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The Walking Dead: Should Awards that Have Been Annulled at the Seat Nevertheless be Enforced by Courts in Other Jurisdictions?

ABSTRACT

The question of whether an arbitral award can be enforced after it has been annulled at the seat of the arbitration divides domestic legal orders, academics, and practitioners alike. French jurisprudence – which is one of the most permissive in that it rests on the premise that the law of the seat of arbitration is not the ultimate regulator of the validity of an arbitral award – has been at the centre of the debate for many years. With the 2019 decision of *the Cour d'appel de Paris* enforcing an arbitral award that was annulled in Egypt although not only the parties but also the *lex arbitri* and the *lex contractus* were Egyptian, it is time to revisit the debate and examine why the arguments levelled against the French approach are unconvincing. In this context, the article will analyse the main lines of thought against the enforcement of annulled arbitral awards and will argue that – except for internationally recognised standard annulments – annulled awards can and should be enforced under the New York Convention.

KEYWORDS: arbitration, enforcement, recognition, arbitral award, New York Convention, annulment, set aside, France

I. INTRODUCTION

By virtue of continuous development in the field of international arbitration,¹ one might argue that a certain universal body of transnational arbitration law has emerged that

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¹ See as an example of development: the adoption of UNCITRAL Model Law by more and more countries: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (Last accessed: 31 July 2019); international treaties governing enforcement and recognition of awards: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention), 330 U.N.T.S. 38 (1959); the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention); the European Convention on International Commercial Arbitration of 1961 done at Geneva, April 21, 1961; and the widespread application of general principles of international law as enshrined in Article 38 of Statute of the International Court of Justice.

governs international arbitration in the same way, right around the globe. The reality, however, is more nuanced. Even among jurisdictions that are commonly referred to as “pro-arbitration”, divergence persists. A typical example of such divergence concerns the enforcement of awards annulled at the seat.

The debate surrounding this subject is an old one.² Nevertheless, no uniformly accepted solution exists, and harmonisation is yet to take place. The two main lines of thought on the matter can be boiled down to the following questions: (i) whether the seat of the arbitration is the mainstay that inseparably connects the arbitration to the legal order of the seat, thereby raising ordinary courts at the seat to the rank of final guardians; or (ii) whether the seat is nothing more than a place of convenience for the parties and, consequently, the courts at the seat should be given no special weight.

In this essay, I undertake to argue that – except for internationally recognised standard annulments – annulled awards can and should be enforced under the New York Convention. I will first present the approach taken by France, the jurisdiction that is leading the way when it comes to the enforcement of arbitral awards annulled at the seat. The French courts’ interpretation will then serve as a basis for the second part of the discussion, on arguments against enforcement and why they hold no merit. Finally, I will provide my conclusion by arguing that local standard annulments should be disregarded for the sake of uniformity.

II. THE FRENCH WAY

It is irrefutable that France is one of the most influential jurisdictions on international arbitration. This is even more so when it comes to the topic of this essay, as French jurisprudence has become the poster child for the pro-enforcement approach. This is because the line of decisions rendered by French courts – beginning in 1984 with *Nolsolor*³ followed up by *Hilmarton*⁴ and *Putrabali*⁵ – gave life to issues surrounding the present topic that had only existed before as fiction in the minds of legal scholars.

² J. Paulsson, *Delocalisation of International Commercial Arbitration: When and Where It Matters*, (1983) 32 (1) *International and Comparative Law Quarterly*, 53–60. <https://doi.org/10.1093/iclqaj/32.1.53>; J. Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulments*, (1998) 6 (2) *Asia Pacific Law Review*, 1–28. <https://doi.org/10.1080/18758444.1998.11788058>; A. J. van den Berg, *Enforcement of Annulled Awards?* (1998) 9 (2) *The ICC International Court of Arbitration Bulletin*, 15–21.

³ Note, B. Dutoit, 1985 Rev. Crit. DIP 551 (1985).

⁴ E. Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, (1999) 14 (1) *ICSID Review – Foreign Investment Law Journal*, 22–24. <https://doi.org/10.1093/icsidreview/14.1.16>

⁵ Cour de cassation, civile, Chambre civile 1, 29 juin 2007, 05-18.053.

As these decisions have been analysed at length by many commentators,⁶ here I will only summarise the compounded findings of these cases.

The line of argumentation put forward by French jurisprudence in these cases is a combination of the interpretation of Article V(1)(e) and Article VII of the New York Convention and the relevant provisions of the French Civil Procedure Code. In *Norsolor*, the French courts established that there is an interplay between Article V(1)(e) and Article VII of the New York Convention. This allows for the application of the more favourable law in the case of the enforcement of an annulled award. In turn, this leads to the applicable French law as the more favourable law. According to the applicable French rules, the French court may not refuse enforcement of an arbitral award except in limited cases under Article 1502 (now Article 1520) of the Civil Procedure Code. These, however, do not encompass the annulment (or setting aside) of an award at the seat of arbitration as a barrier for enforcement. As such, the domestic review of the arbitral award for which enforcement is sought is based only on the applicable criteria of French law.

The conditions for enforcement of an annulled award were further crystallised in *Hilmarton*. In that case, the award – notwithstanding its annulment in Switzerland – was enforced by the *Tribunal de grande instance* in France. In the aftermath of the French decision on enforcement, a second arbitral award was rendered between the same parties on the same issue in Switzerland. The award creditor sought to enforce the second arbitral award in France. The French courts were faced with the dilemma of how to reconcile three decisions living simultaneously in their legal system: (i) the court decision at the seat of arbitration, setting aside the first award; (ii) the first award enforced in France; and (iii) the second award for which enforcement was sought. After multiple rounds of remittals, the *Cour de cassation* answered the dilemma. Relying on the principle of *res iudicata*, it held that no subsequent arbitral award between the same parties on the same subject matter could be enforced in France.⁷ Consequently, only the first award could “survive”.

In *Putrabali*, the French courts reaffirmed the principles laid down in *Norsolor* and *Hilmarton*. The courts additionally held that an international arbitral award is independent of the national legal order of the seat and that the award’s validity was

⁶ E. Gaillard, L'exécution des sentences annulées dans leur pays d'origine, (1998) 125 *Journal du Droit International*, 645.; C. Jarroson, Note – Cour de cassation (1re Ch. civ.) 23 mars 1994 – Société Hilmarton v. société OTV, (1994) *Revue de l'Arbitrage*, 329–336.; P. Mayer, Revisiting Hilmarton and Chromalloy, in A. J. van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story* (Kluwer Law International, 2001) 165–176.; P. Pinsolle, The status of vacated awards in France: the Cour de Cassation decision in Putrabali, (2008) 24 (2) *Arbitration International*, 277–295. <https://doi.org/10.1093/arbitration/24.2.277>

⁷ P. Fouchard, La portée internationale de l'annulation de la sentence arbitrale dans le pays d'origine, (1997) (1) *Rev. Arb.*, 329.

to be ascertained by the laws of the country where enforcement is sought.⁸ The courts further clarified the distinction between international arbitral awards and domestic awards in France.

More recently, in 2019, the Paris Court of Appeal decided to enforce an arbitral award that was annulled in Egypt. The particularity of this decision lies in the fact that both parties were Egyptian and the suit concerned a contract with the place of performance in Egypt and where the applicable substantive law was also Egyptian.⁹ In this case, the Paris Court of Appeal progressed previous case law by clarifying that an award is to be considered foreign if it was rendered outside of France, irrespective of whether it can be regarded as international or domestic in nature. Therefore, under French law, an arbitral award can be international, foreign or domestic. Under the new case law, it seems that foreign awards are afforded the same treatment as international awards.

In conclusion, the doctrine of enforcing annulled arbitral awards in France is quite fleshed out: annulment at the seat does not itself constitute grounds for non-enforcement of the award in France. The French courts will analyse the award based on the applicable criteria of French law and decide upon its enforcement under the same rules. Nevertheless, many questions have been raised by opponents of the pro-enforcement approach, which need to be addressed.

III. ARGUMENTS FOR AND AGAINST THE ENFORCEMENT OF ANNULLED AWARDS

In this section, I will analyse some of the most pertinent arguments opposing the idea of enforcing annulled awards and show that none of these arguments is sufficient to conclude that awards annulled at the seat cannot be enforced.

1. The New York Convention prohibits enforcement of awards annulled at the seat

The first argument appears to support an interpretation of Article V(1)(e) of the New York Convention,¹⁰ according to which the enforcement of awards that were annulled at the seat is prohibited. The argument is based on the idea that Article V(1)(e) is to be read as placing an obligation without any discretion on domestic courts to refuse

⁸ Cour de cassation, civile, Chambre civile 1, 29 juin 2007, 05-18.053.

⁹ *Cour d'appel de Paris, Société Egyptian General Petroleum Corporation v. Société National Gas Company (NATGAS)* / 17/19850, 21 May 2019.

¹⁰ Article V(1)(e) of the New York Convention reads in relevant part: "recognition and enforcement of the award may be refused [...] only if [...] the award [...] has been set aside or suspended by a competent authority of the country in which [...] the award was made".

enforcement should any of the scenarios encompassed by Article V come into play. This idea has been refuted by most eminent authors¹¹ and domestic courts alike.¹²

By applying the general rules of treaty interpretation,¹³ we may arrive at the conclusion that enforcement is not prohibited by the New York Convention. First, the use of the modal verb “may” in the first sentence of Article V(1) is a tell-tale sign of the drafter’s intention to allow for judicial discretion. This is also supported by the wording of the equally authentic texts of all other language versions of the New York Convention, bar the French text. Nevertheless, even the French text is not in explicit contradiction to this interpretation.¹⁴ Second, as to the object and purpose of the New York Convention, domestic court interpretation is consistent – the goal of Article V(1)(e) was to move away from the “double exequatur” system of the 1927 Geneva Convention.¹⁵ Therefore, if we accept the premise that Article V(1) is to be interpreted as a non-discretionary obligation, there is a dissonance between the actual text and the drafters’ intention, since this interpretation would entail the same double exequatur mechanism that the drafters wished to avoid.¹⁶ Consequently, as both the textual interpretation and the analysis based on the object and purpose support the approach proposed by French courts, the argument that the New York Convention prohibits enforcement holds no ground.

2. An award annulled at the seat is “dead”

Another argument put forward by some eminent practitioners is that an award has no continued existence once it is annulled at the seat.¹⁷ This idea proclaims that the binding nature of an arbitral award derives from the national legal system of the seat of the arbitration. Hence, the courts at the seat have exclusive competence to decide upon the validity of an arbitral award. The idea also received more traction after the

¹¹ Paulsson, *Enforcing Arbitral Awards...*, 6–11.

¹² High Court of England, judgment of 20 January 1997, per Longmore J (unreported); G. R. Delaume, *Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State*, (1997) (2) *Revue du droit des affaires internationales*, 253–254.

¹³ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331, Article 31.

¹⁴ J. Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, (1998) 14 (2) *Arbitration International*, 229. <https://doi.org/10.1093/arbitration/14.2.227>

¹⁵ Paulsson, *Enforcing Arbitral Awards...*, 7–9.

¹⁶ See, *German (F.R.) party v. Dutch party*, President of Rechtbank, The Hague, Netherlands, 26 April 1973, *Yearbook Commercial Arbitration 1979* – at 305–306 (stating that “[a]n important improvement of the New York Convention for the Execution of Foreign Arbitral Awards of 1927 is the fact that the double exequatur leave for enforcement is abolished”); *Joseph Müller AG v. Bergesen und Obergericht (II. Zivilkammer) des Kantons Zürich*, Court of First Instance, Switzerland, 26 February 1982 (holding that “the aim of the New York Convention is to avoid the double exequatur”).

¹⁷ van den Berg, *Enforcement of Annulled Awards?*

oft-cited U.S. Appellate court decision in *TermoRio SA v. Electranta SP*.¹⁸ In that case, the U.S. Appellate court refused to enforce an arbitral award that was annulled at the seat of arbitration. The court relied on the argument that an award does not exist to be enforced once it has been annulled at the seat.¹⁹ According to the U.S. Appellate court, this approach is also in line with the spirit of the New York Convention.²⁰

This argument is, however, refutable when we take a closer look at from where the power of the arbitrators to decide upon the issue derives. As opposed to ordinary courts – whose power to decide disputes are conferred upon them by State legislation – arbitration is a creature of consent. It is based on an agreement between private individuals who, in most scenarios, select a seat based on convenience and logistics and not to root their dispute immutably to one jurisdiction. International arbitration therefore cannot be regarded as a manifestation of the power of the state. In fact, one of the most glaring elements that defines arbitration compared to ordinary courts is the lack of state control over the arbitral process.²¹ As such, it is unconvincing that domestic courts at the seat of arbitration would have the power to extinguish arbitral awards with an *erga omnes* effect towards other States based on this idea.

Furthermore, the idea of “Ex Nihilo Nihil Fit” (nothing comes from nothing) simply does not line up with the text of the New York Convention.²² Both Article V(1) and Article VII of the New York Convention stipulate the possibility of the recognition of an arbitral award despite its annulment. Consequently, any idea claiming that an award is extinguished would render the text in Article V(1) and Article VII of the New York Convention obsolete, in that there would be no award left to be recognised.²³

Hence, if we accept that international arbitration is not tied to one legal system and that the New York Convention allows for the enforcement and recognition of awards annulled at the seat, an award cannot be extinguished via annulment at the seat.

3. Uniformity must be maintained

The idea here is that the enforcement of annulled awards gives rise to inconsistencies in the system. The *Hilmarton* decision is usually singled out as the main perpetrator of this. In *Hilmarton*, as discussed above, there was a point in time when two arbitral awards with a party- and issue identity existed simultaneously in the French legal

¹⁸ *TermoRio SA v. Electranta SP*, 487 F.3d 928 (D.C. Cir. 2007).

¹⁹ *Ibid.* 936.

²⁰ *Ibid.* 937.

²¹ P. Lalive, *Les régies de conflit de lois appliquées au fond du litige par arbitre international siegeant en Suisse*, (1976) (3) *Revue de l'arbitrage*, 155.

²² G. Born, *International Commercial Arbitration*, 3rd ed., (Wolters Kluwer, 2021) 3991–3992.

²³ *Ibid.*

system. Commentators were swift to point out the absurdity of such a result.²⁴ They claimed *Hilmarton* to be a warning sign for things to come should the French approach gain more popularity.

Despite the pertinence of this argument, history has not proved that such fears are valid. Even so, the inconsistency produced by *Hilmarton* was ultimately resolved by the *Cour de cassation*.²⁵ It is to be noted that situations similar to those in *Hilmarton* arise only sporadically. As Professor Paulsson puts it “[Hilmarton] is a two-headed white rhinoceros which might give us a thrill in the cinema but does not really endanger our daily walk to work”.²⁶ This is because awards are rarely annulled, since the grounds for annulment in UNCITRAL Model Law countries²⁷ are very limited. Moreover, the court of enforcement will usually come to the same conclusion on annulment as the seat, since the grounds for annulment will in most instances be the same in the jurisdiction of enforcement.

In any event, the benefits of the pro-enforcement approach, i.e. respecting the principle of party autonomy to the fullest extent and refraining from the encroachment of state sovereignty, far outweigh the issues caused by the possibilities of occasional and temporary inconsistencies in the system.

IV. POTENTIAL SOLUTIONS

The above-raised issues may be resolved at the international treaty level or the local domestic level. This entails either (i) the revision of the relevant articles of the New York Convention so that it leaves no debate on interpretation, or (ii) to maintain the *status quo* and trust State courts to develop an approach organically, that inches closer to uniform as time passes by.

1. Revision of the New York Convention

Some authors have argued that the New York Convention is ripe for revision due to the systematic inconsistencies that have arisen in practice.²⁸ Although hypothetically this could be the fastest way to resolve the issue, in practice this seems unlikely to occur,

²⁴ B. Laurent et al., Fabre, 1995 Bull. ASA, 118.

²⁵ Fouchard, La portée internationale de l’annulation de la sentence arbitrale dans le pays d’origine, 329.

²⁶ Paulsson, Enforcing Arbitral Awards..., 14.

²⁷ Legislation based on the Model Law has been adopted in 85 States in a total of 118 jurisdictions see: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (Last accessed: 31 July 2019).

²⁸ Hamid G. Gharavi, Enforcing Set Aside Arbitral Awards: France’s Controversial Steps beyond the New York Convention, (1996) 93 (6) *Transnat’l L. & Pol’y*, 93–108.

since amending the New York Convention would require all contracting parties to the New York Convention to agree on the amendment without reservations. In today's world, this is close to impossible, therefore we may rule out this solution.

2. Organic adoption of uniform standards by national courts

A more likely scenario is that national courts adopt a congruent solution that rises to the level of uniformity which can settle the issue. The only question is what solution they should adopt.

In my view, the approach heralded by Professor Paulsson is to be welcomed. This is to disregard annulment at the seat that was based on "local standard annulment" and instead only refuse enforcement if it is an "international standard annulment".²⁹ International standard annulment could be anything that falls within the scope of the first four paragraphs of Article V(1) of the New York Convention. *Au contraire*, local standard annulment is anything that is specific to the national legal system of the seat but does not meet the conditions laid down in the first four paragraphs of Article V(1) of the New York Convention.

With the adoption of the UNCITRAL Model Law by more and more States, this uniformity is already taking place. The approach elucidated by Professor Paulsson that is international standard annulment, has also been somewhat adopted in the 1961 European Convention of International Commercial Arbitration. In Article IX of the European Convention, the grounds for refusal of recognition or enforcement are limited to those set out in the first four paragraphs of the New York Convention; in essence, to international standard annulment grounds. Thus, a viable alternative to the total restriction of enforcing annulled awards exists. It offers a way to harmonise the process while simultaneously preserving the transnational character of international arbitration and state sovereignty.

V. Conclusion

At the heart of the question lies a policy issue that needs to be decided by States: upon what should a decision on enforcement or non-enforcement of an award be predicated? Should it be the arbitral award or a judicial decision by a national court at the seat of arbitration?

If the answer to the question is the latter, in my view, that would render the arbitral process no more than a mere spectacle. The award would always need to be

²⁹ Paulsson, *Enforcing Arbitral Awards...*, 23–28.

confirmed by a national court at the seat of arbitration to furnish it with any practical effect. This would amount to granting that court a transnational global effect – extra-territorial jurisdiction. Furthermore, this approach would be a step back to the double exequatur system of the Geneva Convention – an outcome that was to be avoided by the authors of the New York Convention.

By taking the approach argued in this essay, the arbitral award would have to be looked at by the national courts who have the most “skin in the game”: the jurisdiction where enforcement is carried out. It seems counterintuitive to afford more power to the decision of a court that has no interest in the enforcement being carried out rather than the court that permits seizure and sale of assets on their territory. On the one hand, the New York Convention is most certainly not a barrier to this line of thought. On the other hand, it is true that inconsistencies might arise by taking this approach; however, they are rare and methods to deal with such anomalies already exist as showcased in *Hilmarton*. If one is a true proponent of international arbitration on a global scale, the approach to be taken, in my view, is to allow the enforcement of arbitral awards annulled under local standards at the seat.