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Recognition and Enforcement of Annulled Arbitral Awards: Jurisprudential Developments in Lithuania

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Although often seen as theoretical, the recognition and enforcement of annulled arbitral awards remain a fascinating issue in international arbitration. As the text of the New York Convention ("NYC") provides limited guidance, there has been substantial consideration in both academic commentaries and national court decisions.

While global arbitration hubs such as Paris, London, or Singapore have a well-developed case-law on the enforcement and recognition of foreign arbitral awards, the approach chosen in other venues is not always clear. Lithuania is no exception. Accordingly, this article will analyze the approach applied by Lithuanian courts regarding the enforcement of annulled foreign arbitral awards.

The Territorial, Westphalian and Transnational Theories

Most agree that annulled awards may still be recognized and enforced outside of the arbitral seat. However, authorities debate the circumstances under which recognition of annulled awards is appropriate. As proposed by the late Emmanuel Gaillard, the existing approaches can be divided into three categories: territorial, "Westphalian", and transnational.

The territorial approach, as explained by Albert Jan van den Berg, asserts that if an arbitral award is annulled in its country of origin, foreign courts must respect that annulment. This approach is rooted in the NYC, which assumes awards are valid unless set aside at the seat of arbitration. Despite its logical consistency, this approach is less popular and is known to be followed by courts in Spain, Luxembourg, Brazil, and Chile.

In contrast, the "Westphalian" approach, promoted by Jan Paulsson, is based on internationally recognized standards of annulment. Paulsson argues that the main goal of the NYC is to avoid domination by the legal system of the seat of arbitration. Thus, foreign courts should disregard annulments unless based on international standards. This approach requires careful scrutiny of annulment grounds and is notably followed by U.S. courts, such as in the case of *Chromalloy Aeroservices v. the Arab Republic of Egypt*, where enforcement was allowed despite annulment at the seat in Egypt due to non-compliance with international standards by the Egyptian Court of Appeal. Dutch and English courts, as seen in *Maximov v. Novolipetsky* and *Yukos Capital v. OJSC Rosneft Oil Co*, similarly evaluate annulment decisions based on international standards.

Lastly, the transnational theory, prominently followed by French courts (but also in Belgium and Austria), suggests that an arbitral award is issued in an autonomous legal order. Thus, the national decision to annul the award has no bearing internationally. The annulment decision should only be followed in cases when the grounds for annulment are the same as the local grounds for non-enforcement (see e.g., the judgment of the Paris Court of Appeal, in *République arabe d'Egypte v. Société Chromalloy Aero Services*).

Approach Followed by Lithuanian Courts

Before Lithuania regained its independence in 1990, arbitration in Lithuania was neither prevalent nor recognized. In 1992, Lithuania ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), following the adoption the NYC in 1995. In 1996, Lithuania introduced its Law on Commercial Arbitration (based on 1985 UNCITRAL Model Law on International Commercial Arbitration).

Since arbitration in Lithuania is relatively recent, some tend to observe that Lithuanian courts are still actively developing case law on fundamental arbitration issues. Recognition and enforcement of annulled arbitral awards is no exception. To the author's knowledge, there is only a single case on recognition and enforcement of an annulled arbitral award that has been heard by the Lithuanian courts.

Signs of the Territorial Approach

In *Imoniu grupe Alita v. the Agency for Dispute Resolution in Privatization of Serbia* (Case No. Nr. 2T-1-881/2021), the Agency for Dispute Resolution in Privatization of Serbia ("the Agency") sought to enforce an arbitral award issued in Serbia against the Lithuanian company Alita. The latter countered by initiating annulment proceedings before the Serbian courts claiming that Alita was wrongfully included as a respondent in the arbitration since the tribunal lacked jurisdiction over disputes involving the company. Ultimately, Alita got a partial annulment decision on jurisdiction which the Agency appealed.

Subsequently, by issuing a procedural order, the Court of Appeal of Lithuania (which is the initial authority to recognize and enforce international arbitral awards in Lithuania) stayed the enforcement proceedings pending the completion of setting-aside proceedings before Serbian courts. The court held that since the annulment decision on jurisdiction at the seat had been appealed, it would have been inappropriate to proceed with the enforcement proceedings. This follows from the perspective that staying the enforcement would save costs and other resources for both the parties and the court. Accordingly, the Court of Appeal of Lithuania stated that if the Serbian courts would uphold the annulment decision, the subject matter of the enforcement case would also disappear under Article V(1)(e) of the New York Convention as an independent ground for refusing to recognize a foreign arbitral award. The Court, therefore, took a position that directly corresponds with the territorial approach.

A few years later, the Supreme Court of Serbia upheld the primary annulment decision. Subsequently, the Court of Appeal of Lithuania refused to enforce the partial award on jurisdiction on the ground that it was annulled at the seat of arbitration. By referring to its own previous

procedural orders on staying the proceedings, the court held that since the Agency itself chose not to pursue the enforcement of the annulled award on jurisdiction and only sought the enforcement of the final award, there was no dispute over the enforcement of the annulled portion of the award, and that Article V(1)(e) of the New York Convention provided sufficient ground to resolve the case. The court concluded that ever since the award on jurisdiction was annulled, a further analysis was not needed.

Interestingly enough, the court sent mixed signals by further noting that the annulment alone would not be sufficient to decline recognition and enforcement in cases when the respondent is resisting enforcement, thereby possibly clarifying its own previous statements that annulment was an independent ground to refuse recognition and enforcement. However, since the Court of Appeal nevertheless refused to recognize the partial award on jurisdiction without assessing any of the reasons for the annulment and only referring to Article V(1)(e) of the New York Convention, it can be assumed that such a position corresponds to the territorial approach.

Such an assumption can be also supported by the fact that the Supreme Court of Serbia annulled the partial award on an internationally recognized standard for annulment, as the award was issued by a biased arbitrator. It remains unclear why the Court of Appeal of Lithuania did not rely on this element and instead chose to refuse enforcement based specifically on the annulment decision, although this fact was brought up by both parties of the dispute.

Possible Shift to "Westphalian" or Transnational Theories

A more recent development suggests that the approach taken in *Alita v. the Agency for Dispute Resolution in Privatization of Serbia* might change. In a case concerning the suspension of recognition and enforcement of an arbitral award amid pending annulment proceedings at the seat (judgment of 26 October 2023), the Court of Appeal of Lithuania briefly mentioned that due to the finality of an arbitral award, ongoing annulment proceedings at the seat do not imply that the enforcement court shall halt the enforcement proceedings, given that an arbitral award can be still be recognized and enforced even if it has been annulled in the country of origin.

However, since this judgment only addressed the suspension of enforcement amid pending annulment proceedings at the seat, and did not pertain to the enforcement of an annulled arbitral award, the court did not further elaborate on its position regarding the enforcement of annulled arbitral awards. Thus, it seems that the approach taken by Lithuanian courts remains subject to further development.

Concluding Remarks

In sum, due to the only court decision – to the author's knowledge – concerning recognition and enforcement of annulled arbitral awards, the precedent in Lithuania seems to lean towards the side of the territorial approach. However, to maintain the reputation of a pro-arbitration jurisdiction and to become an attractive venue for dispute resolution, it can be assumed that the territorial approach is the least desirable one and should not be followed by Lithuanian courts in the future. Notably, the recent judgment of 26 October 2023 seems to lay a favorable foundation for the possible development of Westphalian or transnational approaches. That being said, one must mention that

Alita v. the Agency for Dispute Resolution in Privatization of Serbia is only a single decision that was unreviewed by the Lithuanian Supreme Court. Thus, the question of further development of court practice on enforcing annulled awards in Lithuania remains open.

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