Enforcement of Annulled Awards: A Restatement for the New York Convention?

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On the 24th of November, the Supreme Court of The Netherlands issued a judgment pertaining to the request for enforcement of an award annulled at the seat, Russia. The Supreme Court applied Article V(1)(e) of the New York Convention (hereinafter the "NYC") and refused to enforce the award in favor of Nikolay Viktorovich Maximov for an amount of USD 153 million against OJSC Novolipetsky Metallurgichesky Kombinat, one of Russia's largest steel companies.

The request of enforcement was denied by the District Court in Amsterdam and that refusal to enforce was confirmed by the Court of Appeal of Amsterdam.

The Supreme Court confirmed: 'a court may refuse to enforce an award if that award had been set aside by a competent authority in the country where the award was rendered' [emphasis added] (Article V(1)(e) of the NYC). Refusing to enforce an award when it is set aside is the rule of thumb and is in the spirit of *ex nihilo nil fit* ("out of nothing follows nothing"). I would call this 'traditional' because since the drafting of Article V(1) in 1958, courts and commentators have created various theories that allow for the enforcement of annulled awards. Thus the question as to whether an annulled award can be enforced elsewhere can no longer solely be addressed under the NYC: one must look locally. Article V(1)(e)

has become somewhat of a hollow phrase, perhaps much to the chagrin of those who drafted it, if they would be here to witness the demise of this provision.

The first shockwave was in the 1990s in various parts of the world with *Hilmarton* in France and *Chromalloy* and *Baker Marine* in the US. [fn]Hilmarton v. Omnium de Traitement et de Valorisation (OTV) (Supreme Court 1994), in Yearbook Commercial Arbitration XX (1995) (France no. 23), at 663-665, Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt (District Court of Columbia 1996), in Yearbook Commercial Arbitration XXII (1997) (United States no. 230), at 1001-1012, Baker Marine (Nig) Limited v Chevron (Nig) Limited, Chevron Corp., Inc. and others v Danos and Curole Marine Contractors, Inc. (2nd Cir. 1999), in Yearbook Commercial Arbitration XXIV (1999) (United States no. 288), at 909-914.[/fn] And then the noise died. The rule of thumb became predominantly Article V(1)(e) of the NYC in its traditional sense: an annulled award cannot be enforced. The debate had lost interest and relevance.

The second shockwave came in 2010, with the Netherlands creating its version of the enforcement of annulled awards in *Yukos v. Rosneft*.[fn]Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation) (Court of Appeal 2009), in Yearbook Commercial Arbitration XXXIV (Netherlands no. 31) at 703-714.[/fn] The US, in its Second Circuit, relied on Termo Rio to enforce an annulled award in Pemex.[fn] TermoRio S.A. E.S.P. (Columbia), LeaseCo Group and other v. Electrantra S.P. (Columbia), et al. (District for Columbia 2007), in Yearbook Commercial Arbitration XXXIII (2008) (United States no. 621), at 955-969, Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX – Exploracion y Produccion (Southern District for New York 2013), in Yearbook Commercial Arbitration XXXVIII (2013), at 537-541.[/fn] Both engrained in ideas of public policy.

The Dutch Supreme Court on the Enforcement of Annulled Awards

In the case at hand, the setting aside in Russia was based on the following grounds and was found relevant by the Dutch Supreme Court:

1. The experts assisting the Russian Federation in the arbitration procedure worked at the same Institute as one of the arbitrators. Moreover, one of the experts was the Dean of the Institute and thus fulfilled a higher position than the arbitrator in question.

2. The tribunal failed to disclose the above.
3. The Russian court held that the subject matter was not arbitrable.
4. The method used by the tribunal to assess the validity of the agreement violates Russian mandatory law.

The Dutch Supreme Court held that the annulment of the award stopped enforcement.

The annulment grounds listed above could be considered similar to Article V(1)(b), V(2)(a) of the NYC (due process violation and arbitrability) and the latter could be similar to Article V(2)(b) of the NYC (public policy) but perhaps also Article V(1)(c) if one could argue it as part of the mandate. The first pertains to the impartiality of the arbitral tribunal. A ground that is often a basis for a setting aside; under many national laws it falls under the due process umbrella.

The Yukos v. Russia case that has made headlines around the world where the tribunal had ordered Russia to pay USD 50 billion, was different in that the award was annulled based on the lack of a valid arbitration agreement (provisional application of the Energy Charter Treaty), an annulment ground quite different from annulment grounds based on due process and public policy. Verifying whether there was a valid arbitration agreement is taken seriously by courts as they are the guardians of a party's fundamental right to access to courts. It must be clear that parties – on the basis of freedom of contract – gave up that fundamental right.

The question is: if an annulment is based on something that falls under any notion of public policy or due process (arbitrability, lack of impartiality, etc) is this subject to a local standard (the so-called Local Standard Annulment ("LSA"))? If so, how would that impact the rule of thumb under Article V(1)(e) of the NYC?

The Supreme Court – in line with most lower court judgments in The Netherlands – held that the award could not be enforced because the award had been set aside and thus applied Article V(1)(e). However, it did reiterate the test developed by the Court of Appeal in the 2010 Yukos case: if a court cannot recognize a foreign judgment annulling an award because that recognition would violate Dutch public policy, it will enforce the award.[fn]See for an analysis of the case, M.Paulsson, The 1958 New York Convention in Action (2016 Kluwer), pp. 210-211.[/fn] Its result is similar to the doctrine applied by the US courts – *Termo Rio* and *Pemex* – which

also finds it origin in public policy.

Remarkably, the court also analyzed another doctrine: that of the Local Standard Annulment (LSA) v. the International Standard Annulment (ISA) theory and the question of discretionary power under Article V(1) of the NYC. It holds that an annulment of a foreign arbitral award does not per se stop a court from allowing the enforcement of such annulled award because of the discretionary power allocated to the court on the basis of the word 'may' in Article V(1) of the NYC, albeit in exceptional cases only. The court states that one of those exceptional cases present itself if the annulment judgment is based on grounds that do not align with Article V(1)(a-d) of the NYC or if the annulment grounds are not acceptable on the basis of internationally acceptable standards (the latter have been referred to as International Standard Annulments ("ISAs"))) The court in effect reproduces Article IX of the 1961 European Convention, stating that any grounds similar to Articles V(1)(a-d) of the NYC are proper annulment grounds. Article IX of the European Convention provides that a court will refuse to enforce an annulled award if that annulment was based on Article V(1)(a-d) of the NYC. This doctrine is referred to as the theory of the Local Standard Annulment and it has been codified in the 1961 European Convention, Article IX.

What is confusing and troubling is that the annulment grounds in the case at hand seem not to align with Article V(1)(a-d) of the NYC nor do all of them they seem to be ISAs (if one is to understand that an ISA may not be based on any idea of public policy). Yet, the court applied Article V(1)(e) of the NYC in its traditional sense. The decision demonstrates again that when courts develop, adopt and apply theories such as the above, one is no longer able to predict the outcome under Article V(1)(e) of the NYC.

This decision, along with the decisions of the US 2nd Circuit (Termo Rio and Pemex) with respect to any questions under V(1)(e) of the NYC ought to be a source of concern: first, because it demonstrates the restraints of the NYC that is now 59 years old and second, it reveals the practice of judicial rewriting of the NYC. No more is left of its provisions than a mere framework that will be read differently by courts around the world and notably by courts in important trading nations. It is time to consider the cracks and revisit the idea of the New York Convention now that it is about to celebrate its 60th anniversary. The NYC has become a box of chocolates: it doesn't matter anymore what the text of the treaty says: what matters is the reading glasses used by every single court in the world.

‘If it ain’t broken, don’t fix it?’ At the 50th Anniversary that was the adagio but one would be dishonest to say that the cracks have not become visible this past decade. If not a new treaty, perhaps one single set of reading glasses designed by a reputable organization with a mandate based on the treaty’s Final Act of 1958 could be gifted to the treaty at the occasion of its 60th Anniversary.