

To Enforce or Not to Enforce Annulled Arbitral Awards?

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The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) prescribes mandatory, uniform international rules for the recognition and enforcement of international arbitration agreements and awards in the Contracting States. Pursuant to Article V(1)(e) of the New York Convention, an award *may* be denied recognition and enforcement by the enforcement court if a competent court in the arbitral seat or primary jurisdiction annuls the award.[fn]Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Michigan Journal of International Law 115 (2018)[/fn]

In view of the permissive language in Article V(1)(e) of the New York Convention, enforcement courts have the discretion to: (a) treat the annulled award as an invalid underlying judgment that ceases to exist, hence there is nothing to enforce; (b) accord some deference to the annulment judgment but reserve the right to enforce the award if deemed justified according to the domestic laws of the enforcement jurisdiction; or (c) disregard the annulment judgment and make an independent decision on whether or not to enforce the annulled award. As the Honourable the Chief Justice of Singapore Sundaresh Menon noted in his keynote address at the CI Arb London Centenary Conference on 2 July 2015,

[There is] growing uncertainty over the international framework governing the recognition and enforcement of awards. There is, for instance, a lack of international consensus on the effect of an order by the seat court setting aside an award in subsequent enforcement proceedings. And we have also seen the re-litigation of identical issues in different enforcement proceedings in different courts. This is bound to increase costs and further erode the value of finality.

The Territorial, Westphalian and Transnational Theories

Whether or not enforcement courts decide to enforce an annulled award is influenced by how the enforcement courts characterise the nature and role of the arbitral seat. On a broad spectrum, there are three theories namely: (a) the seat or territorial theory i.e. where an award has been set aside by the competent authority in the country where it was rendered, it ceases to exist and is not enforced; (b) the Westphalian or multi-local theory pursuant to which annulment decisions do not conclusively

determine enforcement unless the annulment is based on internationally recognised grounds; and (c) the transnational legal autonomy or delocalisation theory according to which the annulment decision has no bearing on enforcement, and an annulled award may be enforced unless it falls within the grounds to refuse enforcement under the domestic law of the enforcement court.[fn] See Albert Jan van den Berg, *Enforcement of Annulled Awards*, 9 (2) ICC International Court of Arbitration Bulletin 15, 15 (1998), Julian Lew, *Achieving the Dream: Autonomous Arbitration*, 22 (2) *Arbitration International* (2006), and Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010)[/fn]

As an example of the prevailing seat theory, the Singapore Court of Appeal observed in 2013 that it was doubtful whether an enforcement court might recognise and enforce a foreign award which had been set aside by courts in the arbitral seat. This is because the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there was simply no award to enforce: see [76] and [77] in *PT First Media TBK v Astro Nusantara International BV and others* [2013] SGCA 57. This observation accords with Professor Peter Sanders' opinion that if an award is annulled, the courts will refuse enforcement as "*there does not longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement.*"[fn]Peter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1955(6) *Netherlands Int'l Law Review* 43 at p. 109-110[/fn]

The strict public policy exception in the US

In *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 939 (D.C. Cir. 2007), the D.C. Circuit affirmed the District Court's decision to refuse enforcement of an award on the grounds that Colombia's highest administrative court - at the arbitral seat - had annulled the award, accepting that there is a "narrow public policy gloss" on Article V(1)(e) of the New York Convention and that a foreign judgment is unenforceable as against public policy to the extent it is repugnant to fundamental notions of what is decent and just in the United States. The appellants had not alleged or provided any evidence to suggest that the proceedings before the Colombian court or the annulment judgment violated any basic notions of justice.

In *Getma International v Republic of Guinea* 862 F. 3d 45 (D.C. Cir, 2017), Getma sought to enforce in the United States an award annulled by the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa ("CCJA"), a court of supranational jurisdiction for Western and Central African States. The D.C. Circuit on 7 July 2017 affirmed the District Court's decision that Getma had failed to satisfy the standard i.e. that the CCJA's annulment of the award was repugnant to the fundamental notions of morality and justice.

As was discussed on this [blog](#), in *Thai-Lao Lignite (Thailand) Co, Ltd v. Gov't of the Lao People's Democratic Republic* 864 F. 3d 172 (2d Cir, 2017), the Second Circuit on 20 July 2017 affirmed *inter alia* the District Court's order refusing enforcement of an award annulled by the Malaysian courts. The 2009 award issued by a Malaysian tribunal in favour of the claimants was initially confirmed by the Southern District in 2011 before it was set aside by the Malaysian courts in 2012. The Southern District subsequently vacated its enforcement judgment, finding that the New York Convention required it to give effect to the later Malaysian decision, which did not "rise to the level of violating basic notions of justice such that the Court here should ignore comity considerations." The Second Circuit decided that the Federal Rule of Civil Procedure 60(b)(5) which permits District Courts to "relieve a party...from a final judgment" when the judgment "is based on an earlier judgment that has been reversed or vacated," applies to a District Court's consideration of a motion to vacate a

judgment enforcing an arbitral award that has since been annulled by courts at the seat. The enforcement courts analyse the Rule 60(b) considerations, including timeliness and the equities, and assign significant weight to international comity in the absence of a need to vindicate “fundamental notions of what is decent and just” in the United States.

The public policy exception in the United States – i.e. that the annulment of the award has to run counter to the United States public policy and be repugnant to the fundamental notions of what is decent and just in the United States – is a stringent one. As was discussed on this [blog](#), this exception was met in *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, No. 13-4022 (2d Cir, 2016) which is the first federal appellate decision to confirm an annulled award. The Second Circuit held that the Southern District did not abuse its discretion in confirming the award annulled by the Mexican courts. The high hurdle of the public policy exception was surmounted in this [case](#) “by four powerful considerations: (1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.”. Normative policing was discussed on this [blog](#).

Does the possibility that the award could be annulled at the arbitral seat result in a stay or suspension of the enforcement of the award? This appears to be unlikely. In the judgment on 24 April 2019 of *Science Applications International Corporation v The Hellenic Republic* (S.D. N.Y. 2019), the District Court decided *inter alia* not to disturb the 2013 D.C. court decision declining to adjourn enforcement of the award until after the resolution of the annulment action in the Greek courts. An award was rendered against the Hellenic Republic in 2013. The prevailing party successfully obtained a [judgment](#) in D.C. confirming the award in 2017 and sought to attach the state’s assets to satisfy the judgment, so it moved the District Court in New York for an order finding that a reasonable period of time has elapsed since judgment was entered pursuant to 28 U.S.C. § 1610(c). According to the Foreign Sovereign Immunities Act, the property of an agency or instrumentality of a foreign state within the United States may not be attached “until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any [required] notice.” Meanwhile, proceedings were ongoing in the Greek courts to invalidate the award. The [District Court in New York](#) held that these circumstances did not prevent it from finding that a reasonable period of time, which was 11 months since the D.C Court entered judgment on 29 May 2018, had elapsed.

According to the international comity test, an annulment decision should be recognised on grounds of comity (i.e. the award is not enforced) unless the annulment decision is “procedurally unfair or contrary to fundamental notions of justice” [fn] William W. Park, *Duty and Discretion in International Arbitration*, Arbitration of Int’l Bus. Disputes, Oxford (2006, 2nd ed 2012[/fn] The line of cases above-cited indicate that it is incumbent on the parties, seeking to enforce in the United States an annulled award, to prove exceptional facts sufficient to meet the stringent public policy test in order for the annulment decision to be disregarded. Further, the courts may vacate its enforcement judgment if the award is subsequently annulled. Finally, the possibility that an award may be annulled at the seat does not impede enforcement of the award.

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