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INTERNATIONAL ARBITRATION LAW

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The Representations of International Arbitration

One's view of the relationship between international arbitration and national legal systems determines the response to such fundamental questions as the respective role of the arbitral tribunal and the domestic courts (often those of the seat of the arbitration)—for example, in determining the validity of the arbitration agreement, the arbitrators' power to choose the rules applicable to the merits in the absence of agreement by the parties or the enforcement of an award set aside in the country where it was rendered.

The most significant question in this respect is the source of the arbitrators' power to adjudicate. Does such power emanate from a single national legal system (frequently that of the seat of the arbitration) or is international arbitration an autonomous process where the arbitrators derive their powers from the sum of all legal systems that recognize, under certain conditions, the legal force of the arbitration agreement and the resulting award?

The impact of one's representation of inter-national arbitration is not merely a question of legal theory and entails significant practical consequences (on the representations of international arbitration from both a theoretical and practical viewpoint, see the course given by the author at The Hague Academy of International Law in July 2007 on "ASPECTS PHILOSOPHIQUES DE L'ARBITRAGE INTERNATIONAL," to be published in the Collected Courses of The Hague Academy, as well as the contribution to the Sixth Brazilian Congress on International Arbitration of Oct. 31, 2006 at Salvador de Bahia on "Souveraineté et autonomie. Réflexions sur les représentations de l'arbitrage international," published in JOURNAL DU DROIT INTERNATIONAL, 2007, No. 3. See also "Autonomy of International Arbitration," NYLJ, Dec. 14, 2006; "L'interférence des juridictions du siège dans le déroulement de l'arbitrage," LIBER AMIROCUM CLAUDE REYMOND, 2004, at 83; "Enforcement of Awards Set Aside in the Country of Origin: the French Experience," ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 1999, at 505).

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One of the most hotly debated subjects is that of the recognition and enforcement of awards set aside in the country where the award was rendered. Those who view international arbitration as rooted in the legal system of the seat of the arbitration will give significant weight to the position taken by the courts of that country on the validity of the award and will expect the courts of other countries where the recognition and enforcement of the award is sought to defer to such position. Those, on the contrary, who view international arbitration as a process not rooted in a given domestic legal system but deriving its legal force from the entirety of the legal systems that accept to recognize the arbitral award will consider that each legal system should determine for itself (including through its courts) the conditions under which it will recognize and enforce an arbitral award.

The New York Convention

The rules established by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, today binding on 142 countries, provide elements of response to the above questions. Article III of the convention provides that "[e]ach Contracting State 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"* (emphasis added). In other words, the standards according to which an award "shall" be recognized are those of the country where recognition and enforcement is sought.

Consistent with this principle, Article V(1)(e) of the convention envisages the situation where 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," but does not make it compulsory for the courts of other countries to give effect to such circumstances: in such a situation, "[r]ecognition and enforcement of the award *may* be refused" (emphasis added). That the convention's drafters specifically chose to use the word "may" rather than "shall"

shows their intention to preserve the discretion of every legal system to decide for itself, and, based on its own standards, whether or not an arbitral award meets the conditions of recognition and enforcement (see also J. Paulsson, "May or Must Under the New York Convention: An Exercise in Syntax and Linguistics," ARBITRATION INTERNATIONAL, 1998, at 227). In other words, the positions taken by the courts of the seat of the arbitration with respect to the validity of the award have no absolute effect in other legal systems.

The underlying foundation of these rules is the convention's policy in favor of enforcement of arbitral awards. This pro-enforcement philosophy also justifies the rule under Article VII according to which the convention's provisions do not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." It follows that, in circumstances in which the convention's provisions are more restrictive than the ordinary rules applicable in the country where the award is relied upon, the more favorable rules benefit the party applying for recognition and enforcement.

Focus on the Award

These rules, together with Article IV of the convention, which requires the party applying for recognition and enforcement to supply solely the award and the arbitration agreement, constitute one of the greatest achievements of the New York Convention in that they focus on the award itself rather than on the judicial process surrounding the recognition and enforcement of the award in the country where it was rendered. Having abolished the requirement of "double exequatur" contained in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the New York Convention no longer requires that an award become "final" in the country where it was rendered in order to be relied upon in another country.

As a result, under the New York Convention, the determination of the validity of an award is conducted on the basis of the award as the primary product of the arbitral process, and not on the basis of the judicial decisions rendered at the seat of the arbitration. The underlying representation is that international arbitration is anchored in all legal systems that accept, according to their respective standards, to recognize the arbitral award, and not in a single legal system assimilating the arbitrators to its judges and integrating their awards into the judicial product of its courts.

This is, for example, the conception long adopted by French case law. French courts have consistently taken the view that, where an award has been set aside in the country where it was rendered, it can nonetheless be recognized and enforced in France if it meets the requirements of French law (see, in particular, the decisions in *Norsolor,* Cour de cassation, decision of Oct. 9, 1984, REVUE DE L'ARBITRAGE, 1985, at 431 and, in the English version, INTERNATIONAL LEGAL MATERIALS, 1985, at 360-364; *Hilmarton,* Cour de cassation, decision of March 23, 1994, REVUE DE L'ARBITRAGE, 1994, at 327 and, in the English version, MEALEY'S INTERNATIONAL ARBITRATION REPORT, vol. 9, Issue 5, May 1994, section E and commentaries at 6-7; and *Chromalloy,* Paris Court of Appeals, decision of Jan. 14, 1997, REVUE DE L'ARBITRAGE, 1997, at 395 and, in the English version, MEALEY'S INTERNATIONAL ARBITRATION REPORT, vol. 12, Issue 4, April 1997, section B and commentaries at 5-6).

Landmark 'Putrabali' Case

The two decisions rendered on June 29, 2007 by the French Cour de cassation in *PT Putrabali Adyamulia v. Rena Holding* are no exception to this consistent case law. The dispute in that case arose out of the performance of a contract for the sale of white pepper by PT Putrabali Adyamulia (Putrabali) to Rena Holding, with a two-level arbitration in London in accordance with the Rules of Arbitration and Appeal of the International General Produce Association (IGPA). Rena Holding having failed to pay the contract price for cargo lost in a shipwreck during transport, Putrabali initiated arbitral proceedings in London. A first award ordering Rena Holding to pay the contract price was reversed by a second award of April 10, 2001, holding that Rena Holding was justified in its refusal to pay the contract price (the 2001 award). Following Putrabali's appeal on a point of law, the High Court in London partially annulled the award based on the determination that Rena Holding's failure to pay for the cargo amounted to a breach of contract and remitted the award to the Arbitral Tribunal for reconsideration. On Aug. 21, 2003, the Arbitral Tribunal issued a new award in favor of Putrabali and ordered Rena Holding to pay the contract price of US$163,086 (the 2003 award).

By recognizing an absolute international effect to the positions taken by the courts of the seat of the arbitration which may happen to be the courts of one of the parties to the arbitration, 'TermoRio' encourages the party resisting arbitration or the resulting award to engage in tactical maneuvers.

In September 2003, Rena Holding obtained in France the recognition and enforcement of the 2001 award, a decision confirmed on March 31, 2005 by the Paris Court of Appeals (REVUE DE L'ARBITRAGE, 2006, at 665). In turn, Putrabali obtained in France the enforcement of the 2003 award, a decision reversed on Nov. 17, 2005 by the Paris Court of Appeals based on the res judicata effect of the enforcement decision of the 2001 award and the irreconcilable nature of the 2003 award with the 2001 award.

The question before the French Supreme Court was therefore the effect of the partial annulment of the 2001 award and its substitution by the 2003 award or, in other words, the international effect of the English High Court's annulment decision of the 2001 award.

Autonomy of Arbitration

In the first *Putrabali* decision, the French Cour de cassation maintained the Paris Court of Appeals' reasoning and the former case law on the French courts' discretion to enforce an award set aside by the courts of the seat of the arbitration when the award meets the enforcement requirements of French law set forth in Articles 1502 and 1504 of the New Code of Civil Procedure. The 2001 award meeting the enforcement requirements of French law, there was no justification to refuse its enforcement in France.

The corollary principle, applied in the second *Putrabali* decision of June 29, 2007, is that the recognition in France of an award set aside in the country where it was rendered is an obstacle to the recognition of a subsequent award rendered following the annulment of the first award, as this would

be contrary to the principle of res judicata and the incorporation into the French system of two irreconcilable decisions on the same dispute between the same parties.

These solutions being well-established in French law, the landmark character of the French Supreme Court's decision in *Putrabali* relates in fact to their ground-breaking justification. The rationale adopted so far by the French courts has been that an arbitral award is "not integrated" into the legal system of the seat of the arbitration and that therefore its annulment by the courts of the seat of the arbitration has no impact on its existence outside the realm of that particular legal system (see in particular the *Hilmarton* decision cited above; Paris Court of Appeals' decisions in *Société Bargues Agro Industries v. Young Pecan Company,* June 10, 2004, REVUE DE L'ARBITRAGE, 2004, at 733, and in *La Société SA Lesbats et fils v. Monsieur Volker Le Docteur Grub,* Jan. 18, 2007, unpublished). In *Putrabali,* the Cour de cassation has reinforced this underlying principle in holding that:

> An international award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought. Under Article VII of the New York Convention of 10 January 1958, Rena Holding was allowed to seek enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules, and could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country.

In other words, the French Supreme Court has recognized not only that an international arbitral award is not integrated into the legal order of the seat of the arbitration, but that it is not anchored in any national legal order at all. This recognition, however, does not mean that the award is not attached to any legal system. In further deciding that the arbitral award is a "decision of international justice," the Court has determined that it is rooted in a legal order autonomous from the national legal systems. Each state has discretion to determine for itself and based on its own standards whether or not to recognize and enforce an international arbitral award, but such decisions have no impact on the objective existence of the award as an autonomous international decision which derives its legal force from the community of all states and not from a single legal system.

The 'TermoRio' Decision

The decision in *Putrabali* can be contrasted with the decision rendered on May 25, 2007 by the U.S. Court of Appeals for the District of Columbia Circuit in *TermoRio S.A. E.S.P. and LeaseCo Group LLC v. Electranta S.P. et al.* The Court of Appeals in that case affirmed the District Court's decision to refuse the enforcement of an award annulled in Colombia as the seat of the arbitration (see *TermoRio S.A. E.S.P. et al. v. Electrificadora Del Atlantico S.A. E.S.P. et al.,* March 17, 2006, 421 F. Supp. 2d 87). The dispute related to the purchase by Electrificadora Del Atlàntico (Electranta) of energy supplied by TermoRio, a Colombian state-owned public utility, pursuant to a power purchase agreement containing an arbitration agreement with an ICC arbitration in Colombia. The award in excess of US$60 mil-lion rendered in 2000 in favor of TermoRio was challenged in Colombia by Electranta and the Colombian Council of State (Consejo de Estado), Colombia's highest administrative court, set aside the award on the ground that the arbitration clause violated Colombian law which, at the date of the agreement, did not expressly permit recourse to ICC arbitration.

Referring to Article V(1)(e) of the New York Convention, the Court of Appeals held that:

> The arbitration award was made in Colombia and the Consejo de Estado was a competent authority in that country to set aside the award as contrary to the law of Colombia. See New York Convention art. V(1)(e)…. Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, *obliged* to respect it…. Accordingly, we hold that, because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of the award under the FAA or the New York Convention. (Emphasis added).

Revival of Double Exequatur

The Court's reasoning is largely based on the "validity of a foreign judgment vacating an arbitration award." Deciding that, under the New York Convention, "the critical element is the place of the award" and that, notwithstanding the convention's "purpose…to encourage the recognition and enforcement of commercial arbitration agreements in international contracts," "only a court in a country with primary jurisdiction over an arbitral award may annul that award," the Court held that, under Article V(1)(e), "a secondary Contracting State normally may *not* enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary Contracting State" (emphasis added). By adding the word "not" to the language of Article V(1)(e), the Court interprets "[r]ecognition and enforcement of the award *may* be refused" in that provision to mean "[r]ecognition and enforcement of the award *shall* be refused" if the award has been set aside in the country in which it was rendered. This is confirmed by the Court's reference to the "command of Article V(1)(e)." No explanation, however, is provided for such reversal of logic, or for the concept of courts of "primary" and "secondary" jurisdiction, which is absent from the New York Convention. Focusing exclusively on "the judgment of a court of competent authority," whose judgment it cannot "second-guess," the Court never even considers the award itself to determine whether it meets the enforcement requirements of U.S. law.

The Court of Appeals thus endorses the representation that views international arbi-tration as rooted and entirely integrated into the legal system of the seat of the arbitration. Accordingly, if the award is set aside in that system, it simply does not exist to be enforced in other countries:

> …an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made.

This conception of international arbitration which, in stark contrast with the *Putrabali* decision, denies any legal existence to the award outside the realm of the seat of the arbitration, results in re-establishing the two levels of control abolished by the New York Convention and requiring a review of the award itself at the seat of the arbitration followed by the recognition, in other countries and on the basis of the rules applicable to foreign

judgments, of the judicial decision assessing the validity of the award at the seat of the arbitration.

From a legal standpoint, this decision contravenes both the language and the purpose of the New York Convention. From a policy stand-point, it is an encouragement to the losing party to initiate unnecessary litigation in the country where the award was rendered even where no enforcement is sought in that country.

The recent proliferation of anti-suit injunctions in international arbitration shows that the courts in an increasing number of states support the recalcitrant conduct of the local party to an arbitration—often a state entity—in its attempt to circumvent the arbitration agreement freely entered into or to resist the resulting arbitral award. By recognizing an absolute international effect to the positions taken by the courts of the seat of the arbitration which may happen to be the courts of one of the parties to the arbitration, the *TermoRio* decision is a further encouragement to the party resisting arbitration or the resulting award to engage in tactical maneuvers, whereas one of the main purposes of international arbitration is precisely to avoid one party from being subjected to the courts of the other party.

By contrast, adopting the view, consistent with the New York Convention, that no sovereign enjoys exclusive rights or can impose on other sovereigns its views with regard to international arbitration—which is today largely recognized as the ordinary means of settlement of international commercial disputes—and that each state has discretion to determine for itself the requirements according to which it will recognize the validity and legitimacy of the arbitral process, is nothing more than recognition that, in this field, indifference is a virtue.

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