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The Drawbacks of Two Arbitral Awards: How Can We Avoid Another 'Putrabali' Controversy?

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An award set-side underlines that it has been annulled in the jurisdiction in which it has been rendered. The grounds for setting aside an award are provided by the UNCITRAL Model Law and are quite similar throughout numerous jurisdictions. Article V of the New York Convention ('NYC') presents a set-aside award as one of the potential grounds for refusal of award recognition by state courts.

Despite an award being been set aside, the winning parties have nevertheless sought its enforcement in other jurisdictions. Whether an annulled award should be enforced or not, there are diverse approaches of the contracting states of the NYC. The *Putrabali v. Rena* case is peculiar on its own and the French court decision made it even more bizarre. Years later, the uncertainty regarding the enforcement stage when there exist two awards on the same matter, continues to loom in the air, somewhat undermining arbitration as a dispute resolution mechanism in the international arena.

The French courts are continuously relying on the *Putrabali* precedent, as demonstrated in their latest decision to enforce an award which was set aside in Egypt. Although the award was closely associated with the national interests of Egypt, the court refused to admit such view. This shows the importance of further academic research and regulation necessary on this issue.

Enforcement of Set-Aside Awards

The approach of French courts has always leaned towards Article VII rather than Article V of the NYC when refusing enforcement of arbitral awards. Article VII allows parties to enjoy the rights provided by the country in which the award is to be enforced, regardless of the NYC. In France, this leads to the application of national law, namely Article 1520 (former Article 1502) of the French Civil Code, which contains 'violation of public policy' as a ground for refusal of enforcement of set aside awards.

Violation of Public Policy

In one of the judgments delivered by Judge J. Smith, he emphasized that public policy violation

could be invoked if "…enforcement would violate the forum state's most basic notions of morality and justice".

In absence of a unified or statutory, public policy has provoked various legal thoughts throughout jurisdictions and varied interpretations. Most definitions provided by judges usually note that public policy consists of justice and morality.

The International Law Association report asserts that the procedural public policy refers to the issues such as fraud, corruption, breach of natural justice, etc. The French renowned jurist, Philippe Fouchard, stated that "the French procedural public policy underlines rejecting an award enforcement when it involves a proceeding in which the basic notions of justice have been violated".[1)]

The Hamburg Court of Appeal noted in *Firm P v. Firm F* that the argument that the arbitral award would be the same even if a fair trial was conducted, would still present a violation of public policy. The German Federal Court of Justice held that "the recognition of an arbitral award can generally only be denied in those cases where the violation of the duty of impartial administration of justice had a real impact on the arbitral proceedings".

The *Putrabali v. Rena* Case

The contract between Putrabali and Rena contained by reference the IGPA Rules, which designate the Arbitration Act 1996 as the applicable law and England as the seat of arbitration. The Arbitration Act 1996 allows for appeal of award on questions of law. Therefore, the possibility for appeal agreed by the parties was clearly indicated.

An award was rendered in favor of Rena, which Putrabali appealed on points of law in front of the English High Court. The latter set aside the award and sent the case back to arbitration. The second award was rendered in favor of Putrabali, with the identical case number as the first award. Now with two awards in place, Rena filed an application for recognition and enforcement of the first award of 2001 before the French court. Enforcement was granted by the court and Putrabali immediately filed an appeal, which was not successful.

The arguments provided by the French Cour de Cassation rest on two premises: (i) the fact that an international arbitral award is not anchored in any legal system; (ii) the fact that an international arbitral award is an international judicial decision.

What Was Wrong with the Decision of the French Cour de Cassation?

- **Good faith**

The wrongful acts committed by Rena are easy identifiable. It accepted the appeal made by Putrabali and fully participated in the second arbitration proceedings. Once the award was issued in favor of the other party, Rena quickly decided to enforce the first award in France. The only reasonable explanation of such behavior is Rena's expectation of another award rendered in their favor, applying double standards and positioning itself in a 'win-win' situation.

Similarly, in an arbitration case in which the American party demanded from the US courts to have the award set-aside because the arbitrator was corrupt, the judge reasoned that the American party was aware that the arbitrator was corrupt from the commencement of the proceedings. Such behavior indicated that the American party was expecting somehow to either win its arbitration case in Russia or appeal the award in United States if it loses. The judge characterized such position as “heads I win, tails you lose”, resembling the situation in Putrabali.

- **Party autonomy**

Party autonomy is the fundamental principle of arbitration.[2)] With state courts having the authority over settlement of dispute, it takes both parties’ will and agreement to go to arbitration. Additionally, almost all civil codes and arbitration statutes entitle the parties to determine their arbitration procedure. Furthermore, the significance of party autonomy is recognized in article II (1) of the NYC.

Putrabali and Rena did not opt-out of the appeal provision; they agreed to have it. In the *Chromalloy* case, the U.S. courts emphasized the party autonomy in choosing to opt out of any appeal or other recourse. Although they had chosen Egyptian Law (which allows for appeal), they specifically wanted the award to be final and binding, and they thus opted out of appeals. Note how the U.S. courts made the deference of weight towards party’s autonomy:

> *…the parties agreed to apply Egyptian Law to the arbitration, but, more important, they agreed that the arbitration ends with the decision of the arbitral panel.*

- **Race to the court**

Despite the arguments made by the Cour de Cassation, in the end the same result is reached: the race to the court. When there are two contradictory awards, the party that is faster to enforce the award, wins the case. Is this matter totally unregulated, so that state courts have such powerful discretion to enforce an award based on a marathon? Nevertheless, Putrabali could not have brought the award before French courts for enforcement before *Rena* due to logical and practical reasons. First Putrabali could not have reasonably expected that the counterparty would enforce the first award after it willingly participated in the second trial proceedings. Second, if Rena’s plan during the whole time was to enforce the first award immediately upon the rendering of the second award (in case the outcome of such an award was not in its favor), it had the time and opportunity to do so, which Putrabali did not have.

What Can Be Done?

- **Adequate interpretation of public policy violation**

Going back to the previous discussion of the NYC, Article VII provides for violation of public policy as a ground for refusal of recognition and enforcement of award. However, NYC does not offer a definition of public policy, and its legislative history does not provide any guidelines. In the drafting process, an *ad hoc* committee simply claimed that the public policy exemption should apply to awards violating fundamental legal principles.

The behaviour of *Rena* affected basic procedural rights of Putrabali and it affected the outcome of the case entirely. The court, as an impartial adjudication organ, ought to have an answer for it. Any court facing an award enforcement request is destined to carefully assess any probable abuse of procedural rights before it grants enforcement. The French court could have issued a decision in favour of Putrabali by reasoning that enforcing the first award would be a violation of the international public policy, pursuant to its own national law and by using its discretionary power to retain notions of justice.

- **Amending the rules**

There is quite some literature on this matter and criticism on the current version of the NYC.[3)] The problem with it is that it remains silent on the nature and status of annulled awards; it does not define whether an annulled award in a jurisdiction continues to exist in other jurisdictions. Therefore, if the current convention is amended or a new convention is adopted, the following article is proposed:

> *1. A second arbitral award replacing the first arbitral award, as a result of an appeal by one of the parties, shall prevail, if one of the following criteria is fulfilled:*
>
> 1. *the parties agreed on the appeal mechanism in their agreement*
> 2. *the arbitration seat chosen by the parties provides for an appeal*
> 3. *Paragraph b) above is not applicable if parties opt out of any appeal recourse in their agreement*

Nevertheless, as long as the courts of Contracting States of the NYC would approach the ‘award set-aside’ challenges differently, the implications of adding paragraph number 2 could make this matter even more complex than it is. Therefore, a more detailed analysis would be required to determine whether such paragraph should be amended or not added at all. After all, it has been already emphasized by other authors that the success of arbitration is dependent on the courts’ support.

Conclusion

The presented solutions would presumably enhance the arbitration concept around the world by recognizing the hierarchy of two rendered awards equivalent to state court judgments. The integration of second awards within the national jurisdictions is not necessarily needed but merely a recognition of the international binding nature of a second arbitral award would strengthen the gravity of arbitration for parties willing to have an opportunity to appeal the award. Although it

might take time, like it took decades for countries to recognize the doctrine of separability, this objective is likewise achievable. Thus, it is reasonable to claim that the principles of good faith and party autonomy were embraced by the authors when drafting the New York Convention, rather than a race to the court or ‘first come, first served’ rule.

The views expressed in this article are those of the author and do not necessarily reflect those of PwC Legal.

References

?1 Philippe Fouchard, Droit International Prive, Paris 1996, p. 972.

?2 See G. Born, International Arbitration: Law and Practice, 2012, p. 4-5.

?3 See for example A. van den Berg, The New York Arbitration Convention of 1958: towards a uniform judicial interpretation, 1981.

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