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The US Courts and Their New York Convention Public Policy Gloss Revisited: Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas: Glossing with International Comity

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The decision made in the case of *Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas (Civ. Action No. 16-140 (D.D.C. 7 June 2018)) (*"Hardy case") is yet another decision in a string of outcomes under the New York Convention proving that the repeated adagio "*if it ain't broken, don't fix it*" is at least frustrating. Public policy under Article V(2) of the New York Convention was an expression of sovereignty by the delegates agreeing to the text of the Convention in 1958 – as such has a legitimate place in this treaty, and it made sense not to dictate its exact meaning in the text itself. It would have been impossible for legislators and courts of all Contracting States to comply with a narrowly circumscribed and detailed description of public policy.

In the United States, courts have adhered to a narrow concept of public policy: fundamental notions of morality and justice. The landmark case on the matter is *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), Bank of America,* rendered in the Second Circuit and followed across the nation.[1)] This year, the District Court of Columbia, when requested to enforce an award rendered in Kuala Lumpur, denied the enforcement under Article V, after it refused to stay the enforcement due to the pending setting aside proceedings under Article VI of the New York Convention. The award was not one that granted damages to the claimant. It was an award ordering the respondent, the Government of India, to reinstate the investor, i.e. it ordered a government specific performance.

Beware the billiard balls of sovereignty:

> "[…]independent sovereigns States act too often like billiard balls which collide, and do not co-operate." (Fali Nariman, Introduction to the New York Convention – The Convention and Sovereignty)

These are the famous words of Fali Nariman at the occasion of the Judicial Dialogue with the Supreme Court of India. In the *Hardy* case, the court held that the enforcement of the award would violate public policy of the U.S. (Article V(2)(b)). The Convention allows Contracting States to

stop enforcement if that enforcement violates the public policy of the enforcing State. The drafting of that provision demonstrated that the right to impose sovereignty was important: States were not willing to sign on to the Convention if they could not stop enforcement in their territory of awards that somehow clashed with public policy (which, in return, is an expression of sovereignty). This is described by Nariman as the colliding billiard balls. The enforcement of this award would violate the U.S. notions of public policy of Article V(2)(b), but for reasons other than the billiard balls. Indeed, the District Court refused to enforce the award on the basis of Article V(2)(b). However, it was not for imposing on its own right of sovereignty. It was out of respect for the sovereign rights of the country against whom enforcement was requested, i.e. this is an expression of international comity.

After the award was rendered in favor of the investor, India filed for the setting aside in India, not in Kuala Lumpur, whereas an award can only be set aside in the country where the award was rendered by the competent authority. This was confirmed in the *Karaha Bhodas* case[2)], in which the District Court of Columbia held that parties could not exclude the jurisdiction of the competent court.[3)] While respondent – the government of India – filed for the setting aside with the court that was not competent, the claimant filed a request with that same court, but for the enforcement of the award. An enforcement request can be filed anywhere in the world and if the country is a Contracting State to the New York Convention it must comply with its obligations under that treaty. The Indian Court applied the philosophy of *Karaha Bhodas* and dismissed the request for setting aside as it did not have jurisdiction to address the setting aside request. However, the court held that the court with jurisdiction was not so much a court in Kuala Lumpur but the Madras courts as the site that was the subject of the dispute was closest to that court. Then, the appellate court held that the courts with jurisdiction to address the request for setting aside would be the courts of Malaysia. This is a turn of events that puts to question the proper application of the Indian Arbitration Act. Furthermore, it is the refusal to enforce in the U.S. that begs the question: What to do with the international comity gloss of Article V(2)(b)? For, in the end, the successful party in the arbitration proceeded to request the enforcement of the award in the U.S. but unsuccessfully.

The U.S. District Court reiterated the U.S. view on public policy under the New York Convention. The U.S. courts tend to construe the notion of public policy narrowly but then they transplant it as a gloss to Article V(1)(e). In the *Pemex case*, the court allowed for the enforcement of an annulled award by glossing Article V(1)(e) with public policy. The Court of Appeal in *Pemex* confirmed the lower court's holding that the award could be enforced notwithstanding the annulment judgment because the latter violated the most fundamental notions of morality and justice of the United States (which is a narrow interpretation of public policy in the respective jurisdiction). However, in the *Hardy* case, the court went on to hold that it was the sovereign right of the government of India to control and regulate the extraction and processing of natural resources within their own territory. Therefore, the court refused to enforce the award on the basis of Article V(2)(b) because the enforcement would violate the public policy of the United States. It held that the enforcement would effectively be interference in India's governance over its own territories. That interference – based on international comity – trumped the U.S. favorable attitude towards international arbitration and their so-called pro-enforcement bias.

The Court finds that India does not overstate the United States' public policy interest in respecting the right of other nations to control the extraction and processing of natural resources within their own sovereign territories. (*Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas*, Civ. Action No. 16-140 (D.D.C. 7 June 2018),

memorandum opinion, p. 21.)

This is not so much the application of public policy under the New York Convention and it is not a clash of sovereignty here, but rather the opposite. It is the application of international comity, i.e. respecting the sovereignty of another State by withholding the reliance on its own sovereignty. Within the premise of the New York Convention, the US courts have done so before in the *Thai Lao Ignite* case.[4)] Over and over again, when enforcing against States, the courts of other nations seem hesitant to play a role in the enforcement against States. Whenever a court of another country is requested with the enforcement of an award against a State or a State-owned entity, there is a real chance that courts will not allow for it. For instance, a court may declare a case inadmissible because it has no jurisdiction under the doctrine of *forum non conveniens.*

The idea of arbitration was to provide parties in international trade with a fair forum to level the playing field: When commercial parties undertake to engage with governments or state entities for commercial purposes, both parties often agree to submit any disputes to a neutral tribunal, not to State organs – national courts. Somehow, at the end, when the enforcement of binding awards is due, nations are less willing to honor those commitments when it means they must hold other States to their obligations under those agreements to which they were not a party. With that, the U.S. courts have not only developed a practice of glossing Article V(1)(e) with public policy as explained above and in earlier posts on the *Pemex* case. The U.S. courts want to apply the idea of international comity when applying the New York Convention in cases where the respondent is a State and cases that involve that respondent State controlling and exercising its own sovereign rights. It appears that with these line of cases that the U.S. courts gloss Article V(2)(b) with international comity. It is their way of respecting the sovereign rights of other States and so it seems in that case the billiard balls actually do co-operate.

References

?1 Rendered by the Second Circuit in 1974, in Yearbook Commercial Arbitration I (1976) (United States no. 7), at 205. See also M. Paulsson, “The New York Convention in Action” (Kluwer 2016), p. 218.

?2 Karaha Bodas Co., L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al., 335 F. 3d 357 (5th Cir. 2003), in Yearbook Commercial Arbitration XXIX (2004), (no 482), at 1262-1297.

?3 M. Paulsson, “The New York Convention in Action” (Kluwer 2016), p. 205, footnote 198.

?4 Thai-Lao Lignite (Thailand) v. Government of the Lao People’s Democratic Republic, (2nd Cir. 2017).

This entry was posted on Wednesday, December 26th, 2018 at 10:12 am and is filed under Arbitration, Arbitration Awards, Arbitration Proceedings, Enforcement, International arbitration, Investment Arbitration, New York Convention, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Public Policy, United States, USA
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