

ARTICLE

*Should the Setting Aside of the Arbitral Award be Abolished?*

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**Abstract**—The text of the 2nd Karl-Heinz Böckstiegel Lecture of 13 September 2013 as adapted for publication examines the question on whether the setting aside of the arbitral award should be abolished. It does so by identifying the various issues that arise out of an action for setting aside, such as the possibility of double control and conflicting decisions, the (universal) effect of a setting aside in the country of origin and the court with the last say on the validity of an international arbitral award. The origin of the action for setting aside and its current legal status in international arbitration. The various attempts to reduce or eliminate the role of setting aside in international arbitration. The situation in investment arbitration. Whether the setting aside action should be abolished and if so, what may be the alternatives.

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## I. INTRODUCTION

By way of introduction to the subject of this article, I would like to give you two hypothetical examples. The first example: Assume you are acting for a German client who had lost an arbitration procedure in Kuala Lumpur against a Thai party. Your client is furious about the result, complaining that the Arbitral Tribunal has awarded far more than the Thai party had claimed. He refuses to pay. You have two options: One is to wait until the Thai party seeks enforcement in Germany. The other is to seek the setting aside of the award in Malaysia. You do your research and discover that, like Germany, Malaysia has implemented the United Nations Commission on International Trade Law (‘UNCITRAL’) Model Law on International Commercial Arbitration (‘Model Law’). You discover also that the grounds for setting aside in the Model Law are substantially similar to the grounds for refusal of enforcement of an award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’). That applies in particular to the complaint of your client that the Arbitral Tribunal had awarded more than the Thai party had claimed. You conclude that the courts in Malaysia and in Germany would review the same award on the basis of the same grounds.

Your client doesn’t understand the reason for doing the same thing twice (‘Only lawyers can invent that’), but believes that attacking is the best defence. So, you are instructed to seek the setting aside of the award in Malaysia. The German judges appear to be faster than their brethren in Malaysia. But the German judges are not impressed with the argument that the Arbitral Tribunal would have awarded more than claimed. They grant enforcement under the New York Convention. After the Thai party happily returns to Bangkok with your client’s money, news arrives from Kuala Lumpur: the Malaysian courts set aside the Award for excess of authority.<sup>2</sup> Your client is stunned. You are now instructed to get the money back in Thailand, but that event is beyond the scope of this article.

The second example: Your German client is also active in the Middle East. Here, your client has got into a dispute with a Saudi party. The arbitration in Dubai is a great success for your client: he wins spectacularly. However, the Saudi party goes to the UAE courts and obtains the setting aside of the award for

<sup>2</sup> Arbitration Law 1998 (Germany), Code of Civil Procedure (Germany) (10th b) (Zivilprozessordnung [‘ZPO’]) s 1060.

violation of public policy on the ground that certain witnesses had not been administered the oath in the locally prescribed manner. Your client is furious again and demands that you seek enforcement. You apply for enforcement in Saudi Arabia and England (where you know the Saudi party has assets). In both cases enforcement is refused under the New York Convention because one of the grounds for refusal of enforcement of a foreign award is that it has been set aside by a court in the country of origin (Article V(1)(e)).

After this second disaster, your client needs a break. He goes for an extended weekend to Paris. On the *Champs Élysées* he sees a lawyer carrying a book on the philosophy of international arbitration. ‘What philosophy?’ he complains to the lawyer, unloading on him his story about the Dubai arbitration. The French lawyer smiles amiably: ‘*Chez nous*, you can still get enforcement.’ What happens next, I will tell you later in this lecture.

I provide these examples with the purpose of introducing the four issues that arise out of an action for setting aside:

- (1) the potential double control by having a judicial review of the award on similar grounds in enforcement proceedings and setting aside proceedings;
- (2) the potential of conflicting decisions regarding the same ground between enforcement proceedings and setting aside proceedings;
- (3) whether universal effect should be given to a setting aside by the court in the country of origin on perceived parochial grounds; and
- (4) whether the courts of one country should have the last say with universal effect about the validity of an international arbitral award.

These issues underlie the question of this lecture: should the setting aside of the arbitral award be abolished?

In Section II, I will describe the origin of the action for setting aside and its current legal status in international arbitration. In Section III, I will address the various attempts to reduce or even eliminate the role of setting aside in international arbitration. In Section IV, I will briefly examine the situation in investment arbitration. Finally, based on the foregoing, in Section V, I will address the question of whether the action for setting aside should be abolished and if so, what may be the alternatives.

## II. ORIGIN AND CURRENT STATUS OF SETTING ASIDE IN INTERNATIONAL ARBITRATION

### A. *Origin*

As long as arbitration has existed as an alternative to litigation in court, the award has been subject to some form of judicial review. This was the case under Roman law, in the Middle Ages and under the Napoleonic Codes. Review by the courts occurred mostly in enforcement proceedings. If the court found that enforcement should be refused, it was the end of the story.

There were two developments which introduced the setting aside - also called annulment - of the award as a *separate* action.

First, a dissatisfied party did not wish to wait until the winning party would seek enforcement of the award. It went on the offensive by seeking a declaration that

the award is a nullity or should be annulled. In that sense, the action for setting aside is the mirror of the action for enforcing the award.

Second, with the advent of international arbitration in the 19th century, enforcement was no longer confined to the country where the award was made. There was a danger that the decision on enforcement of the same award in the various countries could differ. The losing party, therefore, had an interest in obtaining a declaration that the award was null and void in the country where made. It could do so by applying for the setting aside of the award in that country.

The transformation of the opposition to enforcement in the same procedure into a separate action for setting aside of the award in the country of origin could have led to a double review in the country of origin: one in the enforcement proceedings, and another in the annulment proceedings. To avoid a double review on the same grounds in the country of origin, legislators and courts reduced the grounds for refusal of enforcement to a minimum (usually violation of public policy only) and provided that a losing party should resist enforcement by applying for setting aside in a separate action. That was the situation until the UNCITRAL Model Law in 1985, about which I will discuss more shortly.

The avoidance of double review worked of course within the country where the award was made. However, when enforcement was sought in another country, the grounds for refusal of enforcement as set forth in multilateral or bilateral treaties were not limited as in the country of origin.

### *B. Setting aside as ground for refusal of enforcement of a foreign award*

One of the grounds for refusal of enforcement of an arbitral award made in another country has traditionally been the setting aside of the award in the country where it was made. It was a ground under the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (Article 2(a)), the New York Convention's predecessor. It is a ground for refusal of enforcement under the New York Convention. Article V(1)(e) provides that enforcement may be refused if the respondent proves that the award has been set aside by the court in the country where made.

It was, and continues to be, a generally accepted principle that courts in the country of origin have exclusive competence to decide on the setting aside of an award. This principle has been confirmed in numerous court decisions. It is also the underlying premise of Article V(1)(e) of the New York Convention. Thus, the US Court of Appeals for the Fifth Circuit declined to accept that the award had been set aside by a competent authority of the country in which it was made, where the award was made in Geneva, Switzerland, but had been set aside by an Indonesian court.<sup>3</sup>

Two other matters were generally accepted with respect to Article V(1)(e) of the New York Convention. Whether that is still the case, we will see later.

First, if the award had been set aside in the country of origin, it ceases to legally exist. Professor Pieter Sanders, the most prominent 'founding father' of the

<sup>3</sup> *Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT Pln (Perseo)*, 364 F3d 274, 308–10 (5th Cir 2004). Similarly, the US Court of Appeals for the Third Circuit declined to accept that the award had been set aside by a competent authority of the country in which it was made, where the award was made in Singapore, but had been set aside by a Philippine court. *Steel Corp of Philippines v Intl Steel Servs, Inc*, 354 F Appx 689, 692–4 (3rd Cir 2009).

New York Convention, wrote shortly after returning from the New York Conference in 1958 that if an award was set aside in the country of origin, the

Courts will...refuse the enforcement *as there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement.*<sup>4</sup>

Second, the enforcement court was not allowed to question the grounds on which the award was set aside in the country of origin. For example, in *TermoRio SA ESP & LeaseCo Group, LLC v Electranta SP and others*, the US Court of Appeals for the District of Columbia refused to allow enforcement of an International Chamber of Commerce ('ICC') arbitral award, made in Bogotá, that had been annulled by the Colombian Council of State (*Consejo del Estado*) in Colombia on the ground that the arbitral proceedings had taken place on the basis of the ICC Arbitration Rules, the application of which was not permitted by Colombian law at that time.<sup>5</sup> The Court of Appeals observed in particular:

'The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award *in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief*. *Yusuf Ahmed Alghanim & Sons*, 126 F 3d at 23.'<sup>6</sup>

### C. *Grounds for setting aside*

Until the 1980s, arbitration laws around the world contained divergent grounds for setting aside an award. That has changed with the UNCITRAL Model Law of 1985. The Model Law proved to be very successful and is implemented in more than 60 States, including the Federal Republic of Germany. The modernization of arbitration laws in other countries is mostly in accord with the Model Law.

The grounds for setting aside set forth in Article 34(2) of the Model Law can be summarized as follows:

- (a) Validity of arbitration agreement. This category includes: consent; written form; content of agreement; scope.
- (b) Due process. This category includes: equal treatment and the ability of a party to present its case.
- (c) Excess of authority regarding relief sought. This category includes an award in excess of or different from what is claimed.
- (d) Irregular constitution of the arbitral tribunal. This category includes: a constitution of the tribunal in violation of the applicable arbitration rules and, possibly, arbitration law; lack of impartiality and independence of the arbitrator.
- (e) Irregular procedure. This category includes a violation of the applicable arbitration rules and, possibly, arbitration law.
- (f) Arbitrability (dispute is capable of settlement by arbitration). This category comprises arbitrability *ratione materiae* and *ratione personae*.

<sup>4</sup> Pieter Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6 *Netherlands Intl L Rev* 43, 55 (emphasis added); Pieter Sanders, 'The New York Convention' in Pieter Sanders (ed), *Arbitrage International Commercial - International Commercial Arbitration*, vol. 3 (Martinus Nijhoff 1960) 293, 321.

<sup>5</sup> *TermoRio SA ESP v Electranta SP*, 487 F3d 928 (DC Cir 2007).

<sup>6</sup> *ibid* 17.

- (g) Public policy. This category essentially relates to ‘the forum State’s most basic notions of morality and justice’.<sup>7</sup>

Categories (f) and (g) may be limited by the notion of so-called international public policy.

Furthermore, it is increasingly held that not every violation will lead to a refusal of enforcement or setting aside. The violation must have substance and not be *de minimis*. In this connection, certain courts have developed a so-called discretionary power to enforce an award notwithstanding the presence of a ground for setting aside.

It is also important to note that the categories of review no longer include a review of the merits of an arbitral award. This feature has become a generally accepted principle as well.

That is not to say that the grounds for setting aside read the same in each and every arbitration law. The implementation of the Model Law is not uniform and States have taken the liberty to deviate in certain respects. An example is Egypt, which added to the grounds for setting aside the ground that ‘the arbitral award failed to apply the law agreed upon by the parties to govern the subject matter in dispute’.<sup>8</sup> Furthermore, in addition to the Model Law countries, there are basically two other groups of countries: those inspired by the French arbitration law and those which have taken over English arbitration law. One of the main differences between the Model Law and French law is that the latter uses the omnibus notion of ‘mandate’ (*mission*) as ground for setting aside. English law is much focussed on the notion of ‘misconduct’ of the arbitrator.

#### D. *The current status is complex*

Until this point, the matter has been seemingly simple. Setting aside originates as a mirror action to the enforcement of an award; it is a ground for refusal of enforcement of foreign awards; and the grounds are fairly similar. However, it is not as simple as it seems. Complications have arisen because of the field of application of the New York Convention.

Tables 1 and 2 help visualize the complexities:

Table 1 - Actions		
Action	Country of Origin	Abroad
Enforcement	<ul style="list-style-type: none"> <li>National arbitration law</li> <li>If “non-domestic”: New York Convention</li> </ul>	<ul style="list-style-type: none"> <li>New York Convention</li> </ul>
Setting aside	<ul style="list-style-type: none"> <li>National arbitration law</li> <li>Courts have exclusive jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>Not possible</li> </ul>

<sup>7</sup> *Parsons & Whittemore Overseas Co v Société Générale de l’Industrie du Papier*, 508 F2d 969, 974 (2nd Cir 1974).

<sup>8</sup> Law No 27 Concerning Arbitration in Civil and Commercial Matters 1994 (Egypt) art 52(1)(d).

Table 2 - Effect		
Action Country of Origin	Effect Country of Origin	Effect Abroad
Refusal of enforcement	<ul style="list-style-type: none"> <li>Award cannot be enforced</li> </ul>	<ul style="list-style-type: none"> <li>No effect</li> </ul>
Grant of enforcement	<ul style="list-style-type: none"> <li>Execution of award</li> </ul>	<ul style="list-style-type: none"> <li>No effect</li> </ul>
Award set aside	<ul style="list-style-type: none"> <li>Award no longer exists legally</li> </ul>	<ul style="list-style-type: none"> <li>Refusal of enforcement under Art. V(1)(e) New York Convention</li> </ul>
Award not set aside	<ul style="list-style-type: none"> <li>Award can be enforced</li> </ul>	<ul style="list-style-type: none"> <li>No effect</li> </ul>

I will explain these matters in Sections II.E, II.F and II.G.

#### E. *Setting aside and refusal of enforcement in other countries*

To properly understand the interaction between setting aside and refusal of enforcement in other countries, it should be borne in mind that the New York Convention applies to the enforcement of an arbitral award made in *another* (contracting) State. The Convention does not apply in the country where the award was made (unless the award is considered a ‘non-domestic’ award, which happens in the United States, as we will see below).

As I mentioned before, the fact that the arbitral award has been set aside by a court in the country where the award was made constitutes in and of itself a ground for refusal of the award abroad under Article V(1)(e) of the New York Convention.

The effect that a setting aside in the country of origin has in other countries, ie, a bar to enforcement, is not the same for a refusal of enforcement in the country of origin. Such a refusal in the country of origin is not a ground for refusal of enforcement abroad under the New York Convention.

If the award has *not* been set aside in the country of origin, it can still be denied enforcement in other countries and lead to conflicting decisions. A case in point is *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*, which involved a double review. The Award was made in France. Pending setting aside proceedings in France, Dallah sought enforcement of the Award in England. The English courts refused enforcement on the ground of the lack of a valid arbitration agreement.<sup>9</sup> A few months later, the Court of

<sup>9</sup> *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

Appeal of Paris came to the opposite conclusion, and upheld the validity of the same Award in the setting aside proceedings.<sup>10</sup>

*Dallah* concerned the situation where the decision on the refusal of enforcement of the (foreign) award occurred *prior to* the decision of dismissing the setting aside application of that award in the country of origin. But what if the application for enforcement abroad were *subsequent to* the decision dismissing the setting aside application in the country of origin? Here, English courts find that this constitutes ‘normally . . . a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction [ie, in the country of origin] that the award should stand’.<sup>11</sup>

These questions bring us to a *question brûlante* in Germany: Can a respondent oppose the enforcement of a foreign award only if it has applied for the setting aside in the country of origin? This is the question of what is called in Germany *Präklusion der Versagungsgründe*.<sup>12</sup> Under German law, as it existed prior to the new Arbitration Law of 1998, the legal regime governing the enforcement of foreign awards outside the New York Convention was such that a respondent was allowed to invoke grounds for refusal of enforcement only if it had sought the setting aside of the award in the country of origin.<sup>13</sup> As of the Arbitration Law of 1998, enforcement of foreign awards is governed solely by the New York Convention. In a Decision of 2006, the *Oberlandesgericht* (Court of Appeal) in Karlsruhe dealt with a case concerning the enforcement of an award made in Geneva.<sup>14</sup> It enforced the award, holding that the Respondent was estopped from invoking the grounds for refusal of enforcement set forth in the New York Convention because the Respondent had not timely applied for the setting aside of the award in Switzerland (which is 30 days from the notification of the award). In another decision of 2012, the same Court of Appeal repeated its view with respect to an award made in the United States.

It seems, however, that the German Supreme Court does not share the view of the Court of Appeal of Karlsruhe. In a 2010 decision it held that a respondent can object to the lack of competence of a foreign arbitral tribunal even if the respondent has not used the means of recourse in the country of origin.<sup>15</sup>

It is my view that a preclusion is not contemplated by the New York Convention. The Convention can be interpreted to imply a possible estoppel in some respects, but not with respect to *all* grounds for refusal of enforcement. The Convention does not contain a condition precedent for reliance on grounds of refusal of enforcement that setting aside has been applied for in the country of origin.<sup>16</sup>

<sup>10</sup> *Gouvernement du Pakistan—Ministère des affaires religieuses v Société Dallah Real Estate and Tourism Holding Company*, Cour d’appel de Paris, Case nos 09/28533, 09/28535 and 09/28541 (17 February 2011); (2011) 1 *Revue de l’Arbitrage* 286.

<sup>11</sup> *Minmetals Germany GMBH v Ferco Steel Ltd* (1999) 1 All ER Comm 315. See also *s v*.

<sup>12</sup> See Wolfgang Kühn, ‘Aktuelle Fragen zur Anwendung der New Yorker Konvention von 1958 im Hinblick auf die Anerkennung und Vollstreckung ausländischer Schiedssprüche. —Eine Betrachtung der deutschen Rechtsprechung’ (2009) 7 *German Arb J* (SchiedsVZ) 53.

<sup>13</sup> ZPO (n 2) (version prior to 1 January 1998) s 1044(2)(1).

<sup>14</sup> *Claimant [not indicated] v Respondent [not indicated]*, *Oberlandesgericht* [Court of Appeal] Karlsruhe, 9 Sch 01/06, (3 July 2006); (2007) 32 *YB Com Arb* 358.

<sup>15</sup> *French Seller v German Buyer*, *Oberlandesgericht* Munich (23 November 2009) and *French Seller v German Buyer*, *Bundesgerichtshof* (16 December 2010); (2011) 36 *YB Com Arb* 273.

<sup>16</sup> See *Oberlandesgericht* (Higher Regional Court) Karlsruhe, 9 Sch 02/09, Decision, (4 January 2012) unreported. If a country wishes to apply rules of preclusion, it may do so on the basis of the more-favourable-right provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38;



F. *Setting aside and refusal of enforcement in the country of origin*

As I mentioned earlier, to avoid a double review on the same grounds in the country of origin, legislators and courts reduced the grounds for refusal of enforcement to a minimum (usually violation of public policy only) and provided that a losing party should resist enforcement by applying for setting aside in a separate action. The Model Law changed that. The reason is that UNCITRAL adopted almost literally the New York Convention grounds for refusal as grounds for *both* refusal of enforcement and setting aside in the Model Law of 1985 (Articles 36(1) and 34(2), respectively).

The legislators in the Federal Republic of Germany appear to have been aware of this potential double review as Section 1060(2) of the Arbitration Law of 1998 shows:

An application for a declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside under section 1059 sub-section 2 exists. Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected. Grounds for setting aside under section 1059 sub-section 2, no. 1 shall also not be taken into account if the time limits set by section 1059 sub-section 3 have expired without the party opposing the application having made an application for setting aside the award.

G. *Setting aside and refusal of enforcement of non-domestic awards*

In the foregoing, I have examined the interaction under the New York Convention if the award was made in another (contracting) State. That is the Convention's field of application as defined in the first sentence of Article I(1). The second sentence offers an additional criterion: 'It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.' The origin of the additional criterion is that certain delegates at the New York Conference of May–June 1958 believed that parties should be able to agree to arbitrate at a place of arbitration under the arbitration law of another country. This theoretical possibility is almost never used in practice.

Instead, the courts in the United States use the criterion to apply the New York Convention to the enforcement of arbitral awards made in the US and governed by federal arbitration law that involves a foreign element. In *Sigval Bergesen v Joseph Muller Corp*, the Award was made in New York, but its enforcement would not be possible under the Federal Arbitration Act as it contains a period of limitation of one year, and the request for enforcement ('confirmation of the award') was made during the second year. The legislation implementing the Convention in the United States, however, provides a period of limitation of three years. On the basis of a definition of the arbitration agreement and award in the

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21 UST 2517; 7 ILM 1046 (1968), art VII(1) ('New York Convention'). However, in doing so, the country in question places itself outside the New York Convention and develops a domestic (case) law on the enforcement of foreign arbitral awards. It is an increasingly frequent misconception that a court may apply at the same time the Convention and more favourable provisions of domestic arbitration law as if the case were an instance of enforcement under the Convention. Such a conflation of legal bases is not permitted by the Convention: the basis for enforcement is either the Convention or domestic law on the enforcement of foreign arbitral awards.

implementing legislation,<sup>17</sup> the US court held that the Award fell under the Convention.<sup>18</sup> The result was a watershed of cases under the Convention in the United States.

When a petitioner applies for enforcement of an international award made in the United States before US courts, the respondent usually cross-moves to seek the setting aside (*‘vacatur’*) of the award on the grounds set forth in the Federal Arbitration Act. That has given rise to the issue of ‘double coverage’: the grounds for refusal of enforcement set forth in the Convention and the grounds for setting aside set forth in the Federal Arbitration Act. The US Court of Appeals for the Second Circuit in *Yusuf Ahmed Alghanim* determined that the grounds for refusing to enforce such an award are those set forth in Article V of the Convention, whilst the grounds for setting aside are governed by Chapter 1 of the Federal Arbitration Act.<sup>19</sup>

### III. ATTEMPTS TO ELIMINATE OR REDUCE THE ROLE OF SETTING ASIDE IN INTERNATIONAL ARBITRATION

Setting aside seems to have become the *bête noire* of international arbitration. Various attempts have been made to eliminate, or at least reduce, the role of setting aside in the country of origin and in other countries.

I recommend that each time that you hear about such an attempt, you ask yourself the question: what is the policy driver behind the attempt? As I identified at the beginning of this article, is it (1) the potential of double control; (2) the potential of conflicting decisions; (3) the international effect of setting aside on perceived parochial grounds; or (4) the question whether the court in the country of origin should have the last say with universal effect on the validity of an international arbitral award? A combination of one or more of these factors is also possible.

Before dealing with the two categories (attempts in the country of origin and attempts in countries outside the country of origin), I wish to mention the - to my knowledge - earliest endeavour to reduce the role of setting aside in the country of origin in a treaty: the European Convention of 1961.

#### A. Treaty level: *European Convention of 1961*

In the early 1950s, various initiatives were undertaken to improve national arbitration legislation—which was quite unfavourable in many countries at the time—and the international enforcement of the arbitral award.

The International Institute for the Unification of Private Law (UNIDROIT) was discussing a project for a draft uniform law on arbitration. It eventually evolved into the Strasbourg Convention providing for a Uniform Law of 1966. It

<sup>17</sup> The US implementing legislation, Federal Arbitration Act, 9 USC ss 201–8 (1980), s 202 gives a definition of an arbitral award that does not fall under the Convention, as follows: ‘award arising out of a such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship . . . has some other reasonable relation with one or more foreign states’.

<sup>18</sup> *Sigval Bergesen v Joseph Muller Corp*, 710 F2d 928 (2nd Cir 1983).

<sup>19</sup> *Yusuf Ahmed Alghanim & Sons WLL v Toys ‘R’ Us, Inc; Tru (HK) Ltd*, 126 F3d 15 (2nd Cir 1997).

was not very successful as it was signed by Austria and Belgium only, whilst Belgium was the sole country to implement it in 1970.

The ICC launched a project for a revision of the Geneva Protocol of 1923 and the Geneva Convention of 1927 in 1953. That project was taken over by the United Nations Economic and Social Council (ECOSOC) and became the New York Convention in 1958.

Another UN organization, the United Nations Economic Commission for Europe ('ECE'), was studying various problems in arbitration in East and Western Europe. In a Note of 1956, the ECE Secretariat suggested to the *Ad hoc* Working Group on Arbitration, which was set up under the auspices of the Committee on the Development of Trade, to abandon the action for setting aside and to have the control over the award exercised in the enforcement proceedings, both in the country of origin and in other countries:

... pour éviter les incertitudes pouvant résulter de la divergence de législations en ce qui concerne la procédure et les délais de recours en nullité, il serait souhaitable que dans le pays d'origine de la sentence, de même que dans tous les autres pays, les irrégularités éventuelles d'une sentence arbitrale soient sanctionnées non pas par l'annulation de la sentence, mais par un refus d'exécution.<sup>20</sup>

The Session Record mentions that the Working Group was unable to form an opinion on the Secretariat's suggestion.<sup>21</sup>

A year later, 1957, the Working Group contemplated a European Convention. With respect to control over awards, in addition to the earlier Secretariat's suggestion, there was now another suggestion. The stated concern was still the double control. This time it was proposed that the award could be contested in the country of origin on two grounds only, within a very short period of time: lack of competence of the arbitrator or irregularities in the procedure. After that, the award would be enforceable in all other contracting States, unless the execution would be contrary to public policy.<sup>22</sup>

Whilst the ECE Working Group was considering all this, the New York Convention was concluded in June 1958. As a consequence, the Secretariat was instructed to draft a European Convention without provisions concerning the enforcement of arbitral awards.

Although the Working Group had not contemplated drafting a special provision on the setting aside of the arbitral award, various delegates had asked the Secretariat to prepare a study on the number of cases in which international arbitral awards may be set aside.<sup>23</sup> A preliminary finding of the Secretariat's study was that the setting aside of an arbitral award in the country of origin is almost always a ground for refusal of enforcement in multilateral and bilateral treaties on the enforcement of foreign arbitral awards.

<sup>20</sup> UN ECE 'Report of the Ad Hoc Working Group' (yr) TRADE/WP1/12, paras 73-5; summarized in UN ECE 'Report of the Ad Hoc Working Group,' TRADE/WP1/13 (UN Library Geneva) para 58.

<sup>21</sup> *ibid* TRADE/WP1/13.

<sup>22</sup> UN ECE, 'Report of the Ad Hoc Working Group,' TRADE/WP1/21 (UN Library Geneva) para 32.

<sup>23</sup> UN ECE, 'Report of the Ad Hoc Working Group,' TRADE/WP1/76 (UN Library Geneva) paras 14 and 54.

The Secretariat then analysed the recent New York Convention:

- (a) The grounds for refusal of enforcement have been reduced to a bare minimum, below which the European countries would not be prepared to go.
- (b) Like the Geneva Convention of 1927, the New York Convention leaves the national legislators free to adopt *any* ground for setting aside an award, also beyond the corresponding grounds for refusing enforcement of an award set forth in the New York Convention.
- (c) Specifically, under Article V(1)(e) of the New York Convention, a decision to set aside an award by a court in the country of origin is binding on other courts of the contracting States. That applies also to setting aside on grounds beyond the corresponding grounds for refusing enforcement of an award set forth in the New York Convention.

The Secretariat considered further that:

- (a) The New York Convention concerns the enforcement of foreign arbitral awards and therefore does not address the grounds for setting aside in the country of origin.
- (b) This is different for an instrument like the European Convention ‘which is designed to settle various questions regarding arbitration that may provoke difficulties internationally’.
- (c) One of the questions is the question of an award set aside in the country of origin on grounds that are not grounds for refusal of enforcement in international conventions.

The Secretariat’s proposed solution for avoiding this possibility was ‘to limit, in the European draft convention, the grounds on which an award may be set aside internationally, in the country of origin, by virtue of article V 1(e) of the New York Convention, to the ground for refusal of enforcement set out in that Convention’.

The Secretariat’s proposal was no longer inspired by the concern about double control. Its concern had shifted to the universal effect of setting aside awards on parochial grounds in the country of origin.

The Secretariat’s proposal was adopted in Article IX of the European Convention of 1961. It operates in a somewhat complicated manner. It does not set forth the grounds for setting aside to be included in national legislation on arbitration. Rather, it limits the ground for refusal of enforcement of Article V(1)(e) of the New York Convention that the award has been set aside in the country where made to a setting aside on grounds specified in the European Convention. Those grounds are indeed almost word for word the grounds for refusal of enforcement set forth in grounds (a) through (d) of the New York Convention. The result is that the grounds for control in the country of origin in setting aside proceedings are the same as the grounds for refusal of enforcement in another country.

The exception is public policy. A setting aside on the basis of public policy in the country of origin has no effect in another country under the European Convention. This is rather clever as each country can always apply its public policy to an award, be it in setting aside proceedings (country of origin) or in enforcement proceedings (both in country of origin and in other countries).<sup>24</sup>

<sup>24</sup> This would be true in particular with the development of the notion of international public policy.

There are very few cases in which Article IX of the European Convention has been applied to an award annulled in the country of origin. An example is a decision of the Austrian Supreme Court concerning an award made in former Yugoslavia that had been set aside on the ground of public policy being a privileged position of one of the parties in the relevant market. The Austrian Supreme Court granted enforcement as the setting aside in the country of origin was not on a ground set forth in Article IX(1) of the European Convention.<sup>25</sup>

On the other hand, the Dresden Court of Appeal denied enforcement of an award made in Belarus between a US party and a company owned by the Belarusian State under Article V(1)(e) of the 1958 New York Convention because the Award had been set aside in Belarus. The Court of Appeal held that the Belarusian court had validly annulled the award at issue on two grounds listed in the European Convention, being Article IX(1)(a) and (d) of the European Convention.<sup>26</sup> The German Federal Supreme Court affirmed.<sup>27</sup>

The scheme of the European Convention is not free of difficulties. I will mention two of them:

- (a) Article IX(1) of the European Convention mentions ‘the setting aside in a Contracting State’. The limitation of Article IX seems therefore not to be applicable if the award has been set aside in a State which is not party to the European Convention. This makes the scheme rather complex because, whilst the European Convention requires that the parties come from (different) States that are party to the Convention, it does not require that the arbitration take place or the award be rendered in a Contracting State.
- (b) Article IX applies in States party to the European Convention only. Accordingly, if an award has been set aside in a State party to the European Convention, its enforcement cannot be refused under the New York Convention in other States party to the European Convention. However, if enforcement of the same annulled award is sought in a New York Convention country that is *not* a Party to the European Convention (and there are many of them), enforcement is to be refused under Article V(1)(e) of the New York Convention. It is submitted that this inconsistency is a typical result of a regional approach to international conventions.

In any event, it bears emphasis that Article IX of the European Convention of 1961 offers a treaty-based solution for limiting the ground of refusal of enforcement that the award has been set aside in the country of origin.

### *B. In the country of origin*

In the country of origin, there were two types of attempt. Both seem to be inspired by concerns of double control.

<sup>25</sup> *Company A v Slovene Company B*, Oberster Gerichtshof (Supreme Court) (20 October 1993); (1995) 20 YB Com Arb 1051; see also *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Radenska*, Oberster Gerichtshof (Supreme Court) (20 October 1993; 23 February 1998); (1999) 24 YB Com Arb 919.

<sup>26</sup> *Supplier (USA) v State enterprise (Belarus)*, Oberlandesgericht (Court of Appeal), Dresden, 11 Sch 18/05, (31 January 2007); (2008) 333 YB Com Arb 510.

<sup>27</sup> *Supplier (USA) v State enterprise (Belarus)*, Bundesgerichtshof (Federal Supreme Court) III ZB 14/07 (21 May 2007); (2009) 34 YB Com Arb 504.

The first is the most far-reaching: to abolish the action for setting aside altogether. That happened in Belgium in 1985.<sup>28</sup> It appeared to be a single person action in the Belgian Senate, much to the surprise of the arbitration community in Belgium. The statutory amendment was to the effect that in arbitration in Belgium in which no Belgian party was involved, no setting aside of the award could be applied for to the Belgian courts. The effect was just the opposite of what the senator had hoped for. Parties turned away from Belgium as place of arbitration. Belgium was also black-listed by arbitral institutions as place of arbitration. Belgium quietly abolished the non-availability of the action for setting aside an international arbitral award in Belgium.<sup>29</sup>

The second attempt in the country of origin is to provide the faculty to the parties to opt out of the action for setting aside the award. Such a faculty is offered by statute in Switzerland, Belgium, France and Sweden.<sup>30</sup>

Switzerland is a case in point.<sup>31</sup> The 1982 Draft Bill for the Swiss Private International Law Act ('LDIP') contained a provision under which two non-Swiss parties were allowed to contract out the action for setting aside an award made in Switzerland.<sup>32</sup> The reason given was 'd'assurer la plus grande efficacité possible à l'obligation de régler les différends par arbitrage, [tout en évitant] que les tribunaux suisses ne soient chargés de statuer sur des recours dilatoires concernant des litiges qui n'ont aucun lien réel avec notre pays' ['to assure the greatest possible efficacy for the obligation to resolve disputes through arbitration, [while avoiding] that the Swiss courts would be burdened with the task to decide on dilatory recourses regarding disputes which have no genuine connection with our country.']<sup>33</sup>

The Swiss Tribunal Fédéral does not readily accept a waiver, but there are not many cases in which it is questioned either. It has determined that the provisions in the arbitration rules to the effect that the award is final and binding on the parties do not amount to an exclusion agreement within the meaning of Article 192(1) LDIP; a specific 'express' agreement is needed.<sup>34</sup> Actually, it was in 2005 only that Swiss highest court accepted that a valid waiver had been made.<sup>35</sup>

<sup>28</sup> Arbitration Law 1985 (Belgium), adding a new para to the Judicial Code 1972 (Belgium), art 1717.

<sup>29</sup> Arbitration Law 1998 (Belgium), amending the Judicial Code 1985 (Belgium), art 1717(4).

<sup>30</sup> Draft Bill for the Swiss Private International Law Act 1982 (Switzerland) ('LDIP'), art 192; Judicial Code 1998 (Belgium) (as amended on 1 September 2013) art 1717(4); Civil Code of Procedure 2011 (France), art 1522; Arbitration Act 1999 (Sweden), s 51.

<sup>31</sup> I owe a debt of gratitude to Laurent Lévy and Erika Hasler (Geneva) for the information and research regarding the situation in Switzerland.

<sup>32</sup> As enacted in 1987, what eventually became LDIP (n 30) art 192 reads as follows:

- (1) Where none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in art. 190(2) LDIP.
- (2) Where the parties have excluded all setting aside proceedings and enforcement of the award is sought in Switzerland, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy

<sup>33</sup> Swiss Federal Council, 'Message on the Draft Bill for the LDIP' (10 November 1982) Feuille fédérale 1983 I, p 451.

<sup>34</sup> *Parties not indicated*, Tribunal Fédéral (19 December 1990) ATF 116 II 639 consid 2c, reported in (1991) 9(3) ASA Bull 262, referring to what was then the International Chamber of Commerce ('ICC') Rules art 24.

<sup>35</sup> *Parties not indicated*, Tribunal Fédéral, Ière Cour civile, 4P.236/2004 (4 February 2005) ATF 131 III 173, reported in (2005) 23(3) ASA Bull 496—, which is the first case in which the highest Swiss court has accepted the validity of a waiver clause. In that case, which provides an interesting overview of the prior case law relating to LDIP (n 30) art 192, the Tribunal Fédéral seems to have relaxed its stringent requirement of its 1990 decision which was interpreted to require an express mention of means of recourse that was excluded under LDIP (n 30) art 192. In the 2005 judgment, the Court found sufficient as an exclusion the text in an arbitration clause for *ad hoc* arbitration under

There does not appear to exist an empirical study on the use of waiver clauses in Switzerland (and elsewhere for that matter). Whilst one author believes that the waiver clauses are used ‘quite frequently in the field of sports,’<sup>36</sup> most commentators seem to assume that this type of clause is rarely used in practice.<sup>37</sup>

Many Swiss commentators have now also started to doubt about the use and advantages of the statutory waiver under Article 192 LDIP.<sup>38</sup> Most of them recommend not to include a waiver clause in a contract because they consider the recourse to the Tribunal Fédéral for the setting aside of arbitral award efficient and satisfactory: it has a minimum number of grounds,<sup>39</sup> is limited to one instance,<sup>40</sup> does not have a suspensive effect on enforcement of the award,<sup>41</sup> and is decided in less than six months.<sup>42</sup> In that context, the recourse is difficult to use for dilatory reasons.

It is telling that indeed it is rare to find in practice an agreement expressly excluding the action for setting aside the award. What it seems to show is that practice does not wish to abandon the action for setting aside the award in the country of origin as a universal bar to enforcement of a dubious award.

### C. *In other countries*

In other countries than the country of origin, the issue of setting aside will arise in the action for enforcement of the arbitral award. Here, a distinction must be made between enforcement on the basis of the New York Convention and on the basis of domestic law on the enforcement of foreign arbitral awards.

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the UNCITRAL Rules in Switzerland providing that: ‘... the parties ... exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made ...’.

<sup>36</sup> Nora Krausz, ‘Waiver of Appeal to the Swiss Federal Tribunal. Recent Evolution of the Case Law and Compatibility with Article 6 ECHR’ (2011) *J Intl Arb* 137, 161. However, in 2007, the Tribunal Fédéral held that the ‘forced renunciation’ of the recourse to the Tribunal Fédéral in sports arbitration is not enforceable, even if it is valid pursuant to LDIP (n 30) art 192(1). The Swiss Court also noted that the validity of such a waiver would be questionable under the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) ‘ECHR’ 213 UNTS 221, art 6(1). *Guillermo Canas v Ass’n of Tennis Professionals (ATP)*, ATF 133 III 235 (22 March 2007) consid 4.3.2.2, (2007) 1(5) *Swiss Intl Arb L Rep* 66, 83–87.

<sup>37</sup> See eg Andreas Bucher, *Commentaire Romand LDIP et CLug* (Basle 2011) ad art 192 LDIP, para 1: ‘les cas d’application [de l’art. 192 LDIP] sont ... restés plutôt rares’.

<sup>38</sup> See eg Christoph Brunner, ‘Rechtsmittelverzicht in der internationalen Schiedsgerichtsbarkeit: eine Standortbestimmung nach dem Cañas-Urteil’ (2008) *AJP* 738, 750; Cesare Jermini and Manuel Arroyo, ‘Pitfalls of Waiver Agreements under Article 192 PILS in Multi-Contract Settings: Some Remarks on Swiss Federal Court Decision 134 III 260’ (2009) *ASA Bull* 103, 113; Elliott Geisinger and Alexandre Mazuranic, ‘Challenge and Revision of the Award’, in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland* (Alphen aan den Rijn 2013) 223, 258. See also Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage international - Droit et pratique à la lumière de la LDIP* (Weblaw, Berne 2010) s 769; and Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (Sweet & Maxwell 2010) s 1667, who underscore, in particular, that for certain awards there will be no control at the enforcement stage. This can be the case if the award does not set out any enforceable obligations, for instance, when all of the claimant’s claims are dismissed. In addition, it should be overlooked that (as noted by the Tribunal Fédéral in *Guillermo Canas* (n 36) consid 4.3.2.2) in sports arbitrations concerning disciplinary measures issued against sport persons, there will normally be no enforcement proceeding, as compliance with the award will be ensured by the competent sports-governing body directly.

<sup>39</sup> LDIP (n 30) art 190(2)(a)(e).

<sup>40</sup> *ibid* art 191.

<sup>41</sup> *Loi sur le Tribunal Fédéral 2005 (LTF)* (Law on the Supreme Court) (Switzerland) arts 77 and 103(2).

<sup>42</sup> Felix Dasser, ‘International Arbitration and Setting Aside Proceedings in Switzerland—An Updated Statistical Analysis’ (2010) 1 *ASA Bull* 82, 92.

(a) *On the basis of the New York Convention*(i) *Text of the Convention*

As mentioned, the New York Convention contains in Article V(1)(e) as ground for refusal of enforcement of a foreign award the fact that the award has been set aside by a court in the country where made.

I have already described the situation under the New York Convention at the time it was concluded. According to Professor Sanders, if the award had been set aside, it would have led to refusal of enforcement abroad under the New York Convention ‘as there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement’.

Indeed, as a ground for refusal of enforcement, the text of the New York Convention states the fact that the arbitral award ‘has been set aside...by a competent authority of the country in which...that award was made’. Based on this text, the enforcement court should refuse to enforce an award if the party against whom enforcement is sought asserts and proves three elements, ie that the arbitral award:

- (1) has been set aside;
- (2) by the competent authority (ie the court);
- (3) in the country in which it was made.

The text of the Convention specifies no additional conditions for the setting aside of an arbitral award in the country of origin as a ground for refusal of enforcement. Neither does the legislative history of the New York Convention mention of any discussion concerning any such additional conditions.

Pieter Sanders’ contemporaneous account is subsequently confirmed by the European Convention of 1961. As reviewed earlier, Article IX of the European Convention was specifically drafted on the basis of the consideration that Article V(1)(e) of the New York Convention would lead to a refusal of enforcement of an arbitral award set aside on *any* ground in the country of origin.<sup>43</sup>

(ii) *Discretionary power (‘may’ vs ‘ne seront...que si’)*

Most of you who have heard about the discussion concerning enforcement of annulled awards will think first about France and then about the verb ‘may’ in the English text of Article V(1) of the Convention. I have to warn you that the two should not be confused. France is enforcing annulled awards outside the New York Convention, as we will see presently. On the other hand, the reliance on the verb ‘may’ is a view expounded by some scholars. But, to my knowledge, there is not a single court that has used a discretionary power under Article V(1) of the Convention, granting enforcement of an award set aside in the country of origin.

Some scholars argue that the grounds for refusing an arbitral award set aside in the country of origin named in Article V(1)(e) of the New York Convention should be limited to cases in which an ‘International Standard Annulment’ (ISA) has been applied.<sup>44</sup> According to this opinion, under the Convention, an enforcement court

<sup>43</sup> See s III.A.

<sup>44</sup> Jan Paulsson, ‘Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)’ (1998) 9(1) ICC Intl Ct Arb Bull 14.



can indeed recognize and declare enforceable an arbitral award that has been set aside in the country of origin, in keeping with a 'Local Standard Annulment' (LSA). The difference between an ISA and an LSA would be:

The rich experience of international trade law since 1958 has told us what an ISA is: a decision consistent with the substantive provisions of the first four paragraphs of Article V(1) of the New York Convention and Article 36(1)(a) of the UNCITRAL Model Law. Everything else would be an LSA, and entitled only to local effect.

In a response, I have argued that this reasoning is not legally correct under present law: 'The problem, however, is that, after annulment, an arbitral award no longer exists under the applicable arbitration law (which is mostly the arbitration law of the place of arbitration). How can a court before which such an "award" is presented declare it enforceable? *Ex nihilo nihil fit*. This legal impossibility appears to exist in any case under the New York Convention, since it explicitly refers in Article V(1)(e) to the applicable arbitration law.'<sup>45</sup> Many courts have confirmed this interpretation of the New York Convention.

*(iii) Recognition of foreign judgment setting aside the award*

Actually, there are three courts only which have decided differently on the basis of the theory that Article V(1)(e) of the New York Convention somehow requires as a preliminary step the recognition of the foreign *judgment* setting aside the arbitral award.

The first instance is the now infamous case *Chromalloy v Egypt*<sup>46</sup> which was decided by the US District Court for the District of Columbia. The case concerned an arbitral award that was made in Cairo in an arbitration between Chromalloy and the State of Egypt that was set aside by the Egyptian court. The US District Court for the District of Columbia, however, declared the arbitral award enforceable on rather unconvincing grounds.<sup>47</sup> In this case, the Respondent (the State of Egypt) had also *requested separately* that the judgment by the Egyptian court setting aside the award be recognized as a final foreign court judgment. The District Court refused that request, invoking the 'US public policy in favor of final and binding arbitration of commercial disputes'. That is not public policy that is applied within the framework of recognition of foreign court judgments.

In subsequent court decisions in the United States, the American courts distanced themselves from *Chromalloy*. In particular, the US Court of Appeals for the District of Columbia refused to follow its District Court in the aforementioned *TermoRio* case.<sup>48</sup> Neither did the US Court of Appeals for the Second Circuit in *Baker Marine*<sup>49</sup> nor the District Court for the Southern District of New York in *Spier*.<sup>50</sup>

The second case is a decision of the Amsterdam Court of Appeal in *Yukos Capital*. The case concerned a dispute between Yukos Capital Sarl ('Yukos Capital') and OAO Rosneft ('Rosneft') concerning four loan agreements between Yukos Capital as lender and OJSC Yuganskneftegaz ('Yuganskneftegaz') as

<sup>45</sup> Albert Jan van den Berg, 'Enforcement of Annulled Awards?' (1998) 9(2) ICC Intl Ct Arb Bull 15, 16.

<sup>46</sup> *Chromalloy Gas Turbine Corp v The Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996).

<sup>47</sup> Albert Jan van den Berg, 'Enforcement of Annulled Awards?' (1998) 9(2) ICC Intl Ct Arb Bull 15, 18.

<sup>48</sup> See Sanders, 'New York Convention' (1959) (n 4); Sanders, 'New York Convention' (1960) (n 4); *TermoRIO* (n 5).

<sup>49</sup> *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd*, 191 F3d 194 (2nd Cir 1999).

<sup>50</sup> *Spier v Calzaturificio Technica, SPA*, 77 F Supp 2d 279 (SDNY 1999).

borrower concluded at the time that Yukos Capital and Yuganskneftegaz formed part of the Yukos group. Subsequent to an auction, Rosneft acquired the majority of the shares in Yuganskneftegaz. A dispute about the loans ensued and Yukos Capital filed for arbitration with the International Court of Commercial Arbitration at the Chamber of Trade and Industry of the Russian Federation. By four arbitral awards of 19 September 2006, the arbitrators decided that Yuganskneftegaz was to pay Yukos Capital some 13 billion rubles (exclusive of interest and costs). By judgments of 18 and 23 May 2007, the *Arbitrazh* Court of the City of Moscow set aside the four arbitral awards on the ground of violation of the right to equal treatment, violation of the agreed rules of procedure and the appearance of a lack of impartiality and independence on the part of the arbitrators. The Federal *Arbitrazh* Court of the Moscow District and, subsequently, the Supreme *Arbitrazh* Court of the Russian Federation affirmed the judgments on appeal on 13 August 2007 and in cassation on 10 December 2007, respectively.

After the Amsterdam District Court had refused enforcement on the basis of Article V(1)(e) of the Convention, by a decision dated 28 April 2009, the Court of Appeal in Amsterdam reversed the decision denying enforcement by the President of the District Court and granted enforcement of the four awards annulled by the Russian courts. The Court of Appeal opined that ‘the Dutch court is, in any event, not obliged to refuse enforcement of an arbitral award that has been set aside if the foreign judgment setting aside the arbitral award cannot be recognized in the Netherlands’.<sup>51</sup> According to the Court of Appeal, ‘[it] must first be considered, on the basis of general law [*commune recht*], whether the decisions by the Russian civil court to set aside the arbitral awards of 19 September 2006 can be recognized in the Netherlands’.<sup>52</sup> The Court concluded that ‘since it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgments cannot be recognized in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of that decision by the Russian court must be disregarded.’<sup>53</sup> I have commented elsewhere that I consider this reasoning flawed in many respects.<sup>54</sup>

The third case was decided very recently. It is the case of *Commisa v Pemex* decided by the District Court for the Southern District of New York on 27 August 2013.<sup>55</sup> The case concerned an ICC award made in Mexico City which was ultimately set aside by a Court of Appeal in Mexico City. The US District Court held that the Mexican judgment ‘violated basic notions of justice in that it applied a law that was not in existence at the time the parties’ contract was formed and left Commisa without an apparent ability to litigate its claims’ and ‘decline[d] to defer to’ the Mexican Court of Appeal.<sup>56</sup> The District Court noted that the ‘broad

<sup>51</sup> *Yukos Capital SARL v OAO Rosneft*, Gerecht-shof Amsterdam (Amsterdam Court of Appeal) LJN: BI 2451, 200.005.269 (28 April 2009) s 3.5; (2009) 34 YB Com Arb 703.

<sup>52</sup> *Yukos* (n 51) s 3.6.

<sup>53</sup> *ibid* s 3.10.

<sup>54</sup> Albert Jan van den Berg, ‘Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 28, 2009’, (2010) 27(2) J Intl Arb 179.

<sup>55</sup> *Corporación Mexicana de Mantenimiento Integral, S De RL de CV (Comissa) v Pemex-Exploración y Producción*, Case 1:10 cv-00206-AKH (27 August 2013).

<sup>56</sup> *ibid* 2.

holding of *Chromalloy* has been criticized' but that it 'remains alive' because it recognized that a district court 'should hesitate to defer to a judgment of nullification that conflicts with fundamental notions of fairness'.<sup>57</sup> The District Court also referred to a judgment nullifying an award that violated 'basic notions of justice in which we subscribe', or 'is repugnant to fundamental notions of what is decent and just in the United States'.<sup>58</sup> What the US District Court found to be in violation of 'basic notions of justice' was that when Commisa initiated arbitration in 2004, 'it had every reason to believe that its dispute with [Pemex] could be arbitrated'.<sup>59</sup> According to the Court, it was not until May 2009, when a relevant Mexican law was amended, that there was a source of law that supported the argument that the dispute was not arbitrable. The Court found that the 'retroactive application of the law and the unfairness associated with such application is at the center of the dispute'.<sup>60</sup> The Court found that the unfairness was that Commisa was left without a remedy to litigate the merits of the dispute because by the time the Mexican Court of Appeal set aside the Award, the applicable statute of limitation had run out. The District Court based its decision on the perceived discretionary power to grant enforcement notwithstanding the presence of a ground for refusal of enforcement, having regard to the word 'may'.

*(iv) Matter of proof*

In my view, it is untenable to interpret Article V(1)(e) of the New York Convention as requiring a recognition of the foreign judgment setting aside the award as a condition precedent to a refusal of enforcement of the award.

If corruption or fraud on the part of the court setting aside an award in the country of origin is convincingly proven, the award should not be refused enforcement under the New York Convention. That is not a matter of discretionary power to grant enforcement notwithstanding the presence of a ground for refusal of enforcement—as advocated by some scholars—or a matter of non-recognition of the foreign judgment setting aside the award—as opined by the Amsterdam Court of Appeal and the US District Court. Rather, it is a matter of proof. According to the text of Article V(1), the respondent must furnish 'proof' that the award has been set aside in the country of origin. If the setting aside is obtained by corruption or fraud, the respondent fails to submit proof in the sense that the document purporting to evidence the setting aside has been obtained by illegal means.

*(b) Outside the New York Convention (France)*

The possibilities for enforcement of annulled awards described in the previous Section relate to a possible interpretation of the New York Convention itself. However, there is also a possibility outside the Convention. In my opinion, this is an important distinction because the discussion concerning the enforcement of an arbitral award set aside in the country of origin is frequently clouded by mixing up the possibilities within and outside the Convention.

<sup>57</sup> *ibid* 24.

<sup>58</sup> *ibid* 25.

<sup>59</sup> *ibid* 26.

<sup>60</sup> *ibid* 28.

The basis is Article VII(1) of the New York Convention, which provides in relevant part: ‘The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon.’

This provision is used in France. The notion of enforcing annulled awards was developed in the beginning of the 1980s with the case *Pabalk v Norsolor*. The ICC Award was made in Vienna in which the Arbitral Tribunal had applied the notion of *lex mercatoria*, an academic invention of the French Professor Bertold Goldman. The Award was set aside by the Court of Appeal in Vienna. The Court of Appeal in Paris, in turn, refused enforcement on the basis of Article V(1)(e) of the Convention as the Award had been annulled in the country of origin.<sup>61</sup> This was not to Professor Goldman’s liking. He wrote a case comment in 1983 arguing that the ICC Award was ‘international’ and therefore ‘not integrated’ in the Austrian legal order.<sup>62</sup> As a consequence, he reasoned, it continued to exist and could be enforced in France. The basis of enforcement was French law on the enforcement of non-French awards, which could be applied by virtue of the more-favourable-right provision of the afore-mentioned Article VII(1) of the New York Convention. For some unexplained reason, French law does not contain as ground for refusal of enforcement of a non-French award made outside France the ground that the award has been set aside in the country of origin.

The French courts enthusiastically embraced Professor Goldman’s eccentric theory. Everyone knows the cases *Hilmarton* (Award made in Switzerland) and *Putrabali* (Award made in England).<sup>63</sup> In the latter, the explanation given by the Cour de Cassation is that: ‘An international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.’<sup>64</sup>

This is a purely French point of view that is shared by hardly any other country. Within France there is the same degree of inconsistency. The notion of ‘la sentence internationale, qui n’est rattachée à aucun ordre juridique étatique’ applies to arbitral awards made outside of France. A ‘sentence internationale’ made in France is connected to the French ‘ordre juridique étatique’: Articles 1492–1507 of the Code de procédure civile concerning international arbitration in France apply to a ‘sentence internationale’ made in France. This also includes the annulment (‘annulation’) of the judgment (Article 1504).

<sup>61</sup> *Norsolor SA v Pabalk Ticaret Limited Sirketi*, Cour d’appel de Paris (Court of Appeals) 1 10192 (19 November 1982); (1986) 11 YB Com Arb 484.

<sup>62</sup> Bertold Goldman, ‘Une bataille judiciaire autour de la *Lex Mercatoria* - L’affaire Norsolor’ (1983) *Revue de l’arbitrage* 388.

<sup>63</sup> *Hilmarton Ltd v Omnium de traitement et de valorisation - OTV*, Cour de Cassation (Supreme Court) France, 92-15.137 (23 March 1994); (1995) 20 YB Com Arb 663; *PT Putrabali Adyamulia (Indonesia) v Rena Holding and others*, Cour de Cassation (Supreme Court) France, 05-18.053 (29 June 2007); (2007) 32 YB Com Arb 299.

<sup>64</sup> *Putrabali* (n 63).

#### IV. INVESTMENT ARBITRATION

Does investment arbitration have the same four issues, viz: (1) the potential of double control; (2) the potential of conflicting decisions; (3) the universal effect of setting aside on perceived parochial grounds; and (4) the last word on the international validity of the award by the courts in the country of origin? The answer is that it depends on which basis the investment arbitration has taken place.

Most bilateral investment treaties (BITs) provide for ICSID arbitration. A number of them also give a choice between ICSID and UNCITRAL arbitration (sometimes ICC or Stockholm Chamber of Commerce (SCC) arbitration). In terms of control, the differences are huge.

If the investment arbitration takes place on the basis of the UNCITRAL Arbitration Rules, all four issues reviewed above are present. The reason is that UNCITRAL arbitration is governed by a national arbitration law, which is almost always the arbitration law of the place of arbitration. That is expressed in Article I(2) of the 1976 version of the Rules, as confirmed in Article I(3) of the 2010 version of the Rules:

These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Thus, the award resulting from an investment arbitration conducted under the UNCITRAL Rules will be subject to the possibility of a setting aside action in the country of origin and to an enforcement action under the New York Convention in other countries, much in the same manner and with the same issues as apply to award resulting from international commercial arbitration and as discussed before.

That is fundamentally different for investment arbitration under ICSID. None of the four issues under review is present because control is concentrated in the *ad hoc* annulment committee under Article 52 and enforcement of the award is automatic under Article 54 of the ICSID Convention. The grounds for annulment set forth in Article 52(1) are in essence not much different from the generally accepted grounds for review mentioned before (although the wording is not the same).<sup>65</sup> However, there is a notable difference: the grounds for annulment in the ICSID Convention do not comprise a violation of public policy. Enforcement of

<sup>65</sup> The grounds of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 52(1) originate from the United Nations International Law Commission Draft Convention on Arbitral Procedure (1953) ('ILC Draft'), which contained a provision as follows:

- (1) The validity of an award may be challenged by either party on one or more of the following grounds:
  - (a) That the tribunal has exceeded its powers;
  - (b) That there was corruption on the part of a member of the tribunal;
  - (c) That there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.

An identical provision was included in the Preliminary Draft of a Convention on the Settlement of Investment Dispute between States and Nationals of other States (15 October 1963). In the First Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States, the annulment provision read as follows:

- (1) Either party may request annulment of the award by application in writing addressed to the Secretary-General on one or more of the following grounds:
  - (a) that the Tribunal was not properly constituted;
  - (b) that the Tribunal has manifestly exceeded its powers;
  - (c) that there was corruption on the part of a member of the Tribunal;
  - (d) that there has been a serious departure from a fundamental rule of procedure; or
  - (e) failure to state the reasons for the award, unless the parties have agreed that reasons need not be stated.

an ICSID award is automatic, without the possibility of a national court reviewing (again) the award on the basis of grounds for refusal of enforcement. Article 54(1) of the ICSID Convention provides: ‘Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.’ Again, an alleged violation of public policy is not a ground for refusal of enforcement of an ICSID award.

Graphically, this difference is presented in Table 3.

Table 3 - Investment Arbitration		
Action	Country of Origin	Abroad
Enforcement UNCITRAL	<ul style="list-style-type: none"> <li>National arbitration law</li> <li>If “non-domestic”: New York Convention</li> </ul>	<ul style="list-style-type: none"> <li>New York Convention</li> </ul>
Enforcement ICSID	<ul style="list-style-type: none"> <li>No “Country of Origin”</li> <li>Art. 54 ICSID Convention</li> <li>Automatic enforcement in all Contracting States</li> </ul>	
Setting aside UNCITRAL	<ul style="list-style-type: none"> <li>National arbitration law</li> <li>Courts have exclusive jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>Not possible</li> </ul>
Setting aside ICSID	<ul style="list-style-type: none"> <li>No “Country of Origin”</li> <li>Art. 52 ICSID Convention</li> <li><i>Ad hoc</i> Committee</li> </ul>	

## V. SHOULD SETTING ASIDE BE ABOLISHED?

Having reviewed the origin and current status of setting aside in international arbitration and the attempts to eliminate or reduce its role, I propose to examine more closely the four issues I identified in the beginning of this lecture.

The *first issue* is the potential double control by having a judicial review of the award on similar grounds in enforcement proceedings and setting aside proceedings.

It is axiomatic that there should be supervision over international arbitration, be it private law arbitration, investment arbitration or public law arbitration. The necessity of control has been convincingly shown by Professor Reisman in his seminal 1971 book *Nullity and Revision - The Review and Enforcement of International Judgments and Awards*.

The question, however, is whether the control should be double. That question becomes more compelling when the grounds for setting aside have become quite similar to the grounds for refusal of enforcement. As I explained earlier, such a convergence results from the UNCITRAL Model Law of 1985, which adopted

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In the same year, the Revised Draft Convention on the Settlement of Investment Disputes amended subsection (1)(e) to read as follows: ‘that the award has failed to state the reasons on which it is based’. Thereafter, the annulment provision of the Revised Draft became the text of the ICSID Convention (n 65) art 52 in 1966. See ‘Report: Background Paper on Annulment for the Administrative Council of ICSID’ (2012) 27(2) ICSID Rev—FILJ 443.

virtually the same grounds for setting aside and refusal of enforcement, and those were grounds in turn modelled after the grounds for refusal of enforcement set forth in Article V(1) of the New York Convention.

Within the country of origin, the issue of double control can be solved by statutory provisions such as Section 1060 of the German ZPO.<sup>66</sup> Note that this is an amendment of the Model Law itself, which allows two bites at the same cherry in the country of origin.

Outside the country of origin, the issue of double control will not arise, provided that three conditions are fulfilled. First, the award has been set aside in the country of origin. Second, the setting aside has occurred prior to a decision in the enforcement action under the New York Convention abroad. And third, the enforcement courts apply the ground for refusal of enforcement of Article V(1)(e) that the award has been set aside in the country of origin without exception. If one of these conditions is not present, the issue of double control is live.

The *second issue* is the potential of conflicting decisions regarding the same ground between enforcement proceedings and setting aside proceedings. As mentioned, conflicting decisions may occur if the enforcement court abroad decides prior to the setting aside court in the country of origin. The example I gave is the *Dallah* case.<sup>67</sup> Another one is *SPP v Egypt*, a Decision by the President of the District Court of Amsterdam in 1984. The President granted enforcement of the Award made in Paris and rejected Egypt's assertion that a valid arbitration agreement was lacking.<sup>68</sup> On the same day, two hours later, the Court of Appeal in Paris annulled the Award for lack of a valid arbitration agreement.<sup>69</sup>

Enforcement courts abroad can limit the potential for conflicting decisions by using liberally the discretionary power to adjourn the enforcement decision pending setting aside action in the country of origin as granted under Article VI of the New York Convention.

Conflicting decisions can also happen in the reverse situation: the setting aside court in the country of origin rejects the setting aside application, but the enforcement court abroad subsequently denies enforcement. For example, in *Activial Internacional SA*, while the Paris Court of Appeal denied the annulment request of the losing respondent party, holding that the agreement was valid under French law. Thereafter, the Spanish Supreme Court denied enforcement, holding that there was no valid arbitration agreement between the parties.<sup>70</sup>

The *third issue* is whether universal effect should be given to a setting aside by the court in the country of origin on perceived parochial grounds. Although it sounds like an attractive proposition to answer this question in the negative, there are a number of reasons not to do so:

- As explained before, neither the text nor the legislative history of the New York Convention allow to interpret the Convention as permitting a court to enforce an award that has been set aside in the country of origin.

<sup>66</sup> See s II.F.

<sup>67</sup> See s II.E.

<sup>68</sup> *Southern Pacific Properties (Middle East) Ltd de Hong Kong v the Arab Republic of Egypt*, District Court, Amsterdam (12 July 1984); (1986) 1 *Revue de l'Arbitrage* 101.

<sup>69</sup> *The Arab Republic of Egypt v Southern Pacific Properties Ltd, Southern Pacific Properties (Middle East)*, Cour d'appel de Paris (12 July 1984); (1986) 1 *Revue de l'Arbitrage* 75.

<sup>70</sup> *Activial Internacional SA v Conservas El Pilar SA*, Tribunal Supremo (Supreme Court) Madrid, 3868/1992 (16 April 1996); (2002) 27 *YB Com Arb* 528. See also s II.E.

- It is not up to a court to judge whether another country had valid reasons to set aside an award. What is considered ‘parochial’ in one country may be a fundamental or even religious value in another country.
- The interpretation creates uncertainty and confusion. It may evolve in a denaturalisation of the Convention.<sup>71</sup>
- Even if an interpretation follows the treaty solution provided by the European Convention (ie to limit the refusal of enforcement to a setting aside on defined grounds), courts in the country of origin may become aware of such interpretation and set aside the award on a parochial ground in the guise of a defined ground.
- France cannot be the example as it operates outside the New York Convention and does not distinguish between setting aside on perceived parochial grounds and setting aside on internationally recognized grounds. France simply ignores *any* setting aside in the country of origin, be it in England, Switzerland or Xanadu.
- The place of arbitration is a direct or indirect choice of the parties. If parties have chosen a country that is not arbitration friendly, enforcement courts are not there to rescue such a choice.
- The number of cases in which an alleged parochial setting aside occurred can be counted by the fingers of one hand. Is that worth all the uncertainty and confusion? In my view, it is a small price to be paid for the certainty and predictability of the Convention.

The *fourth issue* is whether the courts of one country should have the last say with universal effect about the validity of an international arbitral award. Subject to the proposal for the future I will make, I think the answer should be in the affirmative.

The country of origin is described by the courts and commentators as the ‘primary jurisdiction’ and having the ‘supervisory court’.<sup>72</sup> The enforcement country abroad is referred to as the ‘secondary jurisdiction’.

That the courts in the country of origin should have the last word is the prevailing view in practice. For example, when offered the faculty to opt out setting aside in Switzerland, very few parties used the opportunity.

More than 30 years ago I wrote:

[A]n elimination of the ground for refusal that the award has been set aside in the country of origin would, in my opinion, be undesirable. A losing party must be afforded

<sup>71</sup> An example is the interpretation by the Court of Appeal of Amsterdam in *Yukos* (n 51), according to which the New York Convention art V(1)(e) requires as a pre-condition the recognition of the foreign judgment setting aside the arbitral award.

<sup>72</sup> W Michael Reisman and Brian Richardson, ‘The Present—Commercial Arbitration as a Transnational System of Justice: Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration’ in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years, ICCA Congress Series*, No 16 (Kluwer Law International 2012) 25; *Dallah* (n 9). The US Court of Appeals for the Fifth Circuit dealt with a case (*Gulf Petro*) in which a party had been unsuccessful in its attempt to set aside the award in the country of rendition (Switzerland) and sought annulment in the United States. It held that it would seriously undermine the functioning of the Convention if the fact that the opportunity for judicial review of an award in the primary jurisdiction has passed could open the door to otherwise impermissible review in a secondary jurisdiction. See *Gulf Petro Trading Company Inc (US), Petrec International Inc (USA) and others v Nigerian National Petroleum Corporation (Nigeria), Bola Ajibola (Nigeria) Jackson Gaiusobaseki and others*, F3d 2008 WL 62546 (5th Cir 2008).



the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants the enforcement. A claimant would obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States.<sup>73</sup>

Or, as it is described pointedly by Professor Reisman: ‘If the buck does not stop at the primary jurisdiction, it may not stop anywhere.’<sup>74</sup>

More than 30 years later, has the time come to change my mind? My answer is negative within the present legal framework. But my answer is positive for the future. The present legal framework is unsatisfactory because, as explained before, it has an unnecessary potential double control over the award on essentially the same grounds and the potential of conflicting decisions.

What are the solutions? Is it the Draft Convention which I presented hypothetically at the ICCA Congress in Dublin in 2008? Such a Convention would indeed solve the possibly differing types of control in the enforcement proceedings as prevail at present under the New York Convention. As I mentioned before, the New York Convention applies only to the enforcement of an arbitral award made in another (Contracting) State. Thus, in the country of origin different grounds for refusal of enforcement may be applied. The Draft Convention would also have the advantage—if it is one—that it does away with the potential export of parochial grounds for setting aside since it incorporates the scheme of the European Convention of 1961.

However, having reflected on this complex question, I think the solution offered by the Dublin Draft Convention does not go far enough. If we really want to improve the current situation, States should transfer control over an international arbitral award to an independent international body. The body would have the exclusive jurisdiction to set aside an arbitral award. Enforcement of the award would be automatic in all countries.

Is this idea novel? No, it is basically the ICSID model. In my view, they got it right. One instance of control by an *ad hoc* committee in annulment proceedings. The grounds would be internationally uniform. Enforcement takes place ‘as if it were a final judgment of a court of that State’ (Article 54(1)). Yet, I would suggest one amendment: the *ad hoc* committee should have a permanent nature and be comprised of professional international judges. It was also proposed by Judges Holtzmann and Schwebel in 1992 in the context of their musings regarding the next 100 years of international arbitration.<sup>75</sup> Their dreams were commented upon by the great Robert Briner in his speech at the occasion of the 40th anniversary of the New York Convention at the United Nations in New York in 1998: ‘It would

<sup>73</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981) 355.

<sup>74</sup> W Michael Reisman, *Systems of Control in International Adjudication & Arbitration—Breakdown and Repair* (Duke University Press 1992) 118.

<sup>75</sup> Howard Holtzmann, ‘A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards’ in Martin Hunter, Arthur Marriot, and V V Veeder (eds), *The Internationalisation of International Arbitration, The LCLA Centenary Conference* (Graham & Trotman / Martinus Nijhoff 1995) 109; Stephen M Schwebel, ‘The Creation and Operation of an International Court of Arbitral Awards’ in Hunter, Marriot and Veeder, 115.

seem more prudent to be less visionary and to concentrate on the next ten years.<sup>76</sup>

If it is permitted to be somehow looking in a more distant future, there may be not only an *ad hoc* committee for setting aside arbitral awards, whether rendered in international commercial or investment cases. Perhaps there will be an international tribunal that replaces the current arbitral tribunals chosen per case in commercial and investment cases. Such an international tribunal can have an appeal instance. Is that a novel idea? No, it isn't. It is similar to the WTO model, but this time with private parties as well.

## VI. CONCLUSION

I come to my conclusion. The title of this article is: Should the setting aside of an arbitral award be abolished? The issues of double control and potential conflicting decisions are troubling, but their impact is limited to a few cases. The issue of setting aside on parochial grounds is, in my view, not a reason, even if an occasional setting aside on such a ground is unsatisfactory. It is the issue of last say that gives the decisive answer. Practice votes with its feet by wishing to retain the possibility that the court of the country of origin exercises primary jurisdiction over the award in setting aside proceedings with universal effect.

So, the answer to the question of this lecture seems to be 'no'. However, I would not propose to relapse to complacency. I do think that we can live in a better arbitration world. The length of this lecture already demonstrates that the current status of setting aside in international arbitration requires a lot of explaining. This is due in part to the limited scope and outdated provisions of the New York Convention and the copying of the New York Convention into the UNCITRAL Model Law. I genuinely believe that we can do better. I hope that the various options for possible solutions which I mentioned can be explored further. In the end, it cannot be correct that international arbitration would have to operate on the basis of the famous line in the 1942 movie *Casablanca*: 'We'll always have Paris.'

<sup>76</sup> Robert Briner, 'Philosophy and Objectives of the Convention' in *Enforcing Arbitration Awards under the New York Convention Experience and Prospects* (UN Publication 1998) 9 <<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>> accessed 4 October 2013.