

Different Approaches in Enforcement of Arbitral Award Annulled at the Place of Arbitration

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Annotation: This paper seeks to investigate whether the enforcement court should follow the decision of the court at the place of arbitration, or should it can reach a different decision. In doing so, section II briefly explains the text of the New York Convention. Section III identifies the national approaches on the enforcement of vacated award at the seat of arbitration, including that of France, and the United States. In section IV, the author analyzes the standards of arbitral award annulment set forth by the court of those jurisdictions. Finally yet importantly, the conclusion placed in section V.

Key words: commercial arbitration, arbitral award, seat of arbitration, enforcement, set aside of award, national courts, the New York Convention on the Recognition of Foreign Arbitral Awards.

Introduction

With a substantial increase in the number of cases filed to arbitral tribunal, international commercial arbitration has become a preferable method of resolution to international commercial disputes. One of the reasons why the parties of international commercial choose arbitration as their alternative dispute resolution is due to the enforceability of arbitral awards.

The award rendered by the arbitral tribunal is considered contestable to the judgment of the court since it is vested with the same functionality and powers.² Nonetheless, although arbitration clauses generally provide that the arbitral awards will be binding to the parties and final, a party to the dispute usually challenge the arbitral award. The result of a successful challenge is that the award is set aside by the court and no longer exists within the jurisdiction of such court and the parties to dispute put back to the positions they were before the beginning of arbitration.³

If the party affected by the annulment of the arbitral award seeks to have such award enforced in different jurisdiction, the question whether an arbitral award annulled at the seat of arbitration can be enforced in another jurisdiction arises. The national courts which enforce foreign awards set aside at the seat of arbitration relying primarily on *the New York Convention on the Recognition of Foreign Arbitral Awards* (hereinafter the New York Convention). This convention allows its parties to look for the enforcement provisions of national law if they are more favorable than the provisions set forth under the Convention.⁴ Even so, the enforcement of awards following a decision at the seat remains a controversial issue in international arbitration.

2. Text of the New York Convention regarding the Award Set Aside at the Seat of Arbitration

Since the New York Convention came into force in 1958, the uniform standard for recognition and enforcement of foreign arbitral awards has been designed. The Convention has generally been accepted as a foundation of international commercial arbitration.⁵ It significantly imposes the obligation on the national courts of its member states to recognize and enforce arbitral awards rendered in other member States with some limited exceptions.

Under Article V (1) (e) of the New York Convention, the arbitral award which has been annulled by a court of the country of origin constitutes a ground for refusal of the award in other jurisdictions.⁶ According to this Article, the enforcing court may refuse to enforce award setting aside by the court of the country of origin should the party against the award enforcement can prove that the award has been annulled, set aside or vacated by the competent court of the seat of arbitration. Nonetheless, the provision of the Convention does not specify any further additional conditions for accepting to

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² King Nallesons, "Should Arbitral Awards That Have Been Set Aside Be Enforced in a Different Jurisdiction?" *China Law Insight*, May 22, 2012, accessed July 10, 2022, <http://www.chinalawinsight.com/2012/05/articles/corporate/should-arbitral-awards-that-have-been-set-aside-be-enforced-in-a-different-jurisdiction/>, accessed July 19, 2022

³ Ibid.

⁴ *New York Convention*, Article 7.

⁵ Domenico Di Pietro & Martin Platte, "Enforcement of International Arbitration Awards – The New York Convention of 1958" *Cameron* (2001): 5.

⁶ Article V(1)(e) sets forth that: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

enforce the annulled arbitral award. The legislative history of the Convention itself does not refer to any discussion on the additional conditions.⁷

Even so, it is interpreted by many commentators that the New York Convention allow the contracting parties to apply its own established local standard as provided in Article VII (1), stating that:⁸

“The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

Consequently, the contracting parties can decide whether to set aside the annulled awards by providing additional conditions for allowing enforcement of the set aside awards.⁹ In other words, this issue is left at the discretion of the State parties to the New York Convention.

3. The National Approaches to the Enforcement of the Award Annulled by the Seat Court

Despite of the flexibility of the New York Convention, most of the State parties are unlikely to give the effect to an arbitral award annulled in the country of the seat of arbitration.¹⁰ For instance, with exceptions of some cases,¹¹ the US courts normally decline the enforcement of such annulled awards set aside at the seat of arbitration by referring to a decision made by the seat court unless the decision evidently runs counter ‘basic notions of justice.’¹² For example, in the case of *Thai-Lao*¹³, the Southern District of New York declined the enforcement of an award vacated by the Malaysian High Court. It ruled that the Malaysian court had not violated the basic notions of justice, so it deferred to the decision of the Malaysian court.¹⁴

The Australian Court in the recent case of *Gujarat*¹⁵ has also adopted this approach. In this case, a party to arbitration challenged an award in the English courts, alleging that the procedure of arbitration was unfair. The English courts rejected the challenge. That party then sought to resist the award enforcement in Australia on the same grounds; however, the Australian Court significantly ruled, “it would generally be inappropriate to depart from the decision of the English court. Australian courts are therefore taking a similar approach to the US courts, deferring to decisions at the seat in all but exceptional cases”.¹⁶

This practice of the US court is, however, not universal as the national courts in certain jurisdictions have accepted to enforce the awards vacated at the seat of arbitration by referring to their national standards of annulment. This is obvious for the French courts that usually disregard the decisions of courts country of origin by enforcing the awards, which were set aside at the seat countries.

The national law of France governing international arbitration¹⁷ provides only five specific grounds for non-enforcement of arbitral award.¹⁸ Since the annulment of an award by the court of the seat of arbitration is not one of those grounds, the court normally enforces such arbitral awards.¹⁹ In addition, the court views that a foreign arbitral award is not integrated in the place where arbitration occurs; hence, the decision of the seat court on the award validity does not have bearing on the issue whether the award can be enforced in another jurisdiction.²⁰

This view was confirmed in *Hilmarton* case²¹ where the court set forth that, even though the arbitration clause between the two parties to the dispute provides that “the arbitration will take place in Geneva under the law of the Canton of Geneva”, it

⁷ Albert Jan van den Berg, “Should the Setting Aside of the Arbitral Award be Abolished?” *ICSID Review* (2014): 16.

⁸ Jan Paulsson, ‘Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment’ *Asia Pac. L. Rev.*, (1998)1.

⁹ Christopher KOCH “The enforcement of the awards annulled in their place of origin”26 *J. Int. Arb. Kluwer Law International* (2009), 269.

¹⁰ Jan van den Berg, 17.

¹¹ In the case of *Chromalloy v Egypt*, the District Court for the District of Columbia permitted the enforcement of an award set aside by a Cairo court in an arbitration taking place in Egypt; *In Re Chromalloy Aero services and the Arab Republic of Egypt*, 939 F. Supp. 906 (D.C. Cir. 1996).

¹² Matthew Barry, “Enforcing Awards Following a Decision at the Seat: The US or the French Approach?” *Kluwer Arbitration Blog*, 2014, accessed July 30, 2016, <http://kluwerarbitrationblog.com/2014/11/27/enforcing-awards-following-a-decision-at-the-seat-the-us-or-the-french-approach/>.

¹³ *Thai-Lao Lignite (Thailand) Co., Ltd. v. Lao People's Democratic Republic*, No. 10-cv-5256 (S.D.N.Y. Feb. 6, 2014).

¹⁴ *Ibid.*

¹⁵ *Armada (Singapore) Pte Ltd (under judicial management) v Gujarat NRE Coke Limited* (17 June 2014).

¹⁶ Barry.

¹⁷ *French Code of Civil Procedure*, Article 1502, 1520, 1525.

¹⁸ Margaret L. Moses, *The principles and practice of international commercial arbitration* (2nd ed, 2008), 224.

¹⁹ *French Code of Civil Procedure*, Article 1502, 1520, 1525.

²⁰ Barry.

²¹ The Paris Court of Appeal, which on December 19, 1991 decided that “...The provision of Art. V(1)(e) of the Convention—according to which exequatur must be denied to an award which has been set aside in the country in which it was made—does not apply when the law of the country where enforcement is sought permits enforcement of such an award. In case, recognition and enforcement is sought in

was not relevant in determining the issue of award enforcement in the French court.²² The French court of cassation affirmed this view in the case of *Putrabali*.²³

4. Analysis on Different Approaches of National Courts

On the issue whether the arbitral awards set aside by the seat court should be enforced in a different jurisdiction, some scholars argue that, when the award is annulled, there is no legal framework present under the applicable arbitration law. It is mostly the law of the seat, as a consequent, the foreign court before which the arbitral award is presented should no longer be able to enforce it.²⁴ This rationale is suggested under the New York Convention, Article V (1)(e) as it explicitly refers to the applicable law.

On the other hand, by referring to Article V(1)(e) of the New York Convention, many scholars view that the enforcement may be allowed if the international conditions for declining to enforce the arbitral award set aside at the place of arbitration are met.²⁵ This standard is in accordance with the practice of arbitral tribunals in rendering the commercial arbitral awards since 1958, are limited to article V(1) (a) - (d) of the New York Convention and article 36(1)(a) of the *UNCITRAL Model Law on International Commercial Arbitration*.²⁶

Yet, some scholars favor the approach of the French Court, which allows the application of local standards, by reasoning that international arbitration is an international legal order; thus, on the issue of validity, the decision of national court of the seat of arbitration should not be final. As a result, each national court should be able to establish its local enforcement standards for foreign arbitral award, regardless of the decision of the courts of the seat of arbitration.²⁷

Nonetheless, it is worth noting that ignorance of the decisions of seat courts might pose some problems. First, by disregarding the decisions would result in multiple litigations of the same issues in many different jurisdictions; consequently, this would negatively affect the effectiveness and increase the costs of international commercial arbitration. Moreover, it might bring about the conflicting of enforceable awards on the same issue.

Conclusion

Under some national laws, including French law, are more favorable than the conditions specified by the New York Convention since they permit their national courts to enforce a foreign arbitral awards even if they have been set aside at the seat of arbitration by applying either local or international standards of non-enforcement. In light of these difficulties, it is obvious that the approach which enforcement courts defers to the decisions of the seat courts of the place of arbitration is more preferable around the world, unless it is an exceptional case where the seat court has explicitly violated the “basic notions of justice”. The US Courts and the Australian Courts also adopt this approach. This is because the inconsistent between the decisions made by the seat court and the enforcement court results in the uncertainty for the parties, which would make the procedure of international commercial arbitration more costly and cumbersome.

Some commentators have, therefore, proposed to draft a provision that would put the power of arbitral award revision out of the authority of domestic courts.²⁸ Such proposal based on the Articles 50 and 51 of *ICSID Convention*, which would empower an international body to review the issue of enforcement of arbitral awards.²⁹ In case an arbitral award receives confirmation from this international body, the domestic courts in contracting parties must enforce such an award. There is a consensus between parties to New York Convention in favor of this proposal; nevertheless, it would take a long time for any amendment to occur. In the meantime, the enforcement courts should apply the US approach unless the enforcement of the awards would run counter their public interests.

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France of an arbitral award rendered in Geneva; the award having been set aside by the Swiss courts is not a ground for denying exequatur under Art. 1502 NCCP."

²² Christopher Koch, "The enforcement of the awards annulled in their place of origin" *J. Int. Arb.* 2 *Kluwer Law International* 26 (2009): 273.

²³ Cour de Cassation, 1st Civil Chamber, June 29, 2007, 2 decisions, "société Putrabali Adyamulia c/ SA Rena Holding et autre".

²⁴ Albert Jan van den Berg, 'Enforcement of Annulled Awards?' *ICC Intl Ct Arb Bull* 15 (1998): 16.

²⁵ *Ibid*

²⁶ *Ibid*.

²⁷ Okuma Kazutake 'Confirmation, Annulment, Recognition and Enforcement of Arbitral Awards' *The Seinan Law Review* (2005), 23.

²⁸ Barry.

²⁹ Article 51(1) of the *ICSID Convention* states that "Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award".

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