

## ENFORCEMENT OF AWARDS ANNULLED AT THE SEAT: INTERNATIONAL PERSPECTIVE

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### I. INTRODUCTION

The emphasis of the New York Convention has been to broaden the enforceability of arbitral awards.<sup>1</sup> The New York Convention removed the requirement of double exequatur.

As summarized by Lord Collins in *In the Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*,<sup>2</sup> the Geneva Convention had a requirement of getting a leave to enforce (an exequatur) before seeking enforcement of the award. After obtaining an exequatur, a similar order had to be obtained from the country where enforcement of the award was sought. The New York Convention did away with such requirements.

The New York Convention made important changes to make it easier to enforce arbitration awards. In the past, under the Geneva Convention, the party wanting to enforce an award had to prove certain conditions, like showing that the award was final in the country where it was issued. Some countries required an additional order called an exequatur to enforce the award in their jurisdiction. This meant going through a two-step process known as double exequatur. However, the New York Convention removed the need for double exequatur. Now, the burden of proving why an award should not be enforced lies on the party opposing enforcement. They have to provide specific and exhaustive reasons for non-enforcement.

As a result, while Article V(1)(e) of the New York Convention recognizes the seat court as being the appropriate forum to seek the setting aside of an arbitral award, the enforcement of an award under the New York Convention is not limited to any one specific jurisdiction. It also includes the jurisdiction of the places where the award debtor's assets are located. With the removal of *double*

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<sup>1</sup> GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (3rd Ed. 2021), p. Section 22.03.

<sup>2</sup> *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 A.C. 763.

*exequatur* for the enforcement of arbitral awards, there is also no precondition for the award to be first recognized or enforced by the seat court for it to be enforced in other states.<sup>3</sup>

## II. DUALITY OF TREATMENT AND POTENTIAL ISSUES

This duality in the treatment of an arbitral award by different courts gives rise to the potential for either simultaneous setting aside and enforcement actions pending before different courts, or enforcement actions for awards which the seat court has set aside.

In order to address scenarios where an award is, or has been, the subject of both setting aside proceedings and enforcement proceedings, Article V(1)(e) and Article VI of the New York Convention set out the following “*permissive*” provisions:<sup>4</sup>

- i. Under Article V(1)(e) of the New York Convention, the recognition and enforcement of the award may be refused if the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
- ii. Under Article VI of the New York Convention, when an application for the setting aside of the award has been made, the decision on the enforcement of the award may be adjourned.

Therefore, the provisions of the New York Convention allow for the decision in the setting aside application made by the Seat Court to inform the court before which enforcement proceedings lie. The enforcing Court can exercise discretion to allow or refuse enforcement of the arbitral award even after its been set aside in the seat court. This is commented upon by Professor van den Berg: “*It is to be noted that the opening lines of both the first and the second paragraph of Article V employ a permissive rather than mandatory language: enforcement “may be” refused.*”<sup>5</sup> The scope of this discretion is a matter of significant debate, with different enforcing courts adopting varying views on whether the New York Convention imposes strict limitations on exercising or allows discretion. In this regard, the jurisprudence of the French, American and English courts is illustrative of divergent approaches to enforcing annulled or set-aside awards.

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<sup>3</sup> E. GAILLARD & J. SAVAGE (EDS.), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶1676 (1999); UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (New York, 1958), 2016 Ed.; NADIA DARWAZEH, ARTICLE V (1)(E), IN RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 301, 306-07 (H. Kronke, P. Nacimiento et al. eds., 2010); ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 110 (P. Sanders ed., 2011).

<sup>4</sup> *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

<sup>5</sup> The New York Arbitration Convention of 1958 (1981).

### III. DIFFERENT APPROACHES IN JURISDICTIONS

#### 1. French Courts

The French courts adopt the view that an award in international arbitration can still be enforced even if set aside at the seat.<sup>6</sup> This view is grounded in the fundamental principle that an arbitral award has no nationality of its own, and therefore, its annulment by one particular state would not affect its continuing existence in another state for the purpose of enforcement.<sup>7</sup>

Articles 1520 and 1525 of the French Code of Civil Procedure do not include the annulment of an arbitral award as a ground not to enforce arbitral awards<sup>8</sup>. The French courts rely on Article VII(1) of the New York Convention,<sup>9</sup> which allows an interested party to rely on the laws of the country in which he seeks to get the award enforced.

On this basis, the enforcing court is considered to have primary jurisdiction over the enforceability of the award, notwithstanding any prior setting aside of the arbitral award by the Seat Court. This approach stands to good reason in policy, as the automatic refusal to enforce the award simply because it has been set aside, as such an interpretation of Article V(1)(e) would bind the enforcing award to the tyranny of the Seat Court, without the ability of an independent review.

#### 2. US Courts

In stark contradiction to this approach, courts in the United States have refused to enforce awards that are set aside by the seat court for the precise reason that the award would cease to exist upon being lawfully set aside by the seat court.<sup>10</sup> In the oft-cited *Baker Marine* case, the Second Circuit upheld the District Court's decision to refuse the enforcement of an award that had been set aside at the seat of arbitration, Nigeria<sup>11</sup>, as it was reluctant to "second-guess" and undermine the seat court's decision for fear of the risk of conflicting judgments. Although the jurisprudence from the United States is not uniform, by and large, the Courts appear to be guided by this principle of

<sup>6</sup> *Société Pablak Ticaret Limited Sirketi v. Norsolor S.A.* 83-11.355, French Cass (1984). *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV)*, 92- 15.137, French Cass (1994). *Putrabali Adyamulia (Indonesia) v. Rena Holding, et al.*, 05-18.053, French Cass (2007). *The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc* Cour d'Appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 14, 1997, 95/23025 (Fr.). See also, XXII Y. B. COMM. ARB. 691-695 (1997).

<sup>7</sup> CLIFFORD J. HENDEL AND MARÍA ANTONIA PÉREZ NOGALES, 'CHAPTER 12: ENFORCEMENT OF ANNULLED AWARDS: DIFFERENCES BETWEEN JURISDICTIONS AND RECENT INTERPRETATIONS', IN KATIA FACH GOMEZ AND ANA M. LOPEZ-RODRIGUEZ (EDS), 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES, (Kluwer Law International; Kluwer Law International 2019) pp. 187 – 204, pg. 194.

<sup>8</sup> *Code of Civil Procedure, Book IV, Arbitration*, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 14 (Kluwer Law International 1984, Supplement No. 64, May 2011) (Jan Paulsson & Lise Bosman eds. 2018).

<sup>9</sup> Article VII(1), The New York Convention.

<sup>10</sup> *Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd* (1999) 191 F 3d 194; *TermoRio SA ESP v Electranta, SP* (2007) 487 F 3d 928.

<sup>11</sup> 191 F.3d 194, 196 (2nd Cir. 1999).

judicial reciprocity and accept the annulment of an award by the seat Court unless shown to be against American public policy.<sup>12</sup>

### 3. English Courts

Compared to French and American jurisprudence, the English courts adopt a median and practical approach. In the decision of *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*,<sup>13</sup> certain considerations for the exercise of the Court's discretion in enforcing an annulled award were outlined;<sup>14</sup> the enforcing court is permitted to consider the circumstances in which the original arbitration award was made and the reasons for it being annulled at the seat. The enforcing court would not be obstructed from creating their own perspective on the application of legal rules by foreign entities. Therefore, unlike the French and American Courts, appropriate deference would be paid to the decision of the seat court in setting aside an award at the time of its enforcement, without entirely being bound by such a ruling.

### 4. Indian courts

Consistent with a pro-arbitration approach, Indian Courts exercise limited discretion when assessing whether to refuse the enforcement of an award.<sup>15</sup> In the decision of *Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL and Others*,<sup>16</sup> the Supreme Court elaborated on the exercise of discretion when refusing to enforce an award under Section 48. The Supreme Court held that when it comes to resisting the enforcement of a foreign arbitration award under Section 48, the reasons can be grouped into three categories. First, some grounds question the jurisdiction (authority) of the arbitration proceedings. Second, some grounds only affect the interests of the parties involved. And third, there are grounds that relate to the public policy of India, as explained by Explanation 1 to Section 48(2).

If a ground is raised that challenges the very jurisdiction of the arbitration tribunal, such as the arbitration agreement not being valid under the applicable law agreed upon by the parties or the subject matter of the dispute not being suitable for arbitration under Indian law, it is clear that there

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<sup>12</sup> Steven Finizio & Santiago Bejarano, *Annulled Commisa v. Pemex arbitration award enforced*, LEXIS PSL ARBITRATION (2016); *Getma Int'l v. Republic of Guinea*, 862 F.3d 45 (D.C. Cir. 2017).

<sup>13</sup> [2011] 1 A.C. 763.

<sup>14</sup> *Dowans Holdings SA and Anr v. Tanzania Electric Supply Co Ltd*, 1539, UKHC (2011). *Yukos Capital SARL v. OJSC Rosneft Oil Company*, [2012] E.W.C.A. Civ 855

<sup>15</sup> *Cruz City 1 Mauritius Holdings v. Unitech Limited*, (2017) SCC OnLine Del 7810; *Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL and Others* ("Karia") (2020) SCC Online 177.

<sup>16</sup> *Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL and Others* ("Karia") (2020) SCC Online 177, ¶¶ 58-59.

is no room for discretion. Enforcement of a foreign award that was made without proper jurisdiction cannot be considered for enforcement, even if it may seem favourable in some other aspects.

In contrast, there may be some flexibility when the grounds used to resist the enforcement of a foreign arbitration award are related only to the interests of one of the parties involved. For example, suppose a party claims that they could not present their case before the arbitrator, but this ground can be waived or disregarded without causing harm to the party. In that case, a court may still enforce the foreign award even if this ground is proven.

Again, regarding the "public policy of India" ground, there is no discretion when enforcing an award influenced by fraud or corruption or violates the fundamental principles of Indian law, morality, or justice. In these cases, the court cannot exercise discretion and must refuse enforcement of the foreign award.

So, in the "may" in Section 48, depending on the context, it can mean "shall" or that the court still has some residual discretion to enforce a foreign award, even if there are grounds to resist its enforcement. However, this discretion is limited to specific circumstances mentioned above, and the court needs to carefully balance various factors when deciding to enforce a foreign award

Given that an award could potentially be set aside at the seat court on grounds "*linked to party interest*", which grounds may be seen as being insufficient to justify a refusal for enforcement, the approach of courts in India could potentially result in the enforcement of an award that has been annulled at its seat court.

#### IV. CONCLUSION

To conclude, Article V(1)(e) and Article VI of the New York Convention are interpreted differently in different jurisdictions. The French courts adopt a policy of enforcing an award even if it has been set aside at the seat court or setting aside proceedings are going on. On the other hand, American courts are reluctant to 'second guess' the seat court's decision and accept the award's annulment unless it is against American public policy. The English courts follow a median approach and are not bound by the seat court's ruling. However, certain considerations govern the English courts' discretion in enforcing annulled awards. Indian courts, by and large, do not exercise discretion when considering the enforcement of annulled awards. However, if an award has been set aside at the seat court on grounds 'linked to the party interest' as given in *Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL and Others*, an annulled award may also be enforced in India.