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Client Alert

International Arbitration Practice Group

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The Next Chapter in Judicial Treatment of Annulled Awards: New York Court Enjoins Overseas Enforcement of Award

Introduction[1]

On June 29, 2017, a New York state appellate court unanimously upheld an extraordinary lower court order in a decision that may have significant implications for the cross-border enforcement and recognition of arbitral awards. This case had seen a lower court vacate an arbitral award rendered in New York. The lower court then took the additional step of enjoining the holder of the vacated award (the "award creditor") from taking any action anywhere in the world to enforce, execute or collect on the award. While it remains to be seen whether this lower court order will have any practical effect, this highly unusual development adds another dimension to the already-contentious debate concerning the enforceability in secondary jurisdictions of awards that have been vacated by domestic courts at the seat of arbitration.

Background: Regime Governing Enforcement of International Arbitral Awards

The principal legal instrument governing the recognition and enforcement of arbitral awards internationally is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (better known as the "New York Convention"). A large majority of nations (157) are party to this Convention, including all of the world's major economies.[2] The United States has ratified the New York Convention, and its implementing legislation is codified in Chapter 2 of the Federal Arbitration Act (FAA).[3]

The New York Convention replaced a prior international treaty known as the Convention on the Execution of Foreign Arbitral Awards (the "Geneva Convention"). Importantly, the New York Convention removed a requirement, which had been a central feature of the Geneva Convention, that required an award creditor to seek and obtain recognition of an arbitral award by a court at the seat of arbitration as a prerequisite to seeking recognition in any other jurisdiction.[4] In making this change, the New York Convention "liberalized procedures for enforcing foreign arbitral awards."[5]

Unlike its predecessor, the New York Convention embodies a strong pro-enforcement stance, and has created a regime in which there is a presumption in favor of the recognition and enforcement of international arbitral awards

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by domestic courts, subject to narrow exceptions. Article III of the Convention provides, for instance, that each state party "**shall** recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. . .," subject to limited exceptions in which a court may refuse recognition.[6]

Those exceptions are set forth in Article V of the New York Convention, and each is designed to ensure that a court reviewing a foreign arbitral award is not compelled to recognize (and give sovereign backing to) an award that is affected by a fundamental defect that affects due process concerns, the arbitral tribunal's competence, or the award's validity. One of these, codified at Article V(1)(e) of the Convention, permits a court before which the judgment creditor seeks recognition to refuse to recognize the award if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award is made," *i.e.*, by a court at the seat of arbitration or in the jurisdiction whose laws governed the arbitral proceedings.[7] Importantly, this provision of the Convention does not *require* a court to refuse enforcement of an award that has been set-aside, annulled or vacated by a court in which the country was made; it simply relieves a court of its presumptive duty to do so. As one U.S. federal court explained, "an American court, and courts of other countries have enforced awards, or permitted their enforcement, despite prior annulment" by courts at the seat of arbitration.[8] This was illustrated in a recent decision by the U.S. Court of Appeals for the Second Circuit, which upheld the recognition of an arbitral award rendered in Mexico, despite the fact that the award had been annulled by a Mexican court.[9]

The history, text and subsequent application of the New York Convention therefore make clear that the treaty was meant to foster a liberal approach toward the recognition and enforcement of arbitral awards, and specifically to empower secondary jurisdiction courts – *i.e.*, courts in countries other than the country where the award was made – to recognize awards in their own discretion and regardless of whether the award has been confirmed at the arbitral seat. It is against this backdrop that the Appellate Division's recent decision upholding an anti-enforcement injunction must be understood.

The Appellate Division's Decision and its History

In 2010, the petitioner sued the respondents, a financial institution and one of its managers, alleging several civil causes of action.[10] In August of 2013, an arbitration panel convened under the auspices of the Financial Industry Regulatory Authority (FINRA) rendered an award in favor of the petitioner, ordering the respondent to pay nearly US$ 10.8 million in damages.[11]

The respondents promptly sought annulment of the award before the Supreme Court of the State of New York, New York County. They alleged that certain of the arbitrators had engaged in misconduct, including by failing to disclose a past dispute with one of the respondents. More importantly, respondents alleged that the arbitrators had entered an award despite the fact that the parties had already reached a settlement in April 2012, pursuant to which one of the respondents had agreed to pay the petitioner US$ 800,000.[12] In a January 2, 2014 opinion, the trial court found the settlement to be dispositive, and vacated the arbitral award on the ground that the tribunal had manifestly disregarded the law by failing to enforce the parties' settlement.[13] This decision was affirmed.[14]

The dispute did not end there, however, as it later came to light that the petitioner had sought to enforce and collect upon the (now-vacated) award in France, in an *ex parte* court proceeding known as *exequatur*.[15] In March 2016, a French court recognized the vacated award and issued writs for the seizure of property belonging to the respondent financial institution.[16] The petitioner subsequently returned to the New York court and sought to vacate the court's prior judgment that had annulled the August 2013 arbitral award. The respondent in turn cross-moved to enjoin the petitioner from enforcing the vacated award anywhere in the world.

In an order dated January 17, 2017, the court granted the respondent's motion to enjoin the petitioner from "undertaking any action, wherever located, to enforce, execute, or collect on the Award."[17] The petitioner was also enjoined from "opposing any efforts … to appeal, vacate, overturn, or otherwise dissolve" the French court order recognizing the award.[18]

The Appellate Division, First Department affirmed this order on June 29, 2017. It noted that the lower court's injunction was justified and proper "in the interest of protecting the New York judgment."[19] The First Department relied on *Indosuez International Finance v. National Reserve Bank*, in which the court upheld an anti-suit injunction aimed at protecting a judgment on the merits rendered by a New York court.[20] Notably, however, neither *Indosuez* nor any other decision cited by the First Department dealt with the propriety of anti-suit injunctions in the specific context of a party seeking to enforce a foreign arbitral award. The First Department also found that the petitioner had brought the French proceeding in bad faith, a fact which further justified an anti-suit injunction.[21] Finally, the First Department determined that the French court's order was not entitled to recognition on grounds of international comity.[22]

Implications of the Decision

The case presented an issue of first impression in New York, and as such is extremely significant. New York, as a major world financial capital, is a key venue both for international arbitrations and for the enforcement of arbitral awards rendered elsewhere. And because New York is a common law jurisdiction, appellate decisions affecting the enforceability of arbitration awards can have a significant impact both inside and outside the state. That said, the decision, while understandable in a narrow sense – it is well-settled that courts have authority to protect their judgments from being undermined through foreign judicial proceedings – is difficult to reconcile with the New York Convention's animating purpose or specific enforcement mechanisms, which expressly contemplate multiple, simultaneous proceedings on a single award and allow national courts sitting in secondary jurisdiction to retain their sovereignty by making an independent determination about whether to recognize the award in their territory.

Despite this clear tension, the trial court did not find that its decision conflicted with the New York Convention; it found that the New York Convention was not implicated at all. The court based its findings on its view that the dispute was not international: it involved two U.S. parties, and the arbitration was seated in New York. The only international aspect of the case, according to the trial court, arose when the award creditor decided to seek recognition of the vacated award in France, an action that the trial court viewed as inequitable forum-shopping motivated by the fact that French courts do not generally afford deference to set-aside decisions by primary jurisdiction courts.

The court's rationale notwithstanding, the decision is troublesome when viewed within the framework of the New York Convention, which arguably was implicated once the award-creditor sought recognition of the award outside the United States. There is no question that because the arbitral proceedings were conducted in the United States, the New York Convention governed the proceedings in France. And while there is nothing in the New York Convention or the FAA that **prohibits** a domestic court from issuing an anti-suit injunction aimed at preventing a judgment creditor from seeking recognition of an annulled award abroad, it is difficult to square such injunctions with the overall spirit and purpose of the New York Convention, which, as noted above, expressly contemplates that every country sitting as a secondary jurisdiction shall be entitled to make an independent determination about whether to enforce the award, subject only to its treaty obligation – set forth in Article III of the New York Convention – to recognize any award that is **not** subject to one of Article V's grounds for non-recognition. Here, the French court could have refused to recognize the award under Article V, since it had been annulled in New York. The New York court's injunction, however, effectively divested the French courts of the jurisdiction and authority to make that decision, undermining their sovereignty under the New York Convention. By doing so, the New York court's injunction significantly undermines the New York Convention's central mechanism, and the Appellate Division's affirmance of that injunction creates a binding legal precedent that affords New York courts the same veto power over enforcement abroad that primary

jurisdiction courts enjoyed under the Geneva Convention, which was widely considered to be ineffective.[23] The decision also ignores voluminous U.S. caselaw on the issue, as federal courts have held repeatedly that primary jurisdiction courts do not have the authority or ability to prevent enforcement of an annulled award in secondary jurisdictions.[24] Insofar as the Appellate Division's decision – by presenting the threat of contempt sanctions against petitioner should he continue to attempt to enforce the award abroad – does precisely that, the New York Court of Appeals (the court of last resort in the New York state court system) may wish to review the decision, and to consider, as a matter of New York law and policy, whether New York wishes to take an outlier position on a question that is governed by a treaty-in-force in the United States.[25]

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

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[1] The authors would like to thank Timothy McKenzie, an associate in King & Spalding's Global Disputes practice (New York) for his contributions to this client alert.
[2] *See* New York Arbitration Convention, Contracting States (last visited July 3, 2017), http://www.newyorkconvention.org/countries.
[3] *See* 9 U.S.C. § 201 *et seq.*
[4] *See* W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 9 (1995).
[5] *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997).
[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958 [hereinafter New York Convention].
[7] New York Convention art. V(1)(e).
[8] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003).
[9] *Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex – Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016).
[10] Stephanie Russell-Kraft, *FINRA Arbitrators Ignored Citigroup Deal, NY Court Says*, LAW360 (Apr. 9, 2015, 7:04 PM), https://www.law360.com/articles/641460/finra-arbitrators-ignored-citigroup-deal-ny-court-says.
[11] *Id.*
[12] *Id.*
[13] *Citigroup Global Markets, Inc. v. Fiorilla*, No. 653017/2013, 2014 WL 51678 (Sup. Ct. N.Y. Co. Jan. 2, 2014).
[14] *See Citigroup Global Markets, Inc. v. Fiorilla*, 127 A.D.3d 491, 4 N.Y.S.3d 528, 528 (1st Dep't 2015) ("The arbitrators manifestly disregarded the law by failing to enforce the settlement that respondent and petitioner Citigroup Global Markets, Inc. entered into on April 29, 2012.").
[15] *Citigroup Global Markets, Inc. v. Fiorilla*, No. 4400– 4401N, 2017 WL 2800830 (1st Dep't June 29, 2017).
[16] *See id.*
[17] *Citigroup Global Markets, Inc. v. Fiorilla*, No. 653017/2013, Dkt. No. 177 (Jan. 17, 2017).
[18] *Id.*
[19] *Citigroup Global Markets, Inc. v. Fiorilla* , No. 4400– 4401N, 2017 WL 2800830 (1st Dep't June 29, 2017).
[20] *See Indosuez Intern. Fin., B.V. v. National Reserve Bank*, 304 A.D.2d 429, 758 N.Y.S.2d 308, 310 (1st Dep't 2003).
[21] *Citigroup Global Markets,* 2017 WL 2800830.
[22] *Id.*
[23] *See* W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 9 (1995) (noting that the Geneva Convention's "requirement of double *exequatur* greatly limited its utility.").
[24] *See Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex – Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016); *see also Baker Marine (Nig.) Ltd. V. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999); *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F. 3d 928 (D.C. Cir. 2007).
[25] Were the Court of Appeals to decline review, the petitioner would be entitled to petition the U.S. Supreme Court for a writ of certiorari.