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Enforcing Awards Following a Decision at the Seat: the US or the French Approach?

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The enforcement of awards following a decision at the seat remains a controversial issue in international arbitration. Should an enforcement court follow the decision of the seat court, or can the enforcement court reach a different conclusion? US courts and French courts continue to take different approaches to this issue.

US courts will defer to a decision at the seat of arbitration unless the decision 'violates basic notions of justice'. Accordingly, if an award is set aside at the seat of arbitration, a US court will refuse enforcement of the award under Article V(1)(e) of the New York Convention, absent a showing of serious impropriety by the seat court. For example, in the recent case of *Thai-Lao*, the Southern District of New York refused to enforce an award that had been set aside by the Malaysian High Court. The Court found nothing to suggest that the Malaysian court had 'violated basic notions of justice', and therefore deferred to the Malaysian court's decision. This lies in contrast to the case of *Pemex* last year, where the same court enforced an award that had been set aside by the Mexican courts. The Court held that the Mexican court did 'violate basic notions of justice' because (among other things) it retrospectively applied a prohibition on arbitrability in favour of a Mexican party. Outside an exceptional case like *Pemex*, however, US courts are unlikely to enforce awards that have been set aside at the seat of arbitration.

In contrast to the deferential approach of the US courts, French courts disregard the decisions of seat courts altogether. In a series of cases, French courts have enforced awards that have been set aside or suspended at the seat of arbitration. The French courts have provided two justifications for their approach. First, French domestic law does not recognise the setting aside or suspension of the award as a ground for refusing enforcement. Second, French courts consider that an international arbitral award is not 'anchored' or 'integrated' in the seat of arbitration. Therefore, the views of seat courts on the validity of the award simply have no bearing on whether the award should be enforced in France.

Some commentators (especially Professor Emmanuel Gaillard) favour the French approach. In Gaillard's view, international arbitration is a transnational legal order in which no state should have the final say on the validity of the award. Accordingly, each enforcement court should be entitled to form its own view on the validity of the award, regardless of what the courts at the seat of arbitration may think.

However, disregarding the views of seat courts is undesirable from a policy perspective. First,

ignoring decisions at the seat is likely to lead to re-litigation of the same or similar issues across multiple jurisdictions. This undermines the perceived efficiency of international arbitration. Second, in some cases the clear intention of the parties is for the courts at the seat to have the primary say on the validity of the award. If such an intention is found to exist, then the views of the seat court should arguably be respected. Third, as has been well documented, the French approach of disregarding decisions at the seat increases the risk of conflicting awards. If an award is set aside at the seat and the tribunal proceeds to render a second award, should not only the second award be enforceable? Under the French approach, both awards are enforceable.

In light of these difficulties with the French approach, the approach of the US courts is preferable. That is, enforcement courts should defer to the decisions of seat courts, save in exceptional cases where the seat court is shown to have violated basic notions of justice. Courts in other jurisdictions appear to be warming to this approach. In the recent Australian case of *Gujarat*, for example, the award debtor challenged an award in the English courts on the ground of procedural unfairness. The English courts rejected the challenge and upheld the award. Undeterred, the award debtor sought to resist enforcement in Australia on the same procedural grounds. The Australian Court found that there was no procedural unfairness, but held that, in any event, it would *generally be inappropriate* to depart from the decision of the English court. Australian courts are therefore taking a similar approach to the US courts, deferring to decisions at the seat in all but exceptional cases.

The inconsistent approaches taken by enforcement courts to decisions at the seat is not ideal. It creates uncertainty for the parties about the effects of a decision at the seat and undermines the efficiency of international arbitration. In the search for a solution to this issue, several commentators, including Albert van den Berg, have proposed a ‘new’ convention that would take the review of arbitral awards out of the hands of national courts. This proposal, loosely based on the ICSID Convention, would give an international body exclusive jurisdiction to review arbitral awards. Once an award received confirmation from this body, it would be automatically enforceable in contracting states. An international consensus in favour of such reform, however, is not guaranteed and would take considerable time to emerge. Meanwhile, enforcement courts should follow the approach of the US courts. A policy of deference to the seat of arbitration, save in exceptional cases, makes the most sense.

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