Arbitration, The Journal of the
Chartered Institute of Arbitrators
Vol. 58, no. 4 (November 1992)

The Freshfields Lecture 1992

The Efficacy of Award in International Commercial Arbitration

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THE Freshfields Lecture 1992 was delivered at Queen Mary and Westfield College, London University, on 27 May 1992. The author is both Partner, Stibbe & Simont, Amsterdam and Professor of Law, Erasmus University, Rotterdam.

I. Introduction

BY way of introducing the subject matter of my lecture, I would like to tell you about an experience which I had as practising lawyer in the enforcement of a foreign arbitral award some time ago. The case concerns the well-known Pyramids Oasis arbitration. The background of the case was the following.

Attracted by the Open Door Policy to foreign investors promulgated by the late President Anwar Sadat of Egypt, Southern Pacific Properties ('SPP') embarked on a prestigious project to build an exclusive tourist village near the Pyramids of Gizeh. The project included not only luxurious villas for wealthy Arabs and Europeans, but also a golf course and an artificial lake. For the project, SPP concluded an agreement with the Egyptian General Organisation for Tourism and Hotels ('EGOTH'). Beneath the signatures of SPP and EGOTH, the words appeared: 'approved, agreed and ratified by the Minister of Tourism' and the signature of the Minister. The agreement contained a clause for ICC arbitration in Paris.

When the first bulldozers appeared in the desert, the environmentalists in Egypt awoke. They asserted, amongst other things, that the artificial lake would have the effect that the pyramids would sink in the sand. The opposition became so strong that the Egyptian government stopped the project at the end of May 1978.

When an amicable settlement proved to be impossible, SPP initiated ICC arbitration against both EGOTH and the Egyptian State. It claimed approximately US$ 42.5 million as damages. The Egyptian State objected to the competence of the arbitrators. It argued that it was not a party to the agreement in which the arbitration clause was included.

By an award dated 16 February 1983, made in Paris, the arbitrators held that Egypt was a party to the agreement. They ordered Egypt to pay SPP US$ 12.5 million as damages plus interests and costs. Egypt fiercely resisted this and applied to the Court of Appeal of Paris to set aside the award.

In the meantime, SPP requested me to seek enforcement of the award in the Netherlands. The Netherlands was chosen because it was discovered that my country had been so generous in allocating large sums of development money that Egypt had been administratively unable to draw on them.

On 12 July 1984, I was conducting arduous negotiations for another client in Athens. Around 3 o'clock in the afternoon, my office called me informing me that I had won the enforcement proceedings. The President had overruled Egypt's argument that it was not a party to the arbitration clause on which the award was based.

My pleasure over this result, however, lasted only 2 hours. At 5 o'clock I received a call from Paris from the French lawyers who acted for SPP in the setting aside proceedings before the Court of Appeal of Paris. I was now informed that on the very same day the Court of Appeal of Paris had set aside the arbitral award. The Court of Appeal took a view which was diametrically opposed to the view of the President in Amsterdam. It found that Egypt had not become a party to the arbitration clause in the agreement.

Thereupon, I had to suspend the enforcement proceedings in the Netherlands and eventually to withdraw them when the French Court of Cassation

rejected SPP's recourse. Incidentally, SPP subsequently started ICSID arbitration which, now 9 years later, have still not yielded a final result.

This frustrating experience has led me to rethink the question whether the action for setting aside the award in the country of origin should be maintained in international arbitration. And this is the subject matter which I would like to explore with you during this lecture. I will first give you an outline of the prevailing regime governing setting aside in international arbitration. Thereafter, I will review recent developments concerning the setting aside of awards in international arbitration. These developments are twofold. First, certain countries attempt to exclude the setting aside of the award. Secondly, it is said in particular in France that a foreign enforcement court should give no or a limited effect to a setting aside in the country of origin. Against the background of the prevailing legal regime and these developments, I will then address the question whether the action for setting aside of arbitral awards should be retained in international arbitration.

II. Prevailing legal regime concerning annulment

Almost all national arbitration laws provide in one way or another for the setting aside of the award. It is beyond the scope of this lecture to deal with the many differences in these proceedings.

There are also differences among the arbitration laws with respect to the grounds upon which an arbitral award can be set aside. Broadly speaking, the grounds can be divided into the following categories:

1. Lack of a valid arbitration agreement;
2. Violation of the principles of due process;
3. Violation of the scope of authority of the arbitral tribunal (infra, extra or ultra petita);
4. Failure to follow rules on appointment of the arbitrators and the arbitral proceedings;
5. Formal invalidity of the award (including lack of signatures and, if applicable, reasons); and
6. Violation of public policy (including non-arbitrability).

For some countries, such as England, a seventh category can be added:

7. Error in law.

However, in most countries it is a basic principle that the merits of an arbitral award cannot be reviewed by a court.

While the above categories are to a certain extent the same, the major differences appear to be the cases brought under these categories by the legislators and courts in the various countries. Again, it would be beyond the scope of this lecture to deal with these differences.

As regards the question which country's judicial authority has jurisdiction over the setting aside of the award, it appears to be a generally accepted principle that this authority is the court in the country of origin of the award. That country is in the vast majority of cases the country in which the place of arbitration is located.

Since the courts in the country of origin have exclusive jurisdiction over the action for setting aside of the award, the question arises what is the legal effect of a decision in the country of origin setting aside an award in that country. There can be no doubt that once an award has been set aside, it has become devoid of legal force and effect in the country of origin. But the lack of legal force and effect is also extended beyond the boundaries of the country of origin. That is the case if enforcement of the award is sought in other countries under the New York Convention (by now 85). Article V(1)(e) of the Convention provides, namely, that enforcement may be refused if the award has been set aside in the country of origin. This means that a setting aside in the country of origin has in principle an extraterritorial effect under the New York Convention.

The action for setting aside the award should, of course, be distinguished from the action for enforcing the award. Whilst the setting aside of an award has an extraterritorial effect, a refusal of enforcement does not have such effect. A foreign court can in principle ignore the refusal of enforcement in another country.

As regards enforcement of an award itself, a distinction should also be made between enforcement of an award in the country of origin and enforcement abroad under the New York Convention. In most countries, the enforcement of an award made in the country where enforcement is sought consists of relatively quick, summary proceedings in which the control exercised by the courts over the arbitral award is very limited (usually violation of public policy only). In contrast, enforcement abroad under the New York Convention provides for more extensive control on the basis of the grounds of refusal for enforcement listed in Article V of the Convention.

What is interesting for the question of reassessing the setting aside of awards in international arbitration is that the grounds for refusal of enforcement under the New York Convention come close to the grounds on which an award can be set aside in an increasing number of countries. As will be discussed later, this may have the effect that judicial control over the award can effectively be exercised in two fora on more or less the same grounds (i.e., in the country of origin in

setting aside proceedings and in the foreign country where enforcement is sought).

III. Recent developments

Having given an overview of the prevailing legal regime governing setting aside of awards in the international context, I may now turn to the recent developments in legislation and case law in a number of countries with respect to the setting aside of arbitral awards.

The developments are to be distinguished between the country of origin and the foreign country in which enforcement of the award is sought.

III.1 *Country of Origin*

A first country that is to be mentioned is *Belgium*. In 1972, Belgium adopted the Uniform Law setting forth in the European Convention providing a Uniform Law on Arbitration, Strasbourg, 20 January 1966.[1] By Law of 27 March 1985, a fourth paragraph was added to Article 1717 of the Judicial Code, which provides that when both parties to an arbitration in Belgium are non-Belgian, setting aside of the arbitral award by the Belgian courts is excluded altogether.

The Belgian amendment is to the extreme. No setting aside whatsoever is possible. It is not even possible for the parties to agree that the Belgian courts will have jurisdiction to set aside the award in international arbitration (a so-called 'opting in').

The effect of the amendment is that it concentrates judicial control over the international arbitration process on the enforcement court.

For enforcement of Belgian awards between non-Belgians in foreign countries, there does not seem to be a problem. In most cases, enforcement abroad will be governed by the New York Convention.

But what about enforcement *in Belgium* of an arbitral award made in that country between non-Belgians? Here, the extent of control seems to be more limited than the control offered by the New York Convention in enforcement proceedings of the same award abroad. Article 1710(3) of the Belgian Judicial Code provides: 'The President [of the Court of First Instance] shall refuse the application [for setting aside] if the award or its enforcement is contrary to *ordre public* or if the dispute was not capable of settlement by arbitration.' These two grounds for refusal of enforcement correspond to article V(2)(a) and (b) of the New York Convention. It would seem to leave uncovered all grounds for refusal of enforcement listed in the first paragraph of Article V of the Convention. Even under the most generous interpretation of *ordre public* in Belgium, there seems to be an unbalanced treatment of enforcement of an award made in Belgium between non-Belgians, depending on whether enforcement is sought in Belgium (in which case article 1710(3) of the Belgian Judicial Code applies) or in a foreign country (in which case as a rule the New York Convention applies).

Another country which merits our attention is *Switzerland*. On 27 August 1969, the Swiss Federal Government approved an intercantonal agreement unifying the laws on arbitration (the 'Concordat'). Out of the 26 Cantons, 25 have now adopted the Concordat.[2] The Concordat was, however, considered too parochial and, on 18 December 1987, the Swiss Parliament enacted the Swiss Private International Law Act which contains a Chapter XII (Articles 176–194) that governs 'international arbitration'.[3] By doing so, the Swiss introduced on a federal level a specific act for international arbitration in Switzerland.

Article 192 of the Act of 1987 provides that the parties to an international arbitration in Switzerland may exclude the possibility of setting aside before the Swiss courts by agreement. The agreement is subject to two conditions:

(1) none of the parties may have their domicile, their habitual residence, or business establishment in Switzerland, and
(2) the exclusion must result from an express statement in the arbitration agreement or by a subsequent written statement.[4]

The exclusion of setting aside of an award in international arbitration in Switzerland is less far reaching than in Belgium, since it is not achieved by statute in all cases, but requires a specific agreement of the parties (the so-called 'opting in'). Furthermore, the discrepancy between enforcement in the country of origin and abroad, which appears to exist in Belgium, does not exist in Switzerland as the second paragraph of article 192 provides that enforcement of the award in Switzerland shall take place on the basis of an analogous application of the New York Convention.

[1] European Treaty Series 56. This Convention has not entered into force. Austria and Belgium signed the Convention. Austria has not implemented the Strasbourg Uniform Law. The Belgian implementing law dated 4 July 1972, is published in *Monitor Belge* of 8 August 1972. The law is set forth in Articles 1676 through 1723 of the Belgian Judicial Code. See, generally, L. Matray, 'National Report: Belgium' in *The International Handbook on Commercial Arbitration* (Suppl. 8, December 1987).

[2] The only dissenter is Lucerne which is in the process of joining the Concordat. See generally, R. Briner, 'National Report: Switzerland', in *The International Handbook on Commercial Arbitration* (Suppl. 12, January 1991).

[3] AS 1987, 1779–1831 SR 291.

[4] This formal requirement means that an indirect exclusion, for example, an exclusion set forth in arbitration rules, is not sufficient. See, M. Blessing, 'The New International Arbitration Law in Switzerland. A Significant Step to Liberalism', 5 *Journal of International Arbitration* (1988) p. 9 at 75.

A country which seems to be in the same ranks as Switzerland, is *Sweden*. According to a decision of the Swedish Supreme Court on 18 April 1989, in the famous *Uganda* case,[5] if the parties do not have any contact with Sweden (which was the case, considering the Israeli and Ugandan nationalities involved):

> 'Such parties must be considered entitled to agree – even before any dispute arises between them – to limit their right to challenge the award in a Swedish court on account of formal deficiencies.'

The Supreme Court, however, considered that no such agreement had been made in the present case. The observation of the Swedish Supreme Court is *obiter dictum*. It is unclear under what conditions the exclusion agreement may be made and what the extent of the exclusion agreement is, having regard to the Supreme Court's reference to 'formal deficiencies'.

III.2 *Foreign Enforcement Country*

The developments in Belgium, France and Switzerland which I just described concern the question of setting aside from the perspective of the country of origin. I would now like to consider the developments from a foreign country's perspective. Then the question is: if and to what extent setting aside of an award by a court of origin will be given effect by the foreign courts before which enforcement of the award is sought, as a foreign award.

This question comes up in cases of enforcement of foreign awards outside the New York Convention. If the New York Convention applies, setting aside of the award by a court in the country of origin constitutes a ground for refusal of enforcement pursuant to Article V(1)(e) of the Convention. The New York Convention, however, allows one to rely on more favourable domestic law concerning the enforcement of foreign arbitral awards (Article VII(1) of the Convention). Some countries, including France, indeed have domestic law on enforcement of foreign arbitral awards which appears to be more favourable than the New York Convention.

France is, to my knowledge, the only country where the view is advocated that in cases falling outside the New York Convention, no effect need be given to a setting aside of an award in its country of origin. This view is said to be expounded by the highest French court, the Court of Cassation, in the famous case *Pabalk* v *Norsolor* in a decision rendered in 1984.[6] However, this decision does not clearly lay down the rule that no effect need be given to a setting aside in the country of origin.

More specific is the Court of Appeal of Paris in a recent and unpublished decision of 19 December 1991, in the case *Hilmarton Ltd.* v *Omnium de Traitement et de Valorsiation ('OTV')*.[7] The case concerned a contract dated 12 December 1980 between the French company OTV and the English company Hilmarton. According to the text of the contract, Hilmarton was, in exchange for payment of fees, to give advice on legal and tax matters, and to coordinate administrative matters with respect to the procurement and performance by OTV of an important public project in Algeria. When the project was awarded to OTV, a dispute arose over the balance of the fees. The contract between Hilmarton and OTV provided for ICC arbitration in Geneva.

By an arbitral award dated 19 August 1988, the sole arbitrator rejected Hilmarton's claim for payment of the balance of the fees. He considered that the contract was null and void since it had as its object the payment of bribes.

On 27 February 1990, OTV obtained a leave for enforcement on the award from the President of the Court of First Instance in Paris.

In the meantime, Hilmarton obtained the setting aside of the award in Switzerland before the Court of First Instance in Geneva on 21 November 1989, which judgment was confirmed by the highest Swiss court (*Tribunal Fédéral*) on 17 November 1990.

The Court of Appeal of Paris in turn affirmed on 19 December 1991 the leave of enforcement granted by the Court of First Instance of Paris. The Paris Court reasoned that, according to Article VII(1) of the New York Convention, the provisions of the Convention do not deprive a party of the right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. Under these circumstances, the Paris Court observed, OTV was entitled to rely on French law concerning the enforcement of awards made abroad. The Court pointed out that unlike Article V(1)(e) of the New York Convention providing for refusal of enforcement in the case of setting aside of the award in the country of origin, French law on enforcement of awards made abroad does not contain such a ground for refusal of enforcement:

> 'Considering that French law on international arbitration does not oblige a French judge to take into account an annulment decision on the award given within the frame-

[5] Supreme Court, 18 April 1989, no. Sö 203, *Solel Boneh International Limited and Water Resources Development (International) Limited* v *The Republic of Uganda and the National Housing and Construction Corporation of Uganda*, reported in English in XVI Yearbook Comm. Arb. (1991) p. 606 and in French by J. Paulsson, 'Arbitrage international et voies de recours: La Cour suprême de Suède dans le sillage les solutions belge et helvétique', 117 *Journal de Droit International* (1990) p. 589 at 598.

[6] Cour de Cassation (First Civil Chamber), 9 October 1984, reported in *XI Yearbook Comm. Arb.* (1986) p. 484.

[7] Unpublished, docket no. 90-16 778.

work of the foreign internal order (*dans l'ordre interne étranger*), and that, hence, the incorporation in the French legal order of an award which was rendered in international arbitration and which was annulled abroad on the basis of local law, is not contrary to international public policy (*ordre public*) within the meaning of Article 1502(5) of the New Code of Civil Procedure.'

It is interesting to note that in 1990, as allowed by Swiss law, Hilmarton requested the ICC to reopen the case due to the setting aside by the Swiss courts of the award rendered on 19 August 1988. According to unconfirmed reports, the sole arbitrator in the second arbitration decided that the contract was valid and that Hilmarton was entitled to the balance of its fees. One wonders whether Hilmarton will be able to enforce the second award against OTV in France now that the French courts have already granted enforcement on the first award between the same parties on the same subject matter, since both awards flatly contradict each other.

When discussing the question whether a foreign enforcement court should give effect to a setting aside of the award in its country of origin, one cannot leave out the *European Convention on International Commercial Arbitration of 1961*. This Convention has been adhered to by almost all Eastern-European countries. In so far as Western Europe is concerned, the following countries have become party to the New York Convention: Austria, Belgium, Denmark, France, Germany, Italy and Spain.

The European Convention contains extensive provisions on, inter alia, the constitution of the arbitral tribunal, pleas as to the arbitral jurisdiction, the jurisdiction of the courts in relation to arbitration, the law applicable to the substance of the dispute, and the reasons for the award. The European Convention does not provide for the enforcement of the award. Enforcement is to be dealt with on the basis of the New York Convention in conjunction with the European Convention, save that the European Convention in its Article IX limits ground (e) of Article V(1) of the New York Convention.[8]

Article IX of the European Convention requires a number of conditions for the setting aside of an award in the country of origin to constitute a refusal of enforcement in another Contracting State under the New York Convention.

One of them is that the award must have been set aside on one of the four grounds enumerated in Article IX(1) (a)–(d). These grounds are virtually identical to the grounds for which an award may be refused enforcement under Article V(1) (a)–(d) of the New York Convention. Other grounds for setting aside may not be taken into account by the enforcement court under the New York Convention.

IV. Should the action for setting aside arbitral awards be retained in international arbitration?

Having reviewed in the foregoing part recent developments concerning the setting aside of the award, I propose in this last part first to assess the motives for the above developments, second to summarize the disadvantages these developments may cause, and third, to conclude whether or not the setting aside of arbitral awards should be retained in international commercial arbitration.

IV.1 *Assessment of Motives for Above Developments*

Roughly speaking, the motives given for the above developments fall into three categories: (1) international arbitration should not be impeded by local arbitration laws, (2) setting aside proceedings cause unnecessary delay (see IV.1(b), below), and (3) setting aside proceedings amount to double judicial control (see IV.1(c), below).

IV.1(a) *International arbitration should not be impeded by local arbitration laws*

The arguments for this category are twofold. The first argument is that excessive court interference in international arbitral awards should be avoided and, in any case, not be exported. Thus, the setting aside of arbitral awards on the basis of some local particularities or parochial views concerning public policy should have no effect in international arbitration.

This argument does not apply in the country of origin since the control which is considered excessive abroad is exercised anyway, either in setting aside proceedings or, if they are not available, in enforcement proceedings in that country (except Belgium). As regards enforcement abroad, it is to be noted that this argument was forceful some 20 years ago, but that nowadays court interference in the country of origin is less excessive in many countries as a result of the increasingly favourable attitude towards arbitration.

The second argument is that the choice of the place of arbitration in international arbitration is made by reasons of convenience only. Consequently, it is said, local arbitration laws should not interfere. Again, this argument was valid some 20 years ago. Nowadays, parties generally choose a place of arbitration that provides an adequate legal framework for their arbitration. Parties do inquire about this aspect and are well informed about the law and practice in many countries by a number of readily accessible publications.

Furthermore, the second argument is in fact based

[8] See for the European Convention of 1961 in general, including its application by the courts and arbitral tribunals, D. Hacher, 'Commentary European Convention on International Commercial Arbitration of 1961', *XVII Yearbook Comm. Arb.* (1992).

the so-called delocalized arbitration, i.e., an arbitration without any applicable arbitration law. No such arbitration is accepted in a vast majority of countries. Nor is doing away with setting aside the proper mechanism for arriving at delocalized arbitration. In Belgium, for example, the exclusion of setting aside does not mean that Belgian arbitration law is inapplicable to arbitration law in Belgium. In France, international arbitrations taking place in that country are subject to French international arbitration law, including the possibility of a setting aside under that law. It is therefore curious that in France this argument is advocated with respect to the setting aside of awards made abroad to which setting aside the French courts do not give effect in cases in which enforcement is not based on the New York Convention.

IV.1(b) *Setting aside proceedings entail unnecessary delay*

The argument is that setting aside proceedings in the country of origin can cause considerable delays. This is indeed true for a number of countries. However, more modern arbitration laws limit the number of judicial instances before which the setting aside of an award can be brought. For example, in Switzerland setting aside of international arbitral awards is limited to one instance, i.e., the highest Swiss court (*Tribunal Fédéral*).

In addition, the commencement of setting aside proceedings in the country of origin does not foreclose the possibility of seeking enforcement of the award in other countries under the New York Convention. According to Article VI, if the setting aside of an award is requested in the country of origin, the foreign enforcement court may adjourn the decision on enforcement and may also, on the application of the petitioner, order the respondent to put up suitable security. The words 'may adjourn' and 'if it considers it proper' in Article VI indicate that the court has discretionary power to adjourn its decision on enforcement of the award and to order a respondent to provide security, pending the setting aside proceedings in the country of origin. Article VI, therefore, offers a balanced solution between the application for setting aside for reasons of delay only and the right of a bona fide party to contest the validity of the award in the country of origin.

As regards enforcement of the award in the country of origin, whether an action for setting aside has adverse effects depends on the arbitration law of that country. For example, in France, the commencement of an action for setting aside of an international award suspends by operation of law the enforcement of the award in that country.[9] On the other hand, in the Netherlands, the initiation of an action for setting aside has no suspensive effect on the enforcement proceedings; suspension of the enforcement must specifically be requested from the court, which may grant the suspension subject to suitable security by the party seeking setting aside of the award.[10] The same applies in Switzerland.[11] Consequently, delays and adverse risks can be reduced by adequate legislation.

IV.1(c) *Setting aside proceedings lead to double judicial control*

It is submitted that the arguments in support of the foregoing two categories of motives are not compelling reasons for abolishing the setting aside of the award in international arbitration. On the other hand, the third category carries more weight. The argument is that judicial control over the arbitral award is exercised twice, i.e., in setting aside proceedings in the country of origin and in enforcement proceedings in another country. Why should the same award be subject to double judicial checking?[12] From the theoretical point of view at least, it would seem an advantage for international arbitration to abolish the setting aside of the award in the country of origin. But does this advantage outweigh the disadvantages?

IV.2 *Disadvantages of the Developments Concerning Setting Aside*

The following disadvantages can be said to result from the developments which I described before.

IV.2(a) *Country of origin*

The exclusion of the action for setting aside in the country of origin, as is provided for in Belgium, Switzerland, and possibly Sweden carries three disadvantages.

First, a party whose claim has been rejected will be deprived of any remedy against the award. That party effectively has no remedy to challenge the award in the courts, as setting aside has been excluded, even if the arbitration was conducted, for example, in violation of fundamental notions of due process. The aggrieved party, therefore, will have no opportunity to have the

[9] Article 1506 of the French New Code of Civil Procedure.
[10] Article 1066 of the Netherlands Code of Civil Procedure.
[11] Article 38 of the Swiss Concordat.
[12] The judicial double checking is carried to the extreme in the UNCITRAL Model Law on International Arbitration, adopted on 21 June 1985 (UN DOC.A/40/17, Annex 1, reprinted in *XI Yearbook Comm. Arb.* (1986) p. 380). An arbitral award rendered in a Model Law country can in that country be subject to annulment proceedings and enforcement proceedings but in both proceedings the same grounds (i.e., for annulment and refusal of enforcement) apply. This can be considered one of the major defects of the Model Law. As explained in section II, enforcement of an award made in the country where enforcement is sought is subject to summary control only.

award set aside and to have its case adjudicated in proper (new) proceedings.

Second, the exclusion of setting aside in the country of origin may lead to 'enforcement shopping' or rather an 'enforcement chase' abroad, As a losing party will not have the possibility of having the award set aside, which would mean that enforcement cannot be granted under Article V(1)(e) of the New York Convention, a winning party will attempt to enforce the award in as many countries as it can obtain jurisdiction. This disadvantage applies especially to awards that are questionable. Yet, the losing party will as a victim incur considerable costs in defending of this chase.

Third, exclusion of setting aside may create uncertainty about the status of an award for a long period of time. If an award is questionable, a party will not have the possibility of having the uncertainty adjudicated with finality in the courts. This may create a new breed of 'ghost awards'.

Apparently, the above disadvantages are conceived in the same way in practice:

A proponent of the Belgian amendment described it as a 'paradise for international arbitration'.[13] Yet, it does not seem to have increased the number of international arbitrations in Belgium. Some even say that the number has decreased as parties appear to be reluctant to give up the right to challenge an award in the courts.

In Switzerland, while initially conceived as an all encompassing solution and one of the most prominent justifications of the regulation of international arbitration on the federal level, it is is now believed that the possibility of excluding setting aside will not in practice be used frequently in Switzerland. The limited use is thought to be due, as a famous Swiss author, Professor Poudret, put it to 'the prudence of the parties, who are more concerned about certainty than about rapidity and economy, at least when significant interests are at stake'.[14] Furthermore, as another author observes, post-award litigation risk is not totally excluded since parties disappointed by an arbitral award will undoubtedly attempt to question in court the extent and effects of the exclusion agreement itself.[15]

IV.2(b) *Foreign enforcement country*

The main disadvantage of the principle that no effect need be given by a foreign enforcement court to setting aside by a court in the country of origin of an award rendered in international arbitration is that a discrepancy arises between enforcement in the country of origin and enforcement in a foreign country. Setting aside in the country of origin has as a consequence that the award cannot be enforced in that country. In contrast, the same award, notwithstanding its setting aside in the country of origin, can be enforced in a country such as France.

The limited effect to setting aside in the country of origin, as can be found in the European Convention of 1961, has the same disadvantage, albeit less forcefully, since that Convention takes into account at least a number of grounds for setting aside in the country of origin.

The disregard of setting aside of the award also involve basic legal concepts. When an award has been set aside in the country of origin, it has become nonexistent in that country. The fact that the award has been set aside implies that the award was legally rooted in the arbitration law of the country of origin. How then is it possible that courts in another country can consider the same award as still valid? Perhaps some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can provide a special legal status to an award notwithstanding its setting aside in the country of origin. The latter can be deemed to be the case with respect to the European Convention of 1961. However, it should be mentioned that no case has been reported in which the European Convention is relied upon for granting enforcement of an award that has been set aside in the country of origin on grounds other than those listed in Article IX(1) of the European Convention.

IV.3 *Conclusion*

It is submitted that the efficacy of awards in international arbitration is not in danger because of the availability of the action for setting aside in the country of origin. During the last 20 years, notwithstanding the many different new arbitration enactments, creeping unification has occurred. The categories of grounds for setting aside are now similar in many countries. This does not mean that all cases are treated alike by the courts in the various countries in setting aside proceedings, but there is less divergence than there was 20 years ago. The harmonization has been prompted by the increasingly favourable attitude towards international arbitration developed by the courts and legislators in many countries in the course of the last two decades. One of the main reasons for this favourable development was undoubtedly the New York Convention.

The alleged redundancy of double judicial control is

[13] M. Storme, International Business Lawyer (1986) p. 294.

[14] J. F. Poudret, 'Les voies de recours en matière de l'arbitrage international en Suisse selon le Concordat et al nouvelle loi fédérale', *Revue de l'Arbitrage* (1988) p. 595 at 616.

[15] Paulsson, note 5, *supra*, at 597 note 16.

rather academic. In fact, if an action for setting aside is commenced in the country of origin – which usually has to be started within a relatively short period of time – the foreign enforcement judge can, and indeed will, take appropriate measures within the framework of Article VI of the New York Convention (adjournment of the enforcement decision and provision of suitable security). If the award has been set aside in the country of origin, there will no longer be room for judicial control in the enforcement country since the setting aside constitutes a ground for refusal of enforcement under Article V(1)(e) of the Convention. And if one looks to the more than 475 court decisions reported under the New York Convention in the *Yearbook Commercial Arbitration*, a relatively minor portion (i.e., some 30 cases) involves the application of the ground for refusal of enforcement that the award has been set aside or is subject to setting aside proceedings in the country of origin. The cases in which an award has effectively been set aside in the country of origin number only three. None of them concerned the in theory much feared public policy of the country of origin.

In conclusion, there does not seem to be any need to upset the well-established principle that an arbitral award can be subject to an action for setting aside in the country of origin and that setting aside in the country of origin constitutes a ground for refusal of enforcement abroad. In the final analysis, parties can avoid many of the problems identified in this lecture by choosing a country with an adequate arbitration law and courts that are favourable to international arbitration. And that number of countries is rapidly growing.

These countries include England. But – if you allow me to express here a desire as an arbitration practitioner from overseas – please do change your Arbitration Act(s) so that foreigners will be able to understand them. You have the commercial courts which belong to the best in the world, highly supportive for international arbitration. Why then not the best Arbitration Act?