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Enforcement of Arbitral Awards that have been Set Aside at the Seat: The Consistently Inconsistent Approach across Europe

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One of the oft quoted advantages of arbitration is the perceived certainty that the national courts of New York Convention states should enforce an arbitral award unless one of the limited grounds for refusal is met. However, the relationship between national courts and arbitration is far from straightforward. In particular, one notable area where there are differing views amongst a number of supposedly 'pro-arbitration' states is whether or not an arbitration award that has been set aside by the national courts at the seat of the arbitration can then be enforced in another jurisdiction. Indeed, despite a number of high-profile cases in various jurisdictions, this issue is far from settled.

This issue has been thrust into the limelight recently by the decision of the Tribunal de Grande Instance in Paris to recognise a Russian arbitral award in favour of Mr Nikolay Maximov. In this case, Mr Maximov sought enforcement of an arbitral award in his favour for almost US$300 million against Novolipetsky Steel Mill (NLMK). The award had been issued by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) in accordance with a share sale and purchase agreement between Mr Maximov and NLMK. However, the award was subsequently set aside by the Moscow Arbitrazh Court (whose judgment was upheld by the Federal Arbitrazh Court of the Moscow District and the Supreme Arbitrazh Court). The reasons for setting aside the award included a ruling that disputes arising out of an agreement aimed at the transfer of shares cannot be resolved by arbitration because corporate disputes are not arbitrable as a matter of Russian law. In any event, notwithstanding the decision of the Russian courts (which, in itself, has proved to be controversial), Mr Maximov sought enforcement of his award in France. On 16 May 2012, the Tribunal de Grande Instance in Paris concluded that the fact the award had been set aside by the Russian courts was not sufficient to refuse recognition in France. The court said that the ICAC award was a valid arbitration award which had been procured in accordance with the parties' agreed contractual method and it should therefore be recognised and enforced.

This post seeks to summarise the contrasting positions taken by a number of 'pro-arbitration' European jurisdictions in relation to the enforcement of awards that have been set aside by the courts of the seat. The starting point for any debate on such issues is Article v. of the New York Convention, which sets out the circumstances in which recognition and enforcement of an arbitral award 'may' be refused. These circumstances include where the award has been set aside or suspended by the competent authority of the country in which the award was made (Article

V(1)(e)). On a plain reading of the language of the New York Convention, the word 'may' denotes an option and, therefore, there should in theory be no bar to a state recognising and enforcing an arbitral award if it has been set aside at the seat of the arbitration. Indeed, a number of states take such view. However, a significant number of states also take the contrasting view and will not recognise or enforce such awards. The reason for this is that the central issue in this debate does not turn on the language of the New York Convention alone. Rather, it depends on the response to a much more basic (and arguably more controversial) question, namely: what is the role of the seat of the arbitration?

There are two main views. The first view is that the seat of the arbitration is chosen for little more than the sake of convenience. Arbitral tribunals need not operate like the national courts of a particular state simply because they have their seat there. Arbitrators do not derive their powers from the state in which they have their seat, but rather from the sum of all the legal orders that recognise, under certain conditions, the validity of the arbitration agreement and the award. It is for such reasons that it can be said that arbitrators have no forum per se and it follows, therefore, that decisions of the national court at the place of the arbitration should have no (or very little) bearing on the validity of the underlying award.

This first view is dominant in a number of civil law countries, most notably France. In the seminal *Hilmarton* case, the Court of Cassation ruled that a Swiss arbitral award was of an international nature, meaning that it was not attached to the Swiss legal order and thus continued to exist despite its annulment at the seat of arbitration. In the subsequent (and equally well known) *Putrabali* case, the Court of Cassation affirmed the *Hilmarton* principle and stated that an international arbitral award is an international decision grounded in a non-national, arbitral legal order and, therefore, its annulment by a state court has no bearing on its enforcement in another state. There have been a number of other similar decisions, and it is now well established that the French courts will enforce an arbitral award even if it was set aside by the courts at the seat. Indeed, the *Maximov* decision is the latest example of this ever increasing bank of case law (although the decision may yet be appealed).

The Dutch courts take a similar approach to the French. The best known example is the case of *Yukos Capital v. Rosneft*, where the Amsterdam Court of Appeal held that the fact that a Russian court had set aside a Russian arbitral award was not sufficient to prevent enforcement in the Netherlands. Moreover, in this particular case, the Court of Appeal noted that there was evidence that the decision of the Russian court was partial and dependent and was clearly influenced by the Russian state's 'campaign' against the claimant. In such circumstances, the Court of Appeal was able to assist the claimant in seeking justice. Interestingly, Mr Maximov sought to enforce his ICAC award in the Netherlands last year, but his application was rejected at first instance. This decision is currently being appealed to the Amsterdam Court of Appeal.

Indeed, for a period of time last summer, it even looked like Russia (not traditionally viewed as a pro-arbitration state) might join France and the Netherlands as being prepared to enforce arbitral awards that have been set aside by the national courts at the seat of the arbitration (*Ciments Français v. Sibirskiy Cement*). It should be noted, however, that this decision was based on an analysis of Article IX(2) of the Geneva Convention which limits the application of Article V(1)(e) of the New York Convention by providing that the fact an award has been set aside will only be relevant if the reason it was set aside was one of an exhaustive list of reasons set out in Article IX(1) of the Geneva Convention. The Geneva Convention will only apply, however, if the state of the award's origin, the state of enforcement, and the place of residence of all parties to the

arbitration agreement are all signatories to the Geneva Convention. In any event, the decision of the Russian court has since been successfully appealed.

In contrast, the second view is that the seat of the arbitration is almost equivalent to the municipal jurisdiction's forum. Under this view, the law of the seat governs the arbitration agreement and will govern the formation and composition of the tribunal as well as the procedure and form of the award. The courts at the seat oversee the proper functioning of the procedural aspects of the arbitration and, therefore, at the end of the process have the power to confirm or set aside the award. In other words, under this approach, the seat anchors the arbitration to the legal order of the state in which it takes place.

This second view is similar to the position taken by the English courts. In particular, the English courts have traditionally taken the view that where a foreign arbitral award has been annulled by a court of the seat, the English courts are unable to recognise or enforce that award as the act of annulment creates an issue estoppel (*Yukos Capital SARL v. OJSC Rosneft Oil Co*). However, it should be noted that following the recent decision in *Sulamerica v. Enesa*, under English law the law of the arbitration agreement will not automatically be the law of the seat. Rather, the court will look to determine the law of the arbitration agreement by reference to: (i) express choice; (ii) implied choice; and (iii) close connection – which may or may not be the law of the seat.

The German approach accords closely with that of the English courts and prohibits enforcement of such awards, save where the court judgment setting aside the award must be recognised under German procedural law (examples of such situations include where the respondent was not served properly, or where the foreign judgment is irreconcilable with German public policy). Germany is also a signatory to the Geneva Convention, which, as noted above, limits the application of Article V(1)(e) of the New York Convention in certain circumstances.

In conclusion, it appears unlikely that there will be consensus on this issue in Europe (or, indeed, worldwide) any time soon. In the meantime, therefore, litigants like Mr Maximov will have to hope that if their award is set aside by the national courts in the country in which the award was made that their counterparty has assets in a jurisdiction such as France or the Netherlands that may still permit enforcement of the award.

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