Kluwer Arbitration Blog

Finality v. International Comity – Enforcement of Awards annulled in the Primary Jurisdiction

Brunda Karanam · Wednesday, September 27th, 2017

The finality of an award is a key feature and attraction of arbitration as a method of dispute resolution. When an award is annulled at the seat, however, enforcing courts in secondary jurisdictions must decide between enforcing the award or honoring the seat-court's nullification. This issue assumes significance in light of the recent judgment of the US Court of Appeals for the Second Circuit in *Thai-Lao Lignite (Thailand) Co., Ltd. v. Laos No.14-597 (2d Cir. 2017).*

Article V (i)(e) of the New York Convention provides that "the recognition and enforcement of the award *may* be refused if the 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." The use of the word "may" suggests a discretion granted to the courts, where recognition and enforcement of a nullified award is sought. Courts in the United States have applied varying interpretation of this language.

In *Chromalloy Gas Turbine Corp. v. Egypt, 939 F.Supp. 907 (D.D.C. 1996)*, the US District Court for the District of Columbia recognized an award rendered in Egypt, despite the fact that the award had been annulled by an Egyptian court. The US Court read the discretionary standard of Article V, *along with* the mandatory standard in Article VII of the New York Convention, which requires that "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 law… of the country where such award is sought to be relied upon.." However, the court did not analyse in detail, whether the "right" referred to in Article VII survived the annulment of the award in the seat. The court considered this to be a case of first impression, and reasoned that recognizing the seat's annulment of the award would be contrary to the US pro-arbitration public policy. The court also ruled that "comity does not and may not have the preclusive effect upon U.S. law" and concluded that the award was valid under US law.

The US Court of Appeals for the Second Circuit applied a different interpretation, however, in *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F. 3d 194 (2d Cir. 1999)*. There, the Second Circuit recognized Nigerian courts' judgments setting aside an arbitral award, on the ground that "no adequate reason was shown for refusing to recognize" them. The court in *Baker Marine* also cautioned against forum shopping, stating that "a losing party will have every reason to pursue enforcement actions in every country until a court is found which grants enforcement." Subsequent cases reaffirmed *Baker Marine. See Spier* v. *Calzaturificio Tecnica, S.p.A.,* 71 F.Supp.2d 279, 288 (S.D.N.Y. 1999) (stating that "when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary

circumstances"); *TermoRio v. Electranta*, 487 F.3d 928 (D.C. Cir. 2007) (declining to enforce an award nullified by a Colombian court because the arbitrators' procedures had violated Colombian law, the law governing the arbitration).

In *Pemex Corporacion Mexicana De Mantenimiento Integral v. Pemex Exploracion Y Produccion, 962 F. Supp. 2d 642 (S.D.N.Y. 2013)* (as affirmed by the Second Circuit), the United States District Court of New York declined to recognize an award-nullification by the Eleventh Collegiate Court on Mexico, on the ground that the nullification "…violated basic notions of justice" by applying a law retroactively to favour a state enterprise over a private party. As discussed previously on this blog, the court in *Pemex* harmonized *Chromalloy, Baker Marine* and *TermoRio* by ruling that *Chromalloy* still holds the field, as both *Baker* and *TermoRio* also opined that a court should not recognize a nullification that conflicts with fundamental notions of fairness. The court distinguished *Baker* and *TermoRio* on the ground that neither involved a retroactive application of law.

In the recent ruling of *Thai-Lignite*, the Second Circuit upheld the district court's decision to vacate its earlier judgment of enforcing the award. The motion to vacate the judgment under Rule 60(b)(5) of the Federal Rules of Civil Procedure was granted, as the award was set aside by the courts in the seat. The petitioners in *Thai-Lignite* began enforcement actions in the US, UK and France only after the limitation period of challenging the award in Malaysia had expired. In August 2011, the US District Court for the Southern District of New York enforced the award. After the expiry of the limitation period to challenge the award in its seat (the time to file an appeal had expired in early February 2010, and the application to set aside the award was made only in October 2010), Laos (the respondent in the arbitration proceedings) moved the Malaysian court for an extension of time to challenge the award, and the award was annulled in 2012. Laos explained that it was unaware of the deadline. While reversing the judgment of the Malaysian High Court, the Court of Appeal of Malaysia found it appropriate to grant extension of time for a foreign sovereign, owing to the lack of knowledge of Malaysian law. The award was annulled on the ground that the tribunal exceeded its jurisdiction and that the tribunal had co-mingled the claims. The award was annulled almost a year and a half after the US District Court entered judgment to enforce the award.

After the US district court vacated its initial decision to enforce the award, the petitioners in *Thai Lignite* appealed the decision to the Second Circuit.

In rejecting the petitioners' challenge, Second Circuit observed that while Article V(1)(e) of the New York Convention grants discretion to the court to enforce an award that has been annulled in its primary jurisdiction, "it does not say that the enforcement of the award *must* be refused." Based on *TermoRio* and *Pemex*, the Second Circuit held that the scope of discretion granted is "constrained by the prudential concern of international comity." As mentioned earlier, in *TermoRio*, it was held that a decision of the court annulling an award in the primary jurisdiction must be given effect to, unless it offends the public policy of the state in which enforcement is sought. *Pemex* expanded the scope of discretion by stating that US courts may refuse to recognize a foreign court's nullification "to vindicate fundamental notions of what is just and decent." The court in *Thai Lignite* had to decide between its own previous judgment granting enforcement of the award and the UK court's decision enforcing the award on one hand, and the Malaysian court's decision annulling the award on the other. The court observed that Article III of the NY Convention suggests that "a court should apply its procedural rules for vacating judgments to its judgments enforcing awards" and that Rule 60(b) is one such rule of procedure.

This judgment assumes significance on account of two main issues: (i) Application of Rule 60(b) to arbitral awards annulled in the primary jurisdiction and (ii) Enforcement of awards annulled in the primary jurisdiction. *Thai Lignite* unequivocally establishes that Rule 60(b) applies to judgments entered under the New York Convention. It further confirms that Article V(1)(e) considerations may be readily incorporated into Rule 60 (b) analysis. Thus, an analysis under Rule 60(b) is also subject to public policy, fundamental notions of justice and prudential concern for international comity.

As discussed previously on this blog, though *Thai Lignite* affirmed the reasoning in *Pemex*, it did not enforce an annulled award (unlike in *Pemex*). The court differentiates the two scenarios – in *Pemex*, the laws of the foreign jurisdiction were amended retroactively, leaving the claimant without a remedy; but in *Thai Lignite*, the dispute would be re-arbitrated. The court further notes that the circumstances in *Thai Lignite* were "far less suspect" so as to not offend the fundamental notions of justice. The court agreed with the district court's reasoning that equity demands that deference be given to the decision of the primary jurisdiction (Malaysian court judgment) annulling the award over the English judgment enforcing the award.

When considering a seat's annulment of an arbitral award, courts in a secondary jurisdiction must decide between (i) a pro-arbitration approach recognizing the finality of an award and (ii) international comity of recognizing the judgment of a court in a primary jurisdiction annulling the award. In *Thai Lignite*, the court makes clear that an annulment in the primary jurisdiction should receive deference, in the interest of international comity. This is subject to exceptions of public policy, and fundamental notions of justice and fairness, as discussed here. In light of the outcome in *Thai-Lignite*, the need to select a pro-arbitration seat, with a non-interventionist judiciary, is paramount.

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