Hot Topics in International Arbitration – NYSBA International Section Seasonal Meeting

"International Enforcement of Arbitral Awards Annulled at their Seat – A Global Overview with Emphasis on the US and French Positions"

Clifford J. Hendel

I. Introduction

Arbitral awards are not frequently annulled. And annulled arbitral awards are not frequently the subject of enforcement actions in other jurisdictions. But when they are, a veritable Pandora's box of doctrinal considerations and jurisprudential conceptions is opened.

Thus, one of the hottest (and in my view, most fun) issues in international arbitration today involves the consequences of a national court judgment annulling an arbitral award issued in that state: That is, (1) must courts in foreign states recognize either the judgment annulling the award or, on the contrary, the annulled award? and (2) can a foreign court recognize either the judgment or the award consistent with its obligations under the New York Convention and national law?

The answers to these questions are very far from uniform today, creating both risks and opportunities to counsel and clients.

My presentation this morning will provide a quick global overview of the situation. I will focus particularly on the two jurisdictions with the clearest (but diverging) approaches to the issue -- the U.S. and France -- preceding that discussion with a mention of what could be considered the traditional or "common sense" view of the matter and concluding with a mention of where a handful of other jurisdictions appear to be crystallizing on the issue.

II. Starting Point

To the uninitiated, this topic will probably sound like nonsense. After all, even Prof. Pieter Sanders, a founding father of the New York Convention, declared more than 50 years ago that an award which is annulled in its seat no longer exists and thus cannot be the subject of enforcement. Which is another way of saying that 50 years ago, this was not a hot topic at all.

But today it is. Why is that? Why has the traditional "common sense" view been upended? Principally, in my view, due on the one hand to the very text of the New York Convention and to creative advocacy and judicious case law based on that text and on the other, due to an "outlier", a principled, conceptual position on the issue which essentially turns the traditional view on its head.

This radical position is the one developed by French case law and doctrine; the incremental position is the one best exemplified by the U.S. position. Let's take a look first at the U.S. view on the issue.

III. The U.S. View

A series of relatively recent U.S. federal court decisions (including recent Second Circuit and Southern District of New York decisions) on the issue take as a starting point the language of the New York Convention. Specifically, Article V (1), which provides that the courts of a Contracting State "*may*" decline to recognize an award upon proof that one of the provision's specified exceptions -- including (in sub-clause (e)) annulment at the seat – applies. Note that the operative word is "*may*" (not "*must*"): the New York Convention permits, but does not require, non-recognition in the case of annulment[1].

How have U.S. courts dealt with the issue? In short, as they almost invariably do -- on an incremental, case-by-case basis.

Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996)

The leading case is the 1996 decision of the federal district court for the District at Columbia in Chromalloy. The D.C. court's refusal to recognize an Egyptian judicial decision annulling an arbitral award was focused narrowly on the specific ground for the Egyptian annulment decision and the parties' arbitration agreement. Specifically, the court reasoned that the Egyptian annulment decision violated fundamental U.S. public policy (against substantive review of arbitral awards) and the parties' specific arbitration agreement (waiving any such review), and thus concluded that recognition of the award (albeit annulled) should not be refused.

Baker Marine Ltd. v. Chevron Ltd, 191 F. 3d 194 (2d Cir. 1999)

The Second Circuit followed the Chromalloy reasoning in a 1999 decision involving an annulled Nigerian award, but concluded on the facts that non-recognition was appropriate. That is, the Court agreed that the New York Convention permits (but does not require) non-recognition of annulled awards but held that the party seeking recognition and enforcement in this case had shown "*no adequate reason*" for refusing to recognize the Nigerian court's annulment decision. While the Baker Marine court did not detail its reasoning with particular clarity, it appears to have relied on the facts that the parties had not waived (unlike the situation in

[1] The text provides: "*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 proof that ... [t]he award ... 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*".

Article V (2) (b) provides that: "*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ... [t]he recognition or enforcement could be contrary to the public policy of that country.*"

Chromalloy) their rights to appeal from the arbitral award and that the annulment decision did not reflect favoritism towards the award-debtor and was based on procedural grounds widely – recognized as a proper basis for annulment.

TermoRio S.A. v. Electranta SP, 487 F. 3d 928 (D.C. Cir. 2007)

In a 2007 decision, the D.C. Circuit Court of Appeals denied recognition to an award issued in Colombia against a Colombian state entity which had been annulled by a Colombian court on the ground that the parties' arbitration agreement violated Colombia law by providing for ICC arbitration rather that for arbitration under Colombian procedural rules.

In its decision, the D.C. Circuit declared that a "*principal precept*" of the New York Convention was that "*an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully set aside by a competent authority in the State in which the award was made",* observing further that "*the Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State [which] has lawfully acted pursuant to competent authority to set aside an arbitration award made in its country".*

Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA) v. Pemex Exploración y Producción, 10 Civ. 206 (S.D. N.Y. Aug 27, 2013)

The most recent U.S. cases on the issue were handed down by the Southern District of New York.

In August 2013, a Mexican award holding the Mexican State oil company PEMEX liable for nearly $400 million in damages was recognized by the Southern District under the Panama Conventional (the Inter-American Convention on International Commercial Arbitration -- essentially equivalent to the New York Convention for all relevant purposes) notwithstanding having been annulled by a Mexican court. The COMMISA court noting that Baker Marine did not define the scope of a court's discretion under Article V of the New York Convention to refuse to recognize an annulled award, relied on the standard applied by the TermoRio court, and declared that the scope of discretion was narrow: only if the annulment is "*repugnant to fundamental notions of what is decent and just in the United States... [or if it] violated any basic notions of justice in which we subscribe"* may the annulled award be recognized.

Under the facts (which were rather egregious -- PEMEX in fact had been rebuffed in its efforts to annul the award by the first three Mexican court that it approached), the Court found sufficient repugnancy as to merit recognition of the award. Specifically, the case involved retroactive application of a Mexican law not in place at the time of the arbitration agreement which rendered the dispute not only non-arbitrable but indeed without any remedy at all (since the administrative remedy's statute of limitations had expired). The Court found these considerations sufficiently violative of "*basic notions of justice*" and sufficiently *"repugnant to fundamental notions of what is decent and just"* in the U.S. as to warrant recognition of the annulled award.

Thai-Lao Lignite (Thailand) Co., Ltd & Hongsa Lignite (LAO PDR) Co. Ltd v. Government of the Lao People's Democratic Republic (S.D.N.Y., Feb 6, 2014)

In the most recent Southern District case, decided in February of this year, the Court summarized the case law represented as establishing a high standard before an annulled award can be recognized, and noted that such standard is *"infrequently met"* and should be reserved for *"only clear-cut cases"*.

On the facts, the Court concluded that nothing in Malaysian proceedings or judgment (which was based on the "*universally recognized ground*" that the arbitrators had exceeded their jurisdiction, and in which the parties had chosen Malaysia as a neutral third country seat) could fairly be said to violate basic notions of justice. Thus, in the absence of the "*extraordinary circumstances"* envisioned by TermoRio and found to have been present in COMMISA, the annulment judgment was given effect and the annulled award was not recognized and enforced.

The Current State of Play in the U.S.

The current position of the U.S. courts on the issue of enforcement of awards annulled at the seat has been characterized as "*timid and conservative*" (L. Radicati,: "*The Fate of Awards Annulled at the Seat in Light of Thai-Lao Lignite*," http://blogs.aw.nyu/transnational/2014/03).

Absent a clear showing that the annulment decision (or the procedure under which it was rendered) was violative of basic notions of justice, i.e. in practice, absent truly egregious circumstances, comity considerations will carry the day under current U.S. case law, and the annulment decision will likely be respected and the annulled award will likely not be.

IV. The French View

French courts have held, for nearly three decades now, that international arbitral awards which have been annulled in the arbitral seat may be recognized in France. And this, not only in the case of what might be considered egregious violations of basic justice (as in the essentially comity-based U.S. position constructed case-by-case in the application and interpretation of Article V *of the New York Convention) but -- since Article VII of the New York Convention does 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 the treaties of the country where such award is sought to be relied upon*" -- in any case in which the more liberal recognition standards of Article 1520 (formerly 1502) of the French Code of Civil Procedure do not preclude recognition.[2]

[2] Article 1525 of the French Code of Civil Procedure provides, in essence, that recognition and enforcement in France of foreign arbitral awards can only be refused in the circumstances set out in Article 1520 (former Article 1502), which do not include -- contrary to Article V of the New York Convention – the situation in which the award has been annulled. This distinction reflects the especially pro-arbitration orientation of the French legislation, as well perhaps as the somewhat – dated text of the New York Convention, negotiated and agreed as a multilateral treaty in 1958 and not touched since then.

Thus, in the 1984 decision in the Norsolar case, the Cour de Cassation reversed a lower court decision applying Article V of the New York Convention to deny recognition to an arbitral award that had been annulled in its seat.

The 1994 Hilmarton case similarly based its decision on the fact that the annulment in Switzerland of an award issued in Geneva does not constitute a ground under then - Article 1502 for the non-recognition and enforcement of the award in France. The Cour de Cassation famously stated that "[*T]he award rendered in Switzerland is an international award which is not integrated in the legal system of that state, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy*".

Finally, in the 2007 Putrabali case, the Cour the Cassation repeated that an international arbitral award is not integrated in the state legal order and its recognition and enforcement must be examined under the rules applicable where recognition and enforcement is sought, and in the case of France (pursuant to Article VII of the New York Convention), the liberal recognition rules of former Article 1502 of the Civil Procedure Code do not include annulment in the seat as a basis for refusal of recognition and enforcement in order to confirm or deny their recognition and enforcement.

The French view on the issue -- that an international award is not linked to the legal order of the state of the seat, but rather is part of an international arbitral order unconnected to any state -- has been lampooned by some observers (Albert Jan Van den Berg has called it an "*eccentric theory"* based on an "*academic invention*" and one which is "*shared by hardly any other country" ("Should the Setting Aside of the Arbitral Award be Abolished?*", ICSID Review (2014)).

On the other hand, the French position has been exalted by others. Francisco González de Cossío (in "*Ejecución de Laudos Anulados: Hacia Una Mejor Aproximación Analítica*", pending publication) observes that the U.S. comity-based approach of deference towards decisions annulling awards at the seat inevitably generates friction between the two jurisdictions, and lauds the French approach as more sophisticated, realistic and functional, since in it no one passes judgment on anyone else but only reviews awards (annulled or not) under the applicable rules of one's own local law.

V. Other Jurisdictions

Few jurisdictions have had the same number of opportunities to position themselves on the issue as have the U.S. and France.

Surely, the French position is at the extreme, but there are clear indications that certain civil law jurisdictions (Belgium, Holland and Austria, to name a few), may be inclined to follow the French lead[3].

[3] See E. Gaillard's Legal Theory of International Arbitration (2010) for a brief summary of the international position by one of the leading advocates of the French position.

Other jurisdictions may follow the U.S. position of comity on a case-by-case basis.

And still others may follow the outdated and, frankly unsustainable view, that an annulled award ceases to exist and thus can never be recognized and enforced, either *à la americaine* (where only a lawfully annulled award, as interpreted in accordance with the cases discussed earlier, ceases to exist and will to be recognized and enforced), or *à la française* (where the annulment is simply irrelevant in the recognition and enforcement proceeding and the award never ceases to exist, but rather circulates freely in international commerce irrespective of its possible annulment).

VI. Takeaway

The essential take away? That this is an evolving and contentious issue with potentially huge consequences for clients.

Counsel who succeeds in annulling an adverse arbitral award at the seat should not presume that the client is home free. If the client has assets in the U.S., and the annulment decision or process could be argued to be violative of basic justice, the client is exposed to at least some risk. And if the client has French assets, the risk is much greater.

On the other hand, counsel who succeeds in obtaining an award for a client should keep in mind that -- just as some jurisdictions are less likely to annul that others -- there are jurisdictions much more open to recognition and enforcement of annulled awards than others. A modicum of intelligent forum-shopping is critical: if an annulment action is in process or likely in the jurisdiction of the seat, and especially if it is not entirely spurious, counsel interested in having the award enforced abroad may want to go straight to a French school jurisdiction (assuming assets are available in that jurisdiction) and start the process of recognition and enforcement without even waiting for the result of the annulment action.

Materials

New York Convention

Chromalloy

Baker-Marine

TermoRio

COMMISA

Thai-Lao Lignite

Articles 1520 and 1525 of the French Code of Civil Procedure