Kluwer Arbitration Blog

Tribunal's Reference to Annulled Awards: Beyond a Question of Persuasiveness?

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Introduction

This post explores whether a Tribunal may refer to an annulled arbitral award in support of its factual findings or legal assessments. Although a simple reference to annulled awards lies outside the context of any obligation for the Tribunal in terms of *res judicata* and *stare decisis*, this quest is aligned with annulled awards' effectiveness and persuasive value. In essence, it has to do with the perception of annulment's effect; whether and to what extent the annulment impacts the award's value – if any – as a source of reference. This reflects a perception of the role of the seat of arbitration and its legal significance as the sole link between arbitration and national legal orders which decisively inform the award's fate.

The Annulment of Arbitral Awards

In the course of the examination of the different doctrines over annulment, it is important not only to distinguish the annulment of commercial and investment awards but also to examine annulment as perceived in the enforcement context (within and outside the New York Convention ("NYC")). The NYC covers awards rendered in commercial and investment arbitrations (in general outside ICSID) subject to the requirements of Article I. The 'commercial reservation' of Article I (3) does not preclude the use of the NYC in order to enforce investment awards since a narrow interpretation of the term 'commercial' neither is consistent with the purpose of the NYC, nor has been adopted in practice. Outside the NYC a more favorable enforcement regime applies.

Annulment Within the Context of the NYC

The existence of annulment's international effect in conjunction with the NYC presupposes a specific stance over the role of the seat and the autonomy of the arbitration – if applicable – from this forum. Three approaches have been established: the 'territorial', 'delocalized' and 'middle' approach.

According to the 'territorial' approach, the selection of the seat submits the arbitration to a specific legal framework within which the arbitration will be conducted. Arbitration has a *forum*; the award

is legally rooted in the arbitration law of the seat and the seat's courts enjoy supervisory jurisdiction and exclusive competence to set it aside. The curial law permeates arbitration's validity and the proper functioning of its procedural aspects. The legal authority of the award, which is conditioned upon annulment, emanates from that forum. In essence, the annulment prevents the award from having legal force (binding and *res judicata* effect) since it has ceased to legally exist. Thus, its enforcement is impossible (V(1)(e), NYC). '*[E]x nihilo nil fit'*. The Court of the *forum recognationis* refuses recognition, in a quasi-automatic process, without being competent to examine the grounds of annulment and without any residual discretionary power. The seat is the primary jurisdiction having the first and last say on awards' validity and (non)existence. Thus, annulment, a 'repressive' control in terms of national law enjoys an international effect.

The second, 'delocalized' or 'French' approach questions annulment's international reach. The Court has discretionary power to refuse enforcement even if it could be justified. Non-enforcement is permitted but not required by NYC. This is aligned with the permissive nature of Articles VII ('more favorable right' provision) and VI (discretionary adjournment). In essence, arbitration operates in the international sphere and is not anchored to a specific legal forum. Its legitimacy and the arbitrators' power derive from any legal forum that recognizes the arbitration agreement's and the award's validity. The '*juridicity of arbitration is rooted in a distinct transnational legal order'*. This approach does not attribute any legal significance to the seat and annulled awards continue to legally exist.

Pursuant to the third approach, which indirectly accepts the seat's legal significance, annulment's international reach is recognized only when it resulted from a non-local standard (based on grounds similar to Article V(1)(a) to (d), NYC). Arbitration is thus protected from any particularity of the seat. This approach is similar to the perception that annulled awards must be enforced only in extraordinary circumstances, namely when their annulment constitutes a fundamental procedural impropriety, such as fraud. It has also been argued that the annulled award's enforcement is subject to the recognition of the foreign court's annulment judgment by the *forum recognationis* based on a 'judgment route analysis' (for instance, see the *Maximov* case as previously discussed on the blog).

Annulment Outside the NYC

Pursuant to the 'most favorable right' provision (Article VII, NYC), the most favorable enforcement regime established either in a treaty or in national legislation takes precedence and applies in its entirety.

By virtue of this article, the 'French' approach applies. It embraces a 'universalist' perception attributing no legal impact to the seat. French courts have consistently recognized an award as an international decision of justice, which by definition is not integrated or anchored in the national legal order of the seat. Thus, the awards' legal validity and existence are conditioned upon any possible *forum recognationis* and the annulled award continues to legally exist.

Furthermore, a more favorable treaty regime applies. This permeates both investment and commercial arbitration. The ICSID Convention applies as both more favorable *lex specialis* and *lex posterior* rule. It provides for a self-sufficient annulment system, autonomous from national laws and Court's interference. It constitutes the only really delocalized form of arbitration. There is no

seat, and the annulment is feasible only within the ICSID system for specific grounds and beyond national Court's control. The annulled award ceases to legally exist, and the annulment has an *erga omnes* effect (*de facto* international reach) within the contracting parties. Lastly, in the context of commercial arbitration, the 1961 European Convention on Commercial Arbitration applies. It attributes international reach to annulment only when is based on specific grounds (those mirroring the grounds of Article V(1)(a) to (d), NYC).

Tribunal's Quasi- Unfettered Freedom to Make Any Reference When Determining Facts and Law: A Jura Novit Arbiter Question?

The Tribunal has been entrusted with the power to affect or confirm parties' rights and obligations in a final and binding manner. In the course of fulfilling its mandate, it has the power to reach a decision based on its own legal and factual analysis, knowledge and research without being bound by parties' input ('*Jura novit arbiter*'). In essence, it is free to assess the legal relevance of factual findings and adjudicate on different legal grounds from those submitted by the parties. It can also take initiatives to obtain factual evidence as a counterpart of the application of law. An award is not subject to review on the merits, neither its legal and factual findings are subject to *de novo* assessment, at the annulment or enforcement phase. Thus, it cannot be annulled or non-enforced by virtue of wrong application of law and facts or references to any source when dealing with the merits.

However, this freedom is not unfettered. The Tribunal can exercise in full extent its decision-making power within the limits of its ambit as delimited by parties' agreement and submissions ('*ne ultra petita*' principle). This power must be exercised in conformity with due process and procedural fairness (right to be heard; principle of contradiction), in order to have award's enforceability ensured (V(1)(c), NYC). Thus, there is no rule prohibiting the Tribunal from having recourse to any source (such as dissenting opinions, annulled awards) in support of legal or factual findings as long as these are related to legal issues which lie within tribunal's mandate. In cases where it raises *proprio motu* any factual or legal issue, it has to give to the parties a fair opportunity to comment, primarily when the issue was reasonably unforeseeable for them (procedural fairness).

The Impact of a Reference to a Nonexistent Source

We have associated the possibility of having annulled awards as a source of reference with annulment's international reach as perceived in the enforcement context. This reference is not a reliance in terms of *res judicata* and *stare decisis*. First, annulled awards are deprived of *res judicata* effect under the 'territorial' approach and potentially under the 'middle' approach. However, even if we could assume that it had *res judicata* or at least it continued to exist, any precedential value would not be attributed to the award. In commercial and investment arbitration there is no *stare decisis* doctrine. Possibly, there is only a need for consistency. In that sense, since the Tribunal is not obliged to follow precedent (a legally nonexistent award does not form precedent) and since any unjust or unfounded legal or factual assessment is not sanctionable, this reference could raise only concerns of persuasiveness.

However, in ICSID arbitration, a reference to annulled awards could lead to annulment. It touches upon the award's reasoning. In this context, the annulled award does not exist. Thus, the Tribunal

bases its reasoning on a nonexistent source. As a result, this reference – either as the only or as the most decisive ground on which the decision is based – may lead to annulment by virtue of Article 52(1)(e), ICSID Convention. It could amount to lack of legal reasoning, if it is the only ground, or at least to insufficient and inadequate reasoning. However, the annulment of the award will not succeed if the reference is made to support a legal principle that already exists. Then, the reasoning could be deemed implicitly existent in the consideration of the award and thus, reasonably inferable. Additionally, the adequacy of a reasoning based on an annulled award could bring a question of correctness and thus the risk of having an appeal in disguise is raised. Although the reference's persuasive value does not justify annulment, it remains debatable whether this reference is a reason with substance, a 'sufficiently pertinent reason' or a reason which ensures the award's logic and coherence allowing the reader to understand its logical flow.

Lastly, an annulled ICSID award seems not to have any (persuasive) value (see also Procedural Order in the *Fraport* case). In commercial and non-ICSID investment arbitration the annulled award seems either not to have any value at all (legally nonexistent), not having been affected by the annulment ('delocalized' approach), or at least having its effect and persuasive value impaired depending on the ground on which it was annulled. In that sense, such a reference could impact only on the arbitrator(s)' reputation and credibility, and the award's persuasive value. It could be seen as weak decision-making. However, it could be argued that in the ICSID context, a reference to an annulled award is associated with legal consequences beyond the award's persuasiveness.

Overall, it seems that an annulled award could be a source of law or facts affecting arbitrators' credibility but not (necessarily) the second awards' fate.

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