Kluwer Arbitration Blog

2024 PAW: Swords and Shields—Navigating Current Trends in Enforcing Arbitral Awards

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As part of 2024 Paris Arbitration Week, Curtis, Mallet-Prevost, Colt & Mosle LLP hosted a webinar on "Swords and Shields: Navigating Current Trends in Enforcing Arbitral Awards." The event featured Sebastiano Nessi, Loujaine Kahaleh, and Juan Perla, and was moderated by Geoffroy Lyonnet. The panel examined recent trends in the enforcement of arbitral awards, starting with the impact of EU law on enforcement in and outside the EU, before turning to the latest developments on fraud or corruption allegations, with a focus on the approach taken by French courts, and finally to the U.S. approach on the enforcement of annulled awards.

Enforcement of Intra-EU Awards

Sebastiano Nessi opened the floor by addressing the enforcement of intra-EU awards in and outside the EU in the wake of the *Achmea* and *Komstroy* cases. First, he stated that since *Achmea*, it has been clear that intra-EU awards stand almost no chance of being enforced within EU borders. This has been confirmed by the Court of Justice of the European Union ("CJEU") in the *Romatsa* decision, which ruled that intra-EU ICSID awards can have "no effect and cannot be enforced" in the EU. The EU Member Courts have followed the CJEU jurisprudence. Indeed, the German Federal Court of Justice ("BGH") ruled in July 2023 in three decisions that arbitral awards rendered in intra-EU arbitrations could no longer be enforced in Germany.

The intra-EU objection has so far been met with ambivalence outside of the EU. The U.S. District Court for the District of Columbia ruled in February 2023, in *NextEra* and *9Ren*, that decisions by the CJEU retroactively clarifying EU law on investment arbitration could not deprive a U.S. court of jurisdiction under the U.S. Foreign Sovereign Immunities Act. However, in March 2023, a different judge on the same District Court rejected the investors' request to enforce the intra-EU award rendered in *PV Investors (Blasket)*, holding that no valid arbitration agreement existed and therefore Spain retained its state immunity from U.S. courts' jurisdiction. Appeals from both decisions are currently pending before the U.S. Court of Appeals for the D.C. Circuit.

The U.S. government filed an amicus curiae brief in February 2024, responding to the D.C. Circuit's request for the views of the State Department regarding the enforcement of three intra-EU awards. According to Mr. Nessi, although this amicus brief can be perceived as bringing some

form of support to Spain's position, the amicus brief never expresses a position on the core issue of the enforceability of "intra?EU" awards.

Mr. Nessi also presented the position of other non-EU courts. The High Court of Australia and the High Court of Justice of England and Wales (King's Bench Division) have enforced the intra-EU award in the *Antin* case. According to these courts, Spain waived its immunity by joining the ECT. In contrast, Swiss courts adopted a different approach and rejected the enforcement of the *OperaFund* award. The Swiss Supreme Court affirmed that the Swiss rules on state immunity apply to all arbitral awards, including ICSID awards, and that these rules require that the award's underlying relationship have a sufficient domestic connection to Switzerland, which the Court held was missing in the *OperaFund* case.

Recently, the CJEU has ruled that the UK infringed EU law when in 2020 its Supreme Court allowed the enforcement of the *Micula* award during the Brexit transition period.

Finally, Mr. Nessi presented the out-of-court strategies of EU investors targeting sovereign debt instruments to exert pressure on EU States failing to comply with awards. These strategies consist notably of seeking enforcement in the U.S. and the UK in parallel, but also approaching the IMF and private rating agencies to request downgrading the State's credit rating for non-compliance with international arbitration awards.

French Courts' Approach to Awards Tainted by Fraud or Corruption

Loujaine Kahaleh then addressed the approach adopted by the Paris Court of Appeal regarding the review of arbitral awards tainted by fraud or corruption.

First, Ms. Kahaleh highlighted that an award can be annulled under French law if it is contrary to international public policy, and that fraud and corruption fall under this category.

Second, she explained that French courts have adopted a "maximalist" control over arbitral awards in order to assess whether the enforcement of such awards could violate international public policy and that they accepted to consider new arguments and evidence that have not been previously presented to the arbitral tribunal in order to make their assessment.

Ms. Kahaleh referred to the *Sorelec* decision, in which the Paris Court of Appeal set aside both the partial and final awards on the basis that the recognition and enforcement of such awards would violate international public policy. The Court relied on several red flags to conclude that there was "serious, precise and corroborating evidence" showing that the Libyan Minister who signed the settlement agreement, allegedly on behalf of the Libyan State, had colluded fraudulently with Sorelec.

Certain commentators criticized the decision because the Court of Appeal allowed Libya to raise allegations of fraud and corruption for the first time in the annulment proceedings while they had not been raised before the arbitral tribunal during the arbitration.

Ms. Kahaleh dismissed this criticism by pointing out several cases in which some individuals have attempted to take advantage of the political unrest in Libya to obtain substantial amounts through arbitration by signing fraudulent settlement agreements. She stressed that the number of similar

cases where tribunals have been manipulated – such as the *Ghenia* case – only confirm the importance of the control by national courts.

In conclusion, Ms. Kahaleh argued that a general and absolute ban on any review of the merits is incompatible with the requirement of protecting international public policy and that the "maximalist" review by French annulment judges is necessary to safeguard the credibility of the arbitral process. She contended that the French approach, which should make it one of the preferred seats of arbitration, should be embraced by more jurisdictions.

U.S. Perspective on the Enforcement of Annulled Awards

Finally, Juan Perla presented the status of the law in the United States regarding the enforcement of awards that have been annulled at the seat of the arbitration.

He first mentioned that the Federal Arbitration Act, the legislation implementing the New York Convention, provides that an award shall be enforced unless one of the grounds set forth in the New York Convention applies. One of those grounds refers to the setting aside or annulment of an award by a "competent authority of the country in which, or under the law of which, that award was made." Although U.S. courts generally consider these grounds discretionary, there have been very few cases in which U.S. courts have enforced an award after finding that one of the defenses has been satisfied.

Mr. Perla then commented on the current debate about whether a duly annulled award may or should ever be enforced. In 2007, the D.C. Circuit rendered the *TermRio* decision, which suggested that an annulled award "does not exist to be enforced." That statement resonates with what the scholarship sometimes refers to as the "territorial approach," meaning that absolute deference is given to the courts at the seat of the arbitration. The competing view is sometimes called the "delocalized approach," meaning that a decision annulling the award at the seat is not given much, if any, weight at all. Nevertheless, U.S. courts do not typically frame the issue in terms of "territorial" and "delocalized" approaches. Instead, U.S. courts have relied upon a common law test which tends to lean heavily in favor of the "territorial approach" insofar as it gives almost absolute deference to foreign set-aside judgments rendered in regular proceedings.

Mr. Perla then provided examples of cases in which U.S. courts have enforced purportedly annulled awards, such as the *Chromalloy* and the *Comissa* decisions. However, according to him, the pendulum seems to have swung back towards the "territorial approach" with the recent *Esso* decision in 2022, in which the U.S. Court of Appeals for the Second Circuit refused to enforce a portion of an award that had been annulled in Nigeria, emphasizing the comity interest as preeminent even in the face of concerns about potential bias and due process irregularities in the Nigerian proceedings.

Closing the discussion, Mr. Perla referred to the decision handed down by the U.S. Court of Appeals for the Tenth Circuit in *CIMSA* last year, in which he was personally involved as counsel. In this case, a U.S. court refused for the first time to vacate a judgment confirming an award that was later set aside, elevating finality and equity over comity. The court expressed concern that, among other things, the award debtor had not acted diligently in pursuing its post-award remedies at the seat of the arbitration (in that case, Bolivia), and that its ongoing efforts to seek annulment of the award were interfering with the finality of the U.S. judgment and proceedings. Mr. Perla also

observed, however, that one of the judges on the Court of Appeals issued a forceful dissent, expressing concern that the court was not giving the foreign courts enough deference and was not applying the principle of comity, which should have prevailed.

Curtis, Mallet-Prevost, Colt & Mosle LLP, has been representing Libya along with Viguié Schmidt & Associés in the Sorelec setting aside proceedings and the Ghenia revision proceedings discussed in this post.

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