Investment Disputes (ICSID), Stockholm Chamber of Commerce (SCC), and the United Nations Conference on International Trade Law (UNCITRAL). For example, Article 14(2) of the ICC Rules of Arbitration provides that the Arbitral Tribunal may, after consultation with the parties, conduct the hearings and meetings in any location it considers appropriate unless otherwise agreed to by the parties.<sup>19</sup> Once the parties have either agreed to the situs in their arbitration clause, or the arbitral tribunal has chosen the situs with the parties' consent, the diverse physical locations of all the parties involved should not matter.

#### IV. TRADITIONAL ARBITRATION VS. ONLINE ARBITRATION

The following examples show a significant difference between traditional notions of arbitration and at least one emerging online arbitration approach. Traditional arbitration procedure provides the model for WIPO's proposed

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15. Tricia A. Hoefling, Note & Comment, *The (Draft) WIPO Arbitration Rules for Administrative Challenge Panel Procedures Concerning Internet Domain Names*, 8 AM REV. INT'L ARB. 173, 178 (1997).

16. RONALD BERNSTEIN ET AL., HANDBOOK OF ARBITRATION PRACTICE (Derek Wood ed., 3d. ed. 1998).

17. TANIGUCHI, *supra* note 2, at 32.

18. Frank A. Cona, *Focus on Cyberlaw: Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975 (1997).

19. DERAIS & SCHWARTZ, *supra* note 4, at 205.

online arbitration. However, certain unique features of WIPO's online procedure may cause it to not be considered an arbitration for purposes of review.

WIPO defines this online procedure as an administrative procedure. It is questionable whether the administrative procedure will qualify as an arbitration for review purposes, because WIPO recommends that the parties retain the right to initiate litigation in a national court even after the arbitrator renders a decision. WIPO further suggests that a party who disagrees with an arbitrator's determination is free to seek review from a national court. Therefore, the arbitrator's determination will not be binding precedent under national judicial systems.<sup>20</sup> Assuming competent jurisdiction, a national court's decision that is contrary to an arbitrator's determination will override the arbitral determination.<sup>21</sup>

However, most countries' statutory arbitration rules will uphold an arbitrator's determination as binding, which is not subject to review except for a finding of fraud or arbitrator misconduct. For instance, the United States Federal Arbitration Act limits a court's review to four instances; 1) if an award was procured by fraudulent means; 2) if there is evidence of corruption among the arbitrators; 3) if there is any misconduct by the arbitrators; or 4) if the arbitrators have exceeded their powers.<sup>22</sup> A party's dissatisfaction with the outcome does not trigger any of the four factors specified in the United States statutory arbitration law.

Another reason the WIPO procedure may not be considered arbitration for purposes of review is because, typically, submitting to arbitration is a voluntary choice. WIPO's proposal requires a domain name applicant to automatically submit to the online tribunal's jurisdiction when they accept the terms of their registration agreement.<sup>23</sup> However, the submission will not preclude a complainant from filing a claim in a relevant national court.<sup>24</sup> The registration agreement also requires the applicant to submit to the online procedure if a third party feels his intellectual property rights have been infringed. The validity and enforceability of such a mandatory procedure may be questioned in certain jurisdictions because courts view adhesive contracts suspiciously.<sup>25</sup> The mandatory nature of the submission also raises questions particularly for purposes of consumer protection laws, due process considerations, and the fact

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20. WIPO FINAL REPORT, *supra* note 3, ¶ 196(ii).

21. *Id.* ¶ 196(v).

22. Federal Arbitration Act, 9 U.S.C. § 10 (2000).

23. WIPO FINAL REPORT, *supra* note 3, ¶ 110.

24. *Id.* ¶ 196.

25. An adhesion contract is a standardized contract offered exclusively on a "take it or leave it" basis without giving the consumer the opportunity to bargain. *See e.g.*, *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585, 592-93 (1991).

that submission purports to create rights for a third party who is not even privy to the registration agreement.

## V. CYBER-ARBITRATION LOCATION

Typical parties involved in an online arbitration may include the complainant, the defendant, up to three arbitrators, and the arbitral institution. Online arbitration could address the possibility that all the parties could be located in six or more geographical locations. Up to six national courts could have relevant jurisdiction for purposes of review.

The Lex Loci Server theory would suggest that the place of the arbitration can be determined by the geographical location of the computer server through which the arbitration is taking place.<sup>26</sup> If the parties previously stipulated to the place of the arbitration, then the situs will generally be fixed as the parties' wish. However, if the parties did not agree to the arbitration location, then the arbitral tribunal can fix the situs to wherever it deems appropriate.<sup>27</sup>

## VI. ARBITRATION POLICY PERSPECTIVES

The role of the arbitral seat can be seen from two different policy perspectives. Essentially both policy perspectives pose the question to the extent that arbitral awards should be subject to the jurisdiction of judges of the arbitration's situs. First, it is necessary to consider the country's policies where the arbitral award is rendered. The arbitral situs' perspective is relevant regarding grounds for review.<sup>28</sup> The national courts of the arbitral seat must first be concerned with whether it has the power to review the award. A determination then must be made as to whether the situs court has the power to correct errors of law on the merits of the dispute, or if the court should limit itself to a due process review. For instance, in *Hiscox v. Outhwaite*, the House of Lords determined that the place of the award is where the award was signed.<sup>29</sup> Although the entire proceedings in that case were conducted in London, the place of the award was determined to be Paris, the location where the award was signed.

Next, it is necessary to consider the policies of the country asked to enforce the award. If an award is annulled where it was rendered, then the enforcement forum will be concerned if, and under what circumstances, the

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26. Chandru Ganesh, *Arbitration as a Dispute Resolution Mechanism for the Domain Name System* (1999) (paper presented at World Intellectual Property Organization's Regional Consultation on the Internet Domain Name Process held at Singapore on Jan. 22, 1999).

27. *Id.* (discussing the ICC Rules of Arbitration, art. 14(3) of 1984).

28. REISMAN, *supra* note 5, at 1098.

29. *Hiscox v. Outhwaite*, [1991] 2 W.L.R. 1321 (C.A.).

award will be enforceable in a different country where the losing party owns assets.<sup>30</sup> An enforcement forum may always impose its own standards for review as long as those standards are consistent with treaty obligations. It is less clear, however, whether the enforcement forum should always, or ever, recognize an arbitral award annulment by the courts of the arbitration's situs.

## VII. JUDICIAL REVIEW OF ARBITRAL AWARDS

Typically, judicial review of awards falls into one of two categories.<sup>31</sup> One model is a full review on the merits, which seeks to maximize the legal certainty concerning the merits of the dispute. The second model is a limited review for conformity to basic procedural fairness, including arbitrator fraud and abuse of authority. The limited review for procedural fairness is an attempt to insure an arbitration's integrity, while minimizing judicial meddling with the substantive results.<sup>32</sup> Keeping judicial review within acceptable limits is not an easy practice. There is no bright line test distinguishing between the arbitrator who exceeds his authority and one who merely makes a mistake and renders a bad award. In some cases, the arbitrator may even be justified in disregarding the parties' choice of law in favor of the mandatory norms of the arbitral situs.<sup>33</sup> However, from the winning party's perspective, review only adds delay and expense. It also compromises the privacy that the parties expected from the arbitration. However, some measure of court review on the award's merits is necessary out of respect for the losing party's interests.

Belgium's new philosophy of non-review reflects a third model of judicial review. Non-review is an extremely limited model and has been scrutinized by some scholars as a legal fiction because it is hard to qualify as a review policy. Under Belgian law, when both parties to the arbitration are non-Belgian, annulment of an arbitral award by the Belgian courts is excluded all together.<sup>34</sup> This amendment was first introduced into the Belgian Senate in 1981.<sup>35</sup> Belgium is an important center for international arbitration because of its ideal location and the multiple language skills of its nationals. By excluding annulment of arbitral decisions "with which Belgium has nothing to do," the attractiveness of Belgium as a place of arbitration is enhanced. Parties are not even allowed to agree that Belgian courts have jurisdiction to annul arbitrations in Belgium. The arbitral situs will not set aside an award for any reason,

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30. REISMAN, *supra* note 5, at 1101.

31. *Id.* at 1100.

32. *Id.*

33. *Id.* at 1103.

34. *Id.* at 1100.

35. H. Van Houtte, *La Loi Belge du 27 mars 1985 sur l'Arbitrage International*, 595 REVUE DE L'ARBITRAGE 29 (1986).

including fraud by an arbitrator, or an abuse of his authority.<sup>36</sup> In effect, the amendment concentrates judicial control over the international arbitration process on the enforcement court.<sup>37</sup>

### VIII. DELOCALIZATION

Delocalizing international arbitration is a recent trend that decreases the role of the national court at the place of the arbitration while increasing the role of the losing party's national courts.<sup>38</sup> Delocalization tends to promote the parties' wishes without necessarily violating the vital interest of the arbitration situs. However, following the trend of delocalized arbitration too far can also pose problems. The judge at the arbitral seat should possess a clearly defined power to correct fraud, arbitrator excess of authority, and infringement of due process. If not, the losing party may have to defend an unfair award anywhere in the world where he owns assets.<sup>39</sup> A legal system that supports this model supports arbitration within its borders without providing the minimum safeguards of basic justice. An entity that never signed the arbitration agreement will not have the chance to litigate the arbitrator's jurisdiction when the award is rendered. In addition, there would not be an opportunity to review choice of law or arbitral errors.

Imagine if the parties agreed on English law to govern the contract and UNCITRAL rules to govern the arbitral procedure. The arbitrator could apply French law and AAA rules without the losing party challenging these defects until after the award is later presented for enforcement.<sup>40</sup>

When the losing claimant is victim to procedural irregularities, the results of arbitral autonomy are dramatically unfair. If the courts where the award is rendered denies the losing claimant the opportunity to set the award aside, then the losing claimant has no enforcement forum in which to test the defective award. This is simple because there is nothing to enforce.<sup>41</sup> The goals of arbitration, such as speed and finality, are misguided if it is at the expense of the losing party's expected procedural fairness.

Award annulment is the legal principle when a court in the originating country deems that although a document purports to be an arbitral award under the country's arbitration laws, the arbitral award has no legal force. The party

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36. REISMAN, *supra* note 5, at 1100.

37. ALBERT JAN VAN DEN BERG, *Annulment of Awards in International Arbitration, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?* 142 (Richard B. Lillich & Charles N. Brower eds., 1994).

38. REISMAN, *supra* note 5, at 1100.

39. *Id.* at 1101.

40. *Id.* at 1100.

41. *Id.* at 1102.

who has lost the arbitration institutes annulment. In most countries, attempts to have international arbitral awards set aside have not been successful. Almost all national arbitration laws provide for annulment of awards in one way or another.<sup>42</sup> While some countries provide a single action for the annulment of awards, other countries have more complex procedural frameworks. Annulment in these countries is provided through arbitration law and case law.

There are some countries that will allow an arbitral award to be annulled on different grounds. The grounds can be divided broadly into the following categories. First, an award can be annulled for lack of a valid arbitration agreement.<sup>43</sup> Second, an award can be annulled for violating due process principles.<sup>44</sup> Third, an award can be annulled if an arbitrator is found to have violated his scope of authority.<sup>45</sup> Fourth, annulment may occur if the rules for appointing arbitrators or governing the arbitral proceedings are not followed.<sup>46</sup> Fifth, a lack of signatures could create a formal invalidity of an award.<sup>47</sup> Finally, an award can be annulled for a violation of public policy that does not favor arbitration.<sup>48</sup>

In a majority of countries, it is a basic principle that a court cannot review the merits of an arbitral award. WIPO's proposed online arbitration procedure provides that arbitrators' awards can be re-litigated in a court of competent jurisdiction.<sup>49</sup> WIPO's Final Report has recommended that the registrant-applicant submit to the court's jurisdiction in the country of the applicant's domicile and the country of the registrar without prejudice to other potentially applicable jurisdictions.<sup>50</sup>

## IX. JURISDICTION

Jurisdiction is the power of a court to exercise control over subject matter and parties.<sup>51</sup> Generally, the court that has the jurisdiction to review an award is the court in the country of the awards' origin. In other words, it is the court in the country under whose arbitration law the arbitration was conducted and award made.<sup>52</sup> In a vast majority of cases, it is the country of the arbitration situs. An action seeking annulment has a cross-border effect. However, this

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42. JAN VAN DEN BERG, *supra* note 37, at 133-135.

43. *Id.* at 135.

44. *Id.*

45. *Id.*

46. *Id.*

47. JAN VAN DEN BERG, *supra* note 37, at 135.

48. *Id.*

49. WIPO FINAL REPORT, *supra* note 3, ¶ 143.

50. *Id.* ¶ 147.

51. BLACK'S LAW DICTIONARY 766 (5th ed. 1979).

52. JAN VAN DEN BERG, *supra* note 37, at 136.

may need to be reassessed in view of recent developments in legislation and case law in Belgium, France, Sweden and Switzerland, where annulment is no longer sacrosanct.<sup>53</sup> In the originating country, an action for an award rendered via international arbitration is excluded by law in Belgium, and may be excluded by agreement in Switzerland and Sweden.

#### X. SWISS ANALYSIS

In 1969, the Swiss Federal Government approved an intercantonal agreement unifying the laws on arbitration known as the Concordat. The Swiss government introduced a specific federal act for international arbitration. The parties to an international arbitration in Switzerland may exclude the possibility of annulment by agreement before the Swiss courts.

The agreement is subject to two conditions. First, none of the parties may have their domicile, habitual residence, or business establishment in Switzerland. Second, the exclusion must result from an express statement in the arbitration agreement, or in a subsequent written agreement.<sup>54</sup> It is now believed that excluding annulment will have a limited use because parties are more concerned with certainty, versus speed and economy, at least where significant interests are at stake.<sup>55</sup> In the Swiss International Arbitration Act, the highest Swiss court, the Tribunal Federal, is the sole competent authority for entertaining actions of annulment of arbitral awards rendered in international arbitrations taking place in Switzerland. If it is the losing party's intention to try and delay his award obligation, the availability of only one instance of recourse may make the losing party think twice about delay. It also appears that Sweden will allow exclusion by agreement of annulment of an arbitral award rendered in an international arbitration held in Sweden. The Swedish Supreme Court decided that if the parties have no contact with Sweden, and reside in different countries, then the parties must agree, prior to any arising dispute, to limit their right to challenge the award in a Swedish court on the account of formal deficiencies.<sup>56</sup>

Would an award annulled in the court of origin be given effect by a foreign court before which enforcement of the award was sought? This consideration

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53. *Id.* at 133.

54. This formal requirement means that an indirect exclusion, such as an exclusion set forth in arbitration rules, lacks sufficiency. See Marc Blessing, *The New International Arbitration Law in Switzerland*, 5 J. INT'L ARB. 9, 75 (1988); ANDREAS BUCHER & PIERRE-YVES TSCHANZ, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 145 (1989).

55. Jean-Francois Poudret, *Les voies de recours en matiere d'arbitrage international en suisse selon le concordat et la nouvelle loi federale*, REV. ARB. 595, 616 (1988).

56. XVI INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *YEARBOOK: COMMERCIAL ARBITRATION* (Albert Jan van den Berg ed. 1991), discussing *Solea Boneh Int'l Ltd. v. Republic of Uganda* (Sup. Ct. 1989).

would only arise under awards not governed by the New York Convention. If the New York Convention applies, annulment of the award of the court in the country of origin constitutes a ground for refusal of enforcement pursuant to Article V(1)(e) of the Convention.<sup>57</sup> However, the New York Convention enables a party to rely on more favorable domestic law concerning the enforcement of foreign arbitral awards.<sup>58</sup> Some countries, such as France, have domestic law on enforcement of foreign arbitral awards, which appear more favorable than under the New York Convention rules.

## XI. THE FRENCH VIEW

France is one of the few countries to apply two separate statutes for arbitrations. One statute was enacted in 1980, which applied to domestic arbitration. The other statute was enacted in 1981, and applied to international arbitration.<sup>59</sup> Title VI of the 1981 Decree relates to the recognition and enforcement of, and the recourse against arbitral awards that were rendered abroad or through international arbitration. Contrary to Article V(1)(e), the French statute does not include a ground for refusal of enforcing an annulment of an award by a court in a country of origin. Therefore, under French law, an award which was rendered in international arbitration and which was annulled abroad under the basis of local law, is not contrary to French arbitration policy.

French courts do not give effect to an annulment by a court in the origin country because, under the French view of international arbitration, an arbitration award is not incorporated in the legal order of the country where it is merely located geographically.<sup>60</sup> Only French law defines the incorporation of the arbitral award into the French legal order. The French, who follow a unilateral approach, are not concerned with the incorporation of an award in a foreign legal order. This is the case even if the latter is the place where the award has been made.<sup>61</sup>

Whether the arbitral award is incorporated into another legal system does not matter. The rationale is that just because an arbitral award is acceptable to a French judge, the award should not be refused force and effect just because a foreign judge has different ideas of acceptability. In France, the notion of an award's nationality does not exist. There are awards rendered abroad or awards

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57. JAN VAN DEN BERG, *supra* note 37, at 147.

58. *Id.*

59. See generally Yves Derains & Rosabel E. Goodman-Everard, *National Report: France*, in 2 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION 1 (Peter Sanders & Albert Jan van den Berg eds., 1998).

60. Berthold Goldman, *Une Bataille Judiciaire Autour De La Lex Mercatoria*, REV. ARB. 379 n.12 (1983).

61. JAN VAN DEN BERG, *supra* note 37, at 151.

rendered in France relating to international matters. There is no such thing as an English, French, or Italian award.

## XII. AWARD ENFORCEMENT

Enforcement is distinguished from annulment. Enforcement of an award occurs when the prevailing party seeks judicial assistance in forcing the losing party to honor the award. The situs of the arbitration may have an effect in judicial proceedings after an arbitration. Judicial enforcement of arbitral awards must necessarily accommodate two competing policy interests. For international commercial transaction purposes, the most important interest is limiting the courts' review of the merits of the dispute and the arbitrators' decision, thereby giving effect to the parties' choice of arbitration.

The other competing interest is the courts correcting genuine abuses by arbitrators, and enforcing any relevant mandatory jurisdictional rules. Party confidence in the enforceability of the arbitral award without judicial review of the merits is what makes international arbitration such an attractive alternative to domestic litigation on the first place. Countries that have assumed the last of the New York Convention view arbitration as the abandonment of the right to litigation. However, the online arbitration system proposed by WIPO recommends that a party who submits to arbitration will not give up their access to court litigation.<sup>62</sup>

Enforcement of an award can only take place after a court has given permission to execute the award by public force. Awards are appointed by private individuals that hire the parties, and not by judges of the State. However, the procedure and the extent of control exercised by the courts over awards in enforcement proceedings differ from one country to the next.<sup>63</sup> In most countries, an enforcement made in the country where it is sought consists of relatively short summary proceedings. Here, control exercised by the courts over the arbitral award is very limited. The principle international standard for enforcing arbitral agreements and awards is primarily regulated by the New York Convention.<sup>64</sup> The New York Convention provides more exclusive control on the grounds of refusal for enforcement. If enforcement is refused in the country of origin, the arbitral award, in theory, is still capable of enforcement in a foreign country under the New York Convention. The New York Convention does not list refusal of award enforcement in the origin country as a ground for refusal. However, in practice, a refusal of enforcement

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62. WIPO FINAL REPORT, *supra* note 3, ¶ 138-39.

63. Jan van den Berg, *supra* note 37, at 138.

64. H. Verbist, *The Practice of the ICC International Court of Arbitration with Regard to Fixing the Place of Arbitration*, 12 *ARB. INT'L* 347, 350 (1996).

in the country of origin may constitute pervasive authority in a foreign country where enforcement is thought.<sup>65</sup>

Articles III and IV of the New York Convention set forth the rules regarding enforceability under the Treaty. Each of the member states agree to recognize arbitral awards as binding and to enforce them according to the rules of procedure where the award is relied upon. Article VI imposes a further limitation on permissible domestic procedures, by prescribing a straightforward method of obtaining enforcement. The party seeking enforcement need only supply the requested court with a duly authenticated original award, or certified copy, along with the original, or a certified copy, of the arbitration agreement pursuant to which the award was rendered. This rule of minimum formality and abbreviated procedure is exactly the method that needs to be implemented in online arbitration procedures. Thus, a similar need of balancing certainty and flexibility in international arbitration can be applied to online arbitration.

In *Scherk v. Alberto-Culver Co.*, the United States Supreme Court found the underlying purpose in American adoption and implementation of the New York Convention was threefold. The first purpose was encouraging the recognition of, and enforcement of, commercial arbitration agreements in international contracts. The second purpose was to unify the standards by which arbitration agreements are observed. The third purpose was to ensure that arbitral awards are enforced in the signatory countries.<sup>66</sup>

Pro-arbitration is a well-established federal policy in favor of enforcing both arbitral clauses and awards in the international context. However, the *Scherk* Court also pointed out that arbitration obviates certain dangers peculiar to the choice of forum for resolution of international business disputes. These dangers include a forum's hostility towards one parties' interest, and a forum's lack of familiarity with the law to be applied or the subject matter of the agreement.

A few European countries, such as France, the Netherlands, and Switzerland have, as a matter of public policy, accorded greater enforceability to foreign awards, as compared to domestic awards.<sup>67</sup> American case law and the European statutory law take an increasingly internationalist approach, restricting the extent to which arbitral authority is subject to the mandatory rules otherwise applicable to domestic arbitrations.

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65. JAN VAN DEN BERG, *supra* note 37, at 139.

66. *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1973).

67. *See, e.g.*, French Decree of May 12, 1981, 1981 JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE 1492, translated in 27 I.L.M. 917 (1981); the Netherlands Arbitration Act of 1986, 26 I.L.M. 921 (1987); the Swiss Federal Law on International Arbitration, adopted Dec. 18 1987, translated in 27 I.L.M. 37 (1988).

### XIII. CONCLUSION

In most cases, the parties will agree to the situs of a cyber-arbitration in a contract. However, agreeing to a situs without knowing the particular national law of the country agreed to can have serious effects. When the parties do not select a forum and the arbitral tribunal selects one for them, the same problems may arise. The situs of the arbitration will determine whether the local courts will help or hinder the arbitration process. The arbitration situs will also determine local mandatory procedures to be followed. While online arbitration may be a helpful alternative dispute resolution in a relatively short number of years, much work is left to be done to create new, or amend the old rules regulating arbitration.