Cordells Rompotis

August 2017

International Arbitration

Enforcement of arbitration awards: Is there a difference between awards set aside or refused recognition in the seat?

PT First Media v Astro

Leave to Appeal

The Appeal Committee of the Court of Final Appeal in Hong Kong has granted leave to First Media to appeal the Court of Appeal's decision confirming the first instance decision to refuse First Media's application to seek leave out of time to resist enforcement of Singapore awards which were made without jurisdiction.

Awards set aside at the seat

When an award is set aside (annulled) at the seat of arbitration, the award creditor (ie. the winning party in the arbitration) may nonetheless seek to enforce it in another jurisdiction (the secondary jurisdiction) pursuant to the New York Convention. The courts in the secondary jurisdiction are then faced with the question of whether or not to enforce the annulled award.

One of the grounds for refusing recognition and enforcement in Article V of the New York Convention is where the award has been set aside (ie. annulled). Nevertheless the enforcement court has a discretion (because of the word "may" in Article V) to enforce the award regardless.

How this discretion is exercised varies from jurisdiction to jurisdiction, and is an area of some complexity in international arbitration law and practice.

Set aside awards enforced

There are a number of instances where courts have enforced awards annulled at the seat of arbitration.

In *Chromalloy*, an award made in Egypt and subsequently set aside by the Egyptian court was enforced in the United States. In the 2016 *Pemex* decision, while the United States court acknowledged that it should act with trepidation and be reluctant to enforce an award that had been declared a nullity, it nonetheless enforced an award made in Mexico which was subsequently annulled by a Mexican court. In *Yukos*, an award made in Russia and subsequently set aside by the Russian court was enforced in Amsterdam.

Reference may also be made to a series of French cases, which have held that the setting aside of an award at the seat is not, in and of itself, a ground for denying enforcement since awards are decisions of international justice and should therefore be examined according to the laws of the country in which they are being enforced: see *Norsolar*, *Hillmarton* (where the court noted that the recognition of an award in France that had been set aside in its country of origin was not contrary to the French conception of international public policy), and *Putrabali*.

The arguments in support of such an approach include the desire to increase neutrality in international commercial arbitration, and reducing the impact of national arbitration laws in the enforcement process. All of these have the same underlying objective – to increase the effectiveness of arbitration, as well as its independence vis-à-vis national courts.

Set aside awards not enforced

The more common approach, however, is for foreign courts to refuse enforcement of awards set aside at the seat of arbitration.

In *Baker Marine*, an award made and subsequently annulled in Nigeria was refused enforcement in the United States, with the court recognising that second-guessing the primary jurisdiction would seriously

undermine finality of arbitral proceedings and produce conflicting judgments, which would give a losing party every reason to pursue its adversary with enforcement actions from country to country until a court was found to grant enforcement.

In *Termorio*, an award made and subsequently annulled in Columbia was refused enforcement in the United States, with the court stressing the risks to the international arbitration framework in enforcing an annulled award and to international comity, stating that unless the award was extraordinary (ie. repugnant to fundamental notions of what is decent and just), an enforcement court should not go behind the decision of the seat court. In Dana Shipping, the Hong Kong court refused to enforce an award that had been set aside in London. In the 2017 *Pemex* decision, despite the enforcement of the annulled award in the United States, enforcement was refused in Luxembourg. In *First Media*, the Singapore Court of Appeal expressed the obiter view that an award that had been set aside would not be enforceable. And in the very recent decision in *Maximov*, an award made and subsequently annulled in Russia was refused enforcement in England, with the court emphasising the heavy burden faced by a party seeking to enforce an award that had been annulled by the court of the seat.

While there are competing arguments, there is strong academic support for the common approach. Van den Berg states:

"…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."

Arguments in support of this approach include: it is not up to a court to judge whether another country had valid reasons to set aside an award; the place of arbitration is a direct choice of the parties – if parties have chosen a country that sets aside an award, enforcement courts are not there to rescue such a choice.

Put simply, the buck should stop in the jurisdiction where the arbitration is seated.

Set aside and enforcement proceedings

The inter-related nature of the set aside and enforcement proceedings is illustrated by the *Thai Lao* case. In that case, a mining dispute led to an award in Malaysia in the claimant's favour. The respondent did not apply to set aside the award within the statutory time limit permitted under Malaysian law. The claimant sought to enforce the award outside of Malaysia, and succeeding in doing in both the United States and England. However, an application to enforce the award in France was refused.

Prior to the enforcement decisions, the respondent initiated set aside proceedings in Malaysia, out of time, and ultimately, after the date of the enforcement decisions, the Malaysian High Court (ie. the court at the seat) annulled the award. With this decision in hand, the respondent applied to the court in the United States to vacate its earlier judgment enforcing the award. The application was successful, with the court in the United States deeming it appropriate to defer to the decision of the Malaysian High Court to annul the award, referring to the "prudential concern of international comity".

The examples above illustrate the divergence of judicial approach in circumstances where parties seek to enforce awards annulled at the seat of arbitration.

Lippo v Astro

But what is the position where an award debtor does not apply to set aside the award but instead, upon the award creditor's application to enforce the award in the seat, the award debtor is successful in resisting enforcement? In this situation the award ostensibly remains "valid" – since it has not been set aside at the seat – but the supervisory court (albeit sitting in its enforcement capacity) has refused to enforce the award.

How should a foreign court respond when asked to enforce an award that has not been set aside but been refused enforcement in the seat jurisdiction? This issue arose in proceedings between companies within the Malaysian Astro conglomerate and First Media, part of the Indonesian Lippo conglomerate.

Several arbitral awards were made in Singapore in favour of the Astro parties, including some Astro companies that were not parties to the arbitration agreement but which had been joined as added claimants by the Arbitral Tribunal. Notwithstanding objection, the Tribunal ruled that it had jurisdiction to entertain the claims brought by the added Astro parties, and ultimately made awards of about US$130 million in their favour. First Media did not apply to review the preliminary award on jurisdiction. Nor did it apply to set aside the later monetary awards on the grounds of lack of jurisdiction.

The Astro parties then sought to enforce the awards in Singapore. Simultaneously they applied to enforce the awards in a number of other jurisdictions, including Hong Kong. Singapore's highest court, the Singapore Court of Appeal, refused to enforce awards on the basis that they were made without jurisdiction.

In Hong Kong, where Astro also sought enforcement, both the first instance judge (paras 93, 99) and the Court of Appeal considered that the parties were bound by the Singapore Court's ruling that the awards were made without jurisdiction.

The Court of Appeal appeared to not distinguish between the seat court acting as a supervisory court distinct from an enforcement court. At para 44, the Court of Appeal referred to the *Gao Haiyan* case, stating that:

"*Tang VP (as he then was) emphasised the importance to give weight to the decision of the supervisory court of the seat of arbitration, as this is relevant to the decision of the enforcement court whether the award should be enforced".*

In *Gao Haiyan*, the Court of Appeal highlighted the following from Colman J's judgment in *Minmetals* [1999] CLC 647 at 661:

> *"… In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration…*
>
> *In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction*
>
> *…. outside… exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be re-investigated by the English courts on an enforcement application is to be most strongly deprecated."*

The Hong Kong Court of Appeal in First Media followed up with:

> *"But it does seem to us that the judge has fallen into error in not giving proper recognition to the findings in the SCA Judgment. It is part of Hong Kong law that in considering the conduct of the arbitration for the purpose of the "good faith" principle, it is particularly relevant to take account of the law of the seat of arbitration and the ruling of the supervisory court of the seat of arbitration."*

Nonetheless, the awards were enforced in Hong Kong because the trial judge declined to exercise his discretion to extend the time for First Media to apply to set aside the ex-parte orders granting leave to enforce the awards (and the subsequent judgment), because it made the application some 14 months out of time. The Hong Kong Court of Appeal found there to be no error in the trial judge's exercise of discretion, and so as things stand the awards are enforceable in Hong Kong notwithstanding that they were made without jurisdiction.

There is very little authority which assists in guiding the approach that a foreign enforcement court should take when faced with an out-of-time application to resist enforcement in circumstances where there has been no set aside application at the seat, yet the supervisory court has refused enforcement, and where the foreign enforcement court recognises the supervisory court's decision that the awards are made without jurisdiction.

The above scenario give rise to a multitude of important issues in international arbitration law and practice which impacts practitioners dealing with enforcement proceedings, including:

- the proper approach that a foreign enforcement court should take when faced with an application to resist enforcement in circumstances where the award has not been set aside but has been refused enforcement by the supervisory court at the seat;
- the impact of a refusal to extend time to allow an award debtor to resist enforcement on the "choice of remedies" available to an award debtor (which the Singapore Court of Appeal in *First Media*

held to be fundamental to the design of the Model Law);

- the correct test to be applied in an application for an extension of time in the context of enforcement proceedings under the New York Convention, as opposed to similar applications in the context of set aside proceedings under the Model Law, or indeed non-arbitration contexts; and
- the impact of issue estoppel in international arbitration (if indeed it exists).

Some or all of these issues may be the subject of the forthcoming hearing before the Hong Kong Court of Final Appeal.

Cordells Rompotis is acting for First Media.

Toby Landau QC is Leading Counsel for First Media.

International arbitration forms one of the core elements of Cordells Rompotis's practice. For full details of these services please see our website: www.cordells.com.hk