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The 1958 New York Convention Turning into The Battle of Judgments: The Latest in the US Attitude Towards the Enforcement of Annulled Awards

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The US Court of Appeals for the 2nd Circuit's Thai-Lao Lignite (Thailand) v. Government of the Lao People's Democratic Republic

The friction between a seat and an enforcement forum, i.e. between annulment and enforcement continues.

An arbitral award in the Thai-Lao Lignite (Thailand) v. Government of the Lao People's Democratic Republic case ("*Thai Lao Lignite* case") is rendered in Malaysia under the UNCITRAL Rules by a tribunal of US arbitrators. Enforcement is sought in the US, the UK and France, and granted in the US and the UK. A setting aside request was made after the expiration of the statute of limitations. A sovereign appeals the statute, and the Statute of Limitations is trumped by the idea of sovereignty: the Malaysian judges do not want a sovereign to be denied access to justice when Malaysian lawyers failed to notice a reasonable three-month limitation period for the filing of a setting aside request. A novel story. The award is set aside. The US court reverses the US judgment granting enforcement as a result of which the award can no longer be enforced.

The question is: When courts allow the losing party in arbitration to ignore the statute of limitations because that party is a state, does that avoid the denial of justice or does it inflict the denial of justice on the successful party in the arbitration? Is this a broad use of discretion by the court of origin in order to prevent issues of international comity vis-à-vis a sovereign neighbor?

Regarding the statutes of limitation, the US delegate, Becker, in 1958 said:

> The time limits in many countries were reasonable and the losing party should be entitled to have its award reviewed by the court of the country where the award was rendered and the 'losing party should have had sufficient opportunity to avail itself its right to a judicial review.' It was also the US delegate who advocated the 'double exequatur' as he felt that judicial supervision was of the utmost importance and that supervision ought to be exercised in the place where the award was rendered. In that spirit, courts of origin would have more authority than courts of enforcement. The US view did not prevail. [1] [emphasis added]

The US view did not prevail. The delegates did not agree that courts of origin would have more authority than the courts of enforcement. Yet, US courts have introduced the distinction between primary and secondary courts. Also, where does one place the comment of the US delegate when he himself seems to opine that the losing party is bound by the 'reasonable' time limits imposed by the Contracting States. What happened here is a sovereign losing in arbitration abroad, failing to comply with its laws due to negligence, and receiving a subsequent pardon by the courts of the seat on the notion of international comity towards that sovereign.

Did the lack of filing for the setting aside until faced with enforcement amount to abuse of process? Article V(1) was not drafted to protect the rights of sovereign states; it was drafted to protect the rights of the losing party in arbitration by preventing dilatory tactics and the abuse of process. It is Article V(2) that is based on the idea of sovereignty and international comity by respecting the public policy of the country where enforcement is sought. Article V(1), on the other hand, is based on party autonomy: if parties opt for a seat and they agree for the arbitration law of that seat to apply, it is because of party autonomy. The last thing the drafters wanted was for the losing party to use the New York Convention as a stopper to enforcement in order to avoid compliance with a perfectly binding award.

Precisely How Ought Judges Interpret the Text of the New York Convention?

The judicial application of the New York Convention in the 2nd Circuit and the lower courts in New York has departed from the original text of the New York Convention. Since implementing its text in the Federal Arbitration Act, the courts have lost touch with the drafters' intent and have found themselves tangled in a web of precedents, such as Comissa v. Pemex.

The US courts have added a public policy gloss to Article V(1)(e), recently enforced in the *Pemex* decision. Whether or not that public policy gloss will be used is affected by the notion of international comity, which can go both ways as seen in *Pemex* and *Thai Lao Lignite*. So there is not only a public policy gloss, but also an *international comity* gloss. In that way, the successful party and the losing party are both left with a certain level of unpredictability in terms of how to understand the use of the US strong presumption in favor of enforcement, the public policy gloss, judicial discretion, and the international comity gloss.

US Judges and International Comity Unbound

In the *Thai Lao Lignite* case, the court discussed Rule 60(b) as a rule of procedure in favor of deference to Malaysia (and Lao). The Rule provides that a party may seek relief from a final judgment if it is based on an earlier judgment that has been reversed. International comity has led the court to use Rule 60(b) to overturn a judgment.

When analyzing the proper use of Rule 60(b), the court seems to rely on the nationality principle: if it can be used for domestic awards, then it can be used for foreign and international awards. This is incorrect. The drafters' rationale behind Article III of the New York Convention — and the term "not more onerous" — was to make the procedure for enforcement of foreign awards at least no more cumbersome than the procedure for the enforcement of domestic awards.[2)]

That was misunderstood by the United States' delegate who thought that the principle of the so-called "national treatment" should apply to Convention awards. From the perspective of the Convention, Article III was not intended to create a rule that the rules of procedure for the

enforcement of a foreign award should be “identical” to the rules applied to the enforcement of a domestic award, only that they should not be “more complicated”.[3] The principle of national treatment was rejected by 23 votes to 3, with 8 abstentions.[4]

Putting an End to the Myth of the ‘Primary and Secondary Courts under the New York Convention’ and Recovering after Pemex

The court refers to the *Yusuf* and *Karaha Bodas* case, as a precedent on the distinction between ‘primary’ and ‘secondary’ courts.[5] This distinction has no basis in the New York Convention. The drafting history does not include a mention of primary or secondary courts. Rather, the delegates proposed to maintain the role of the courts in the country where the award was rendered but to limit that control.[6]

The court refers to the “Convention’s concern for comity”. It is unclear how Article V(1) displays a concern for comity. If we accept an opposite concluding, the New York Convention perhaps will no longer be about speedy and easy enforcement of arbitral awards across the globe and about limiting the role of the courts, which was precisely the idea which was based on the premise that parties relinquish their fundamental right of access to courts. Eventually, it will become about the battle of judgments.

References

?1 M. Paulsson, The 1958 New York Convention in Action, (Kluwer Law International 2016), p. 204. See also Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoirs – Summary Record of the Fourteenth Meeting, at 5 and 6, U.N. Doc. E/Conf.26/SR.14 (Sep. 12, 1958) (Comment of Mr. Becker (United States)).

?2 Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary Record of the Tenth Meeting, at 2, U.N. Doc. E/Conf.26/SR.10 (Sept. 12th1958) (Comment of Mr. Wortley (United Kingdom)). See also M. Paulsson, The 1958 New York Convention in Action, (Kluwer Law International 2016), chapter IV on Article III.

?3 Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary Record of the Tenth Meeting, at 4-6, U.N. Doc. E/Conf.26/SR.10 (Sept. 12th1958) (Comment of Mr. Cohn (Israel) and Mr. Holleaux (France)).

?4 Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires – Summary Record of the Eleventh Meeting, at 5, U.N. Doc. E/Conf.26/SR.10 (Sept. 12th1958).

?5 Karaha Bodas Co., L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al., 335 F. 3d 357 (5th Cir. 2003), in Yearbook Commercial Arbitration XXIX (2004), (no 482), at 1262-1297.

?6 Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoirs – Summary Record of the Eleventh Meeting, at 6, U.N. Doc. E/Conf.26/SR11 (Sep. 12, 1958), comment of Mr. Urabe (Japan). See for the full analysis on the drafting history and the role of the courts: M.Paulsson, The 1958 New York Convention in Action, (Kluwer Law International Law 2016), p. 203.

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