C. The Effect of Annulment

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WHAT IS TO BE DONE WITH ANNULLED AWARDS?*

If an award rendered in Boston is set aside by a court in Massachusetts, should it (can it) be given effect against assets in Paris or London? Different courts take varying positions. Although the French have shown little difficulty in enforcing annulled awards, American and British courts tend to hesitate. The effect of annulled awards presents itself differently in an international context from a single-country context. If a judge in Boston vacates an award made in Massachusetts, the award normally becomes unenforceable against assets throughout the United States. The story will be different, however, at least in legal analysis, if the vacated award is presented for enforcement against bank accounts in Zürich or London.

The subject retains considerable sex appeal, continuing to provoke controversy among scholars and practitioners. Some eminent writers suggest a free-floating autonomous legal order for arbitration (*un ordre juridique arbitral*) distinct from any national legal orders.[1] Others are more skeptical on that score.[2]

The matter was revisited in lively debate about a Dutch court decision granting enforcement of four arbitral awards that had been annulled in Russia, all arising from the much publicized *Yukos* controversies .[3] Some scholars have expressed a general sympathy with enforcement of vacated awards, at least if the annulment was for a "local" standard, while others argue that an arbitral award has no existence after annulment.[4]

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* Adapted from the first edition of this work.

[1] The theme is further explored in Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (2008); English version published as *Legal Theory of International Arbitration* (2010). See also Emmanuel Gaillard, *The Representations of International Arbitration*, 1 J Int'l Disp. Settlement 271 (2010).

[2] See e.g. Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9(2) ICC Int'l Ct. Arb. Bull. 16 (1998).

[3] *Yukos Capital Sarl v. OAO Rosneft*, Court of Appeal of Amsterdam (Enterprise Division), 28 April 2009, LJN BI2451 § 3.10. The case implicated loan agreements between Yukos Capital as lender and OJSC Yuganskneftgas as borrower concluded at the time when both Yukos Capital and Yuganskneftgas were part of the Yukos group. The underlying dispute derived from a Russian oil company once controlled by Russian oligarch Mikhail Khodorkovsky until he was imprisoned after a bankruptcy and tax assessment which some commentators suggest was manufactured for political reasons.

[4] Compare Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9(1) ICC Bulletin 14 (1998) and Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia, Case Comment on Court of Appeal of Amsterdam 28 April 2009*, 27(2) J. Int'l Arb 189 (2010).

Each side of the debate seems to invoke the same regard for party intent. If litigants agree to remove a dispute from the courts, why defer to a judicial annulment? On the other hand, the parties often agree to arbitration not in the abstract, but in a specific geographical venue. Thus the prospect of annulment at the arbitral seat forms part of the bargain.

A middle position suggests that the soundest policy lies in treating annulment decisions like other foreign money judgments. The annulment should be respected except when reason exists to think that the judgment vacating the award lacked procedural integrity.[5] First put forward a dozen years ago,[6] this intermediate position has so far received little attention among arbitration aficionados, perhaps due to lack of entertainment value as compared with more extreme alternatives. At least one author, however, takes the view that the Amsterdam court in the *Yukos* case adopted this position.[7]

Moreover, the American Law Institute now advances a similar approach. The Draft Restatement of Law on International Commercial Arbitration suggests in commentary that set-aside awards may be recognized where there are "justifiable doubts about the integrity or independence of the set-aside court with respect to the judgment in question."[8]

The English text of Article V(1)(e) of the New York Arbitration Convention gives no automatic *res judicata* effect to a foreign judgment setting aside an arbitral award, but provides that vacated awards "may" (not "must") be refused enforcement. Thus courts outside the country of arbitration are generally free either (i) to recognize the arbitral award, or (ii) to deny recognition and thereby give effect to the annulment.[9]

Nor do many arbitration statutes give much guidance on when or whether courts should enforce vacated awards. Generally the matter is addressed only by scholarly perspectives and conflicting case law.[10] German commentary on award annulment presents an interesting illustration of the uncertainties that lurk in and around the enforcement forum's predicament.[11] The *Zivilprozessordnung* provides that foreign awards will receive recognition in

[5] For an illustration of an annulment lacking procedural integrity, one might point to the underlying South African case implicated by the enforcement proceedings in *Telecordia Tech. Inc. v. Telkom SA Ltd.*, 458 F. 3d 172 (3rd Cir. 2006). An award in an ICC arbitration, rendered in South Africa against a South African company, had been vacated by a South African judge who refused to allow the ICC to appoint a new and neutral tribunal. Instead, the vacating judge constituted a new arbitral tribunal composed of three retired South African judges nominated by the losing South African party.

[6] William W. Park, *Duty and Discretion in International Arbitration*, 93 Am. J. Int'l L. 805 (1999).

[7] Lisa Bench Nieuwveld, Yukos v. Rosneft: *The Dutch Courts find that Exceptional Circumstances Exist*, (11 Feb. 2010), <http://www.kluwerarbitrationblog.com>.

[8] ALI Restatement (Third) of the U.S. Law of International Commercial Arbitration, § 5–12 Tentative Draft, September 2010. Comment "d" provides: "In extraordinary circumstance, an award that has been set aside may also be recognized or enforced . . . when it is shown that the set-aside court knowingly and egregiously departed from the rules governing the set-aside in that jurisdiction [or] substantial and justifiable doubts [exist] about the integrity or independence of the rendering court with respect to the judgment in question."

[9] By contrast, the European Arbitration Convention (Geneva 1961) takes a different approach, permitting non-recognition of annulled awards only if vacated on specific grounds listed in the Convention. See European Convention, Art. IX(2). These "approved" grounds for vacatur mirror the non-recognition standards found in New York Arbitration Convention, Art. V(1)(a)–(d), related to matters such as lack of notice, excess of jurisdiction and improper constitution of the arbitral tribunal.

[10] For a discussion of the controversial French and American decisions in *Hilmarton v. OTV, Chromalloy v. Egypt* and *Baker Marine v. Chevron*, see Park (n. 6), an adaptation of which forms the next chapter.

[11] Thanks are due to Jens Bredow, Ulrich Lohmann and Christina Spiller for help in better understanding these interesting aspects of German law.

accordance with the New York Arbitration Convention,[12] but otherwise gives little guidance on what should be done with awards set aside in their country of origin.[13]

Some scholarly comment allows that German courts can recognize vacated awards in exceptional cases (*Ausnahmefällen*).[14] For example, enforcement of vacated awards would be appropriate under the 1961 European Arbitration Convention, or when the foreign judgment pronouncing annulment was itself tainted with procedural impropriety.[15]

Prevailing opinion in Germany, however, seems more categorical in denying enforcement to awards annulled at the arbitral seat; some authoritative commentary interpreting the "may refuse" (*Versagendiirfen*) in the New York Convention to mean "must refuse" (*Versagenmüssen*), thus transforming discretion into duty.[16]

The following chapter, "Duty and Discretion in International Arbitration" (Part II, Section C, Chapter 2), addresses the concerns implicit in the oft-debated question, "What is to be done with annulled awards?"[17] The dilemma is complicated by the fact that the place where annulment is pronounced might be designated by the parties' contract as the official arbitral "seat" for purposes of making the award,[18] notwithstanding that hearings and deliberations for convenience unfold elsewhere.[19]

The chapter which follows suggests that as a matter of policy the best path might be to treat annulments like other foreign commercial judgments, granting them deference (thus denying enforcement to vacated awards) *unless* the judicial action that vacated the award was infected with fundamental procedural impropriety. Such an approach would fit nicely within the discretionary framework created by the New York Convention.[20] A lack of integrity in the annulment process might be found, for example, in a foreign judge's refusal to remand a

[12] *Zivilprozessordnung* (ZPO), § 1061(1).

[13] The ZPO and case law do, however, provide standards concerning the finality of German judgments related to vacated awards. See ZPO §1061(3). For an interesting discussion of the case, see Erica Smith, *Vacated Arbitral Awards*, 20 B.U. Int'l L.J. 355 (2002).

[14] Peter Schlosser in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, 22. Auflage, Band 9, § 1061 (Tübingen 2002) at 664 (Rdnr. 73) and 696 (Rdnr. 131a).

[15] Peter Schlosser in Stein/Jonas (n. 14) 696 (Rdnr. 131a). In passing Schlosser suggests that a foreign annulment should not be given deference if it falls within ZPO §328(1) (sub 2) and (sub 4), which provide for non-recognition of foreign judgments that result from a violation of the right to be heard or of fundamental principles of German law ("*Unvereinbarkeit mit den wesentlichen Grundsätzen des deutschen Rechts*"). On the view that foreign annulments should be treated like other commercial judgments, see Reinhold Geimer, *Internationales Zivilprozessrecht*, 5. Auflage (Köln, 2005), at 1185 (Rdnr. 3944).

[16] See Joachim Münch, *Münchener Kommentar* ZPO, 2. Auflage, Band 3, § 1061 (München 2001), at 1419 (Rdnr. 6).

[17] During the years since its publication in 1999, scholarly commentary has continued. See e.g. Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID Rev. Foreign Investment L.J. 16 (Spring 1999) and Emmanuel Gaillard, *Jurisprudence Etrangère*, Rev. Arb. 135 (2000).

[18] See English Arbitration Act of 1996, §§ 2 and 3. See also Francis A. Mann, *Where Is an Award "Made"?*, 1 Arb. Int'l 107 (1985).

[19] See e.g. Article 14(2) of the International Chamber of Commerce (ICC) Arbitration Rules, providing that unless otherwise agreed by the parties, the arbitral tribunal may "conduct hearings and meetings at any location it considers appropriate." Article 14(3) goes further, and permits the tribunal to deliberate "at any location it considers appropriate" regardless of whether the parties agree.

[20] See earlier discussion of Article V(1)(e). In some countries, the establishment of this approach might fall to the legislator, while in others (notably common law jurisdictions) the rule might be elaborated through judicial decision.

case to neutral arbitrators.[21] In such circumstances, an enforcement forum might well be justified in recognizing the vacated arbitral award rather than the vacating court judgment.[22]

[21] In this connection, readers might be interested in a recent decision by the High Court of South Africa. In *Telkom SA Ltd v. Anthony Boswood, International Chamber of Commerce & Telcordia Technologies Inc.* (27 November 2003, De Villiers J.).

[22] For a variant on this theme, arising from an intriguing case involving improper administration of oaths, see *International Bechtel Co. Ltd. v. Department of Civil Aviation of Dubai*, 300 F. Supp. 2d. 112 (D.D.C. 2004) and 360 F. Supp. 2d 136 (D.D.C. 2005).