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Correlation between setting aside and enforcing arbitral awards – a never-ending story

On 20 April 2016, the largest set of arbitration awards in history, the three Yukos awards amounting to $50bn, was set aside by The Hague District Court. Consequently, the question of how set-aside and enforcement proceedings in international arbitration relate to each other came back into the spotlight. While comparing the two types of proceedings, this article shall analyse the apparent similarities but also deal with what is quite important: the differences. Finally, the crucial issue of their correlation shall be examined – whether and to what extent setting arbitration awards aside reflects its enforcement.

The obvious similarities between these two proceedings concern the stage when they may be initiated, the necessary involvement of state courts and the relatively unified grounds that may be invoked by the award-debtor in defence.

First, both the set-aside and the enforcement proceedings may be commenced after the dispute has been resolved with an award. Traditionally, arbitral awards are final and are not subject to appellate review as compared to state court decisions. As a result, after an award has been rendered, the parties are free to initiate set-aside and enforcement proceedings.

Second, both proceedings should be commenced before the state courts of the respective jurisdiction. After the award has been rendered, the tribunal and the arbitral institution (if any) cease to participate in the dispute resolution process – eventual annulment and enforcement must be commenced before state courts.

Third, there is a relatively unified standard of grounds for setting aside and denying enforcement of the arbitral awards. They are set in Article 34 and Article 36 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law and Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'Convention'). Article 34 of the Model Law lists as grounds for setting aside: (1) incapacity of the parties or lack of valid arbitration agreement; (2) not providing the opportunity to present a party's case; (3) violation of the terms of the submission to arbitration; (4) composition of the tribunal/the arbitral procedure contrary to the arbitration agreement or the *lex arbitri*; (5) non-arbitrability of the dispute; and (6) contradiction with public policy. The same grounds are provided for refusal of enforcement under Article 36 of the Model Law and Article V of the Convention (with setting aside as additional ground for refusal of enforcement).

In contrast to the similarities between the two types of proceedings described above, there are many more important differences that need a thorough examination.

While analysing the differences between set-aside and enforcement proceedings, a very important aspect needs to be highlighted from the outset – it concerns their mandatory nature. Enforcement of the award is *necessary* whenever there is lack of voluntary compliance with the award of the award-debtor. At the same time, initiating set aside proceedings is *optional* for the award-debtor, as it is also free to choose among other types of defence tools (eg, to invoke grounds for refusal of the enforcement). In other words, creditors need to enforce, whereas debtors might achieve positive results without necessarily commencing set-aside proceedings.

Another key difference refers to the competent forum where both proceedings can be initiated. The 'limits on the judicial forums' are typical aspects of set-aside proceedings in which awards may be annulled. As a rule, it is accepted that the set-aside proceedings may be commenced only before the courts of the country where the seat of the arbitration is or before the courts of the country the law of which governed the arbitration. This view is confirmed by the wording of Article V(1)(e) of the Convention, which provides that enforcement may be

refused if the award was set aside 'by a competent authority of the country in which, or under the law of which, that award was made'. It must be highlighted that the places where the award has been written, signed or where the hearings have been conducted are irrelevant – the award may be annulled only before the court where the seat of arbitration has been determined by the arbitration agreement or in the absence of such an agreement, where the tribunal or institution has specified the seat of the arbitration.

In contrast to set-aside, proceedings to enforce an arbitral award can be brought in every country worldwide. The only restriction in that respect derives from practical considerations – enforcement is usually sought in jurisdictions where the award-debtor has assets that can satisfy the award-creditor's claim.

Another point of difference between set-aside and the enforcement proceedings is the applicable law regulating the standards for annulment, respectively denying enforcement. The grounds for setting aside are regulated by the national legislation. As noted above, the Model Law (Article 34) establishes an exhaustive set of grounds for annulment of arbitral awards that corresponds to most of the refusing enforcement grounds under Article V of the Convention. This model (or even a narrower variation excluding some of the grounds under Article 34 of the Model Law) is followed in many jurisdictions. Nonetheless, some jurisdictions allow setting awards aside under additional grounds that have not been provided in the Model Law, such as substantive review on the merits of the award, internally contradictory awards, formal requirements for the award (lack of reasons, date, place, etc). Therefore, despite the unified standard recommended in the Model Law, it is a game of chance as to whether the law of the seat of arbitration shall provide for specific grounds for setting aside.

Contrary to the set-aside proceedings, there is an internationally recognised legal instrument that regulates the enforcement standards for international arbitral awards: the Convention. Thus, when enforcement is sought in a country party to the Convention, the uniform so-called 'pro-enforcement' regime of the Convention shall apply.

The Convention has set forth an exhaustive grounds list under which enforcement may be denied. The latter have been provided in Article V(1)(a)–(e) of the Convention: (a) incapacity of the parties or lack of valid arbitration agreement; (b) not providing the opportunity to present a party's case; (c) violation of the terms of the submission to arbitration; (d) composition of the tribunal/the arbitral procedure contrary to arbitration agreement or the *lex arbitri*; and (e) setting aside or suspension of the award. In addition, Article V(2)(a) and (b) of the Convention provides for two additional grounds for enforcement refusal: dispute non-arbitrability and public policy violation.

The last two grounds deserve special attention. In contrast to the rest of the grounds under Article V(1)(a)–(e) of the Convention, which have uniform character and generally the same interpretation among different jurisdictions, the non-arbitrability and the violation of public policy should be considered on a case-by-case basis depending on the jurisdiction where the enforcement has been sought. This view is supported by the wording of Article V (2)(b) of the Convention, which provides as ground for enforcement refusal the contradiction 'to the public policy *of that country*' [emphasis added]. Some authors even qualify the provision that regulates the public order ground as 'an escape device, which allows Contracting States exceptionally to rely on local law, rather than Article V(1)'s uniform international standards, to deny recognition of an award'. For the sake of comprehensiveness, it should be acknowledged that some scholars interpret the provision of Article V(2)(b) of the Convention by making reference to 'international' public policy, understood as 'principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value'.

Another important aspect to be considered when exploring the correlation between setting aside and enforcement proceedings is the effect of pending setting aside proceedings on enforcement. Article VI of the Convention resolves this issue by providing that an application for setting aside or suspension of the award entitles (but does oblige) the enforcement forum to postpone the enforcement until the end of the pending set-aside proceedings. As a defence mechanism for the award-creditor, the Convention entitles it to a claim for 'suitable security' from the award-debtor. This solution protects the award-creditor from eventual bad faith actions on the side of the award-debtor aimed to obstruct the creditor's satisfaction during the pending set-aside proceedings (eg,

dissipation or concealment of assets).

The next question to be examined is whether there is any interdependence between parallel enforcement proceedings in different jurisdictions. It has a fairly simple answer: the enforcement proceedings in different jurisdictions are completely independent from each other. If enforcement is denied in a certain jurisdiction, there is nothing precluding the award-creditor from seeking enforcement in another jurisdiction. Moreover, the 'pro-enforcement' regime of the Convention imposes no limits to the jurisdictions where the award-creditor may seek enforcement. As aforementioned, the only practical consideration is to identify the jurisdictions where the award-debtor has assets that may be used to satisfy the claim of the award-creditor

Last but not least, in comparing the two procedures, one must analyse how setting aside and enforcement relate to one another. There are two main perceptions on that matter.

The first one, called the 'delocalised approach' by some authors, recognises the international nature of the award and thus does not deem setting aside at the seat of arbitration as an obstacle to enforce an award elsewhere. This view might be supported by the wording of Article V(1)(e) of the Convention, which provides that enforcement of the award '*may* be refused' [emphasis added] if the award has been set aside. The wording of the Convention does not impose an obligation on the competent enforcement authorities to refuse enforcement if the award has been set aside at the seat of the arbitration.

The plain reading of the said provision clearly leaves discretion to the enforcement forum whether to enforce an annulled award. Moreover, some legal scholars and case law suggest that the provision of Article VII(1) of the Convention might also be interpreted in favour of the possibility to enforce arbitral awards that have been set aside – the Convention shall 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'. Following this approach, the eventual practical implication of setting an award aside appears to be the eventual higher level of examination of the award by the enforcement forum. The enforcement forum shall make a careful consideration of the objections under Article V of the Convention invoked by the award-debtor and of the reasons why the court of the seat has annulled the award. Meanwhile, according to this view, the court has no legal obligation to act any differently regarding an annulled award pending for enforcement compared to the award that has not been set aside.

Contrary to the above, the second perception (typical for English courts) has put an emphasis on the outcome of set-aside proceedings at the seat of arbitration. It deems that, after the award has been set aside, it ceases to exist and there is no longer an enforceable award. As observed by some authors, 'If an award is set aside in its country of origin, it loses the benefit of the New York Convention.' According to this view, the Convention does not recognise the 'delocalised approach'.

Since none of the said views appear to prevail, it is highly unlikely that a uniform approach will be adopted worldwide. The possibility of enforcing an award that has been set aside shall vary with different jurisdictions in a 'never-ending story'. Irrespective of which approach has been adopted, however, the award-debtors should not be left unprotected. In case of grave and fundamental defects in the arbitration procedure, in the award itself or in cases where the imperative rules (regarding arbitrability and public order) of the enforcement jurisdiction prevail, the enforcement forums should deny or postpone the enforcement in accordance with the Convention due to/until the outcome of setting aside proceedings.

Notes

1 In the present article the terms 'set aside' and 'annul' arbitration award shall be used as synonyms, whereas the term 'recognition and enforcement' shall refer to 'enforcement'.
2 Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 307.
3 Emmanuel Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 978, para 1687.
4 See for example Born, *International Arbitration* (2012) 329–333.
5 See Born, *International Commercial Arbitration* (2nd ed) (Klumer Law International, 2014) 2915–2918.
6 Born, *International Arbitration* (2012) 402.
7 Gaillard and Savage, 996, paras 1710–1711.
8 Patricia Živković, 'Enforcement of an Award Set Aside: the So-Called 'Preferred Approach' and its Application under English Law', Kluwer Arbitration Blog (8 April 2015).
9 Born, *International Arbitration* (2012) 338; *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* 92-15.137 in France, the enforcement of *Yukos Capital v Rosneft* awards in the Netherlands, etc).
10 Gaillard and Savage, 978, para 1687.