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Enforcement of Annulled Awards in France: The Sting in the Tail

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"The French soul is stronger than the French mind and Voltaire shatters against Joan of Arc."[1]

In a series of recent decisions, the French courts have again confirmed the *Hilmarton*[2] principle, whereby an arbitral award annulled at its seat can still be enforced by the French courts. As in the original *Hilmarton* decision, moreover, the courts have gone one step further and found that a second arbitral award in the same dispute—rendered after the first award's annulment—could not be enforced because of the *res judicata* effect of the original enforcement order.[3]

In the 1994 decision in the *Hilmarton* case, an award was rendered in Switzerland in favour of a company, OTV, which then obtained an enforcement order for the award in France. Subsequently, the Swiss Supreme Court annulled the original arbitral award. A second tribunal then reached a different conclusion on the facts and issued another award.

Hilmarton applied to the French courts for enforcement of the second award. This meant, of course, that in respect of the same case, there existed two awards and two (contrary) applications for execution. Hilmarton argued that the first award had been annulled and that its enforcement pursuant to the (already-issued) execution order would be contrary to international public policy. The French Supreme Court, however, rejected Hilmarton's argument and held that "the [first] award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy". The second award could not be enforced, however, as the matter had been resolved as a matter of *res judicata* by the first court order for enforcement.[4]

Many have had a tendency to suggest that the US at one time was "in synch" with the *Hilmarton* decision; they do so on the basis of the *Chromalloy* decision.[5] In that case, the District Court for the District of Columbia enforced an award despite its nullification by the Egyptian Court of Appeal. The court took the view that Article VII of the New York Convention of 1958 required that "the provisions of the present 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 of the country where such award is sought to be relied upon".[6]

But almost from the outset, the influence of this decision in the US was limited. For example, in *Spier v. Calzaturificio Tecnica, SpA,*[7] the Southern District Court of New York refused to enforce an arbitral award nullified by the Italian courts.

The court concluded that there was no basis for applying United States law to the rights and obligations of the parties, since the parties contracted in a foreign state that their disputes would be arbitrated in that foreign state. Nothing in Italian law or the parties' agreement precluded the defendant Technica from challenging the arbitral awards in the Italian courts.

The limits of *Chromalloy* were further defined by the Second Circuit in *Baker Marine Ltd v. Chevron Ltd,*[8] where the court affirmed the District Court's decision to decline enforcement of arbitral awards set aside by a court in Nigeria and did so on the basis of the New York Convention and under principles of comity. Because the parties had contracted in Nigeria and agreed that their disputes would be arbitrated according to Nigerian law, the primary purpose of the (US) Federal Arbitration Act was carried out in ''ensuring that private agreements to arbitrate are enforced according to their terms'' which included any agreement not to appeal (although this writer has at times had problems with the US courts' interpretation and application of this undertaking).[9] And this even if Nigerian courts could set aside awards for reasons not recognised in the US. The court summed up its concern in the following fashion:

> "[A]s a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the award under the domestic laws of other nations, a losing party will have every reason to pursue its adversary with enforcement actions from country to country until a court is found, if any, which grants the enforcement."[10]

If there remained any doubts in this regard, one need look only to the most recent pronouncement on the question of enforcement. Earlier this year the US Court of Appeals (District of Columbia Circuit) was asked to enforce an arbitral award against a Colombian state-owned public utility, which award had hitherto been annulled by the Colombian Council of State (the country's highest administrative court).[11]

The application was dismissed by the US District Court, which dismissal was affirmed by the Court of Appeals. The latter, following *Baker Marine,* stated:

> "We affirm the judgment of the District Court. 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) ('Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked… if that party furnishes…proof that:…[t]he award…has been set aside…by a competent authority of the country in which, or under the law of which, that award was made.'). 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. See *Baker Marine (Nig) Ltd v. Chevron (Nig) Ltd,* 191 F 3d 194 (2d Cir 1999). 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."[12]

The court stated that the New York Convention clearly endorsed a regime where a primary state may set aside an award on grounds that are inconsistent with the laws and policies of a secondary state. To say otherwise would, in the court's view, permit secondary states to second-guess courts in that primary state, even where the latter had lawfully acted pursuant to its competent authority to set aside an arbitration award made in its country.

To the extent that the nullification of the award might have conflicted with Colombia's obligations under the New York Convention, the court simply held that the Convention provided no mechanism to ensure the validity of an award where rendered. Rather, such mechanism was left to local law. Since the Colombian court was the final judge of Colombian law, the DC Circuit was in no position to pronounce the decision of the Colombian court wrong.

The bar for enforcement of an annulled award in the US has—it seems—been placed high; rather than a general appeal to the sanctity of the award, US courts will respect foreign annulment decisions unless those decisions are repugnant to the public policy of the United States.[13]

Turning to France, the first of the recent decisions to be considered pitted the US construction giant Bechtel against the Department of Civil Aviation of the Government of Dubai (''DAC''), their dispute having been submitted to a UAE law-governed arbitration in Dubai. In February 2002, the sole arbitrator rendered an award against the DAC and, in October of the following year, the Court of First Instance in Paris (*Tribunal de Grande Instance de Paris*) issued an order enforcing the award against that entity. However, in May 2004, the UAE's highest civil court, the Court of Cassation in Dubai, annulled the arbitral award on the grounds that certain witnesses had not been sworn in, in breach of the procedural provisions of the UAE's arbitration law:

> "As for the last ground in the suit statement concerning the invalidity of the award on the ground that the witnesses did not take oath prior to hearing their statements [,]…the arbitrator…is bound to comply [*sic*] the procedures stipulated in the Arbitration Chapter. As such,…the violation of such requirement renders the procedure invalid, which affects the award.
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> …Article 41/2 of the [Civil Procedure] Law determined the form of the oath to be taken by a witness, namely: 'I swear by the Almighty to tell the truth and nothing but the truth.' Upon taking the oath, the religion of the witness shall take into consideration, if the witness requires the same. The purpose of stipulating to take the oath or to put a witness to oath…is to give such statement a frame leading to the truth with the exclusion, of lying, deviation or fancy, so that the statement becomes a satisfactory decisive evidence and satisfaction arises from taking the oath. The statement of a witness will not be valid and certain unless the witness takes the oath…[nor will] anything that relies on such statement, as it becomes ineffective and cannot, accordingly, be relied upon, particularly if such statement is the evidence on which the award relied. It is imperative that the arbitrator puts a witness on oath prior to giving his statement, which may not be ignored or made other than in the form provided by the law, as above quoted. It is established from the award, the subject matter of the suits, that the arbitrator did not address the oath in the above form as provided in the law upon hearing witnesses William G Leuing, Tilak Raj Billo, Christopher Hertzell, Steven Martin, Keith Kennedy, Ann Saha, Christopher Brown, Mohamed Saleh Al Saleh, HH Sheikh Ahmed Bin Saeed Al Maktoum, Abdullah Al Hashimi, Simon Assam, Surish Kumar, Masood Hasan Dariwala, Robert Burnett and W Michael. As such, the requirements for the validity of the respective statements of the above witnesses were not available, which renders the said statements invalid and also renders everything established on such statements invalid. Whereas the award relied on the statements of the above witnesses without putting them to oath as above quoted, the award, the subject matter of the suits, is invalid because it relied on an invalid procedure.''[14]

As a result, the DAC lodged an appeal in the Paris Court of Appeal against the enforcement order. Among other arguments, the DAC asked the Court of Appeal to recognise the decision of the Dubai Court of Cassation's annulment of the arbitral award. The DAC argued that, by having been annulled, the award did not satisfy the requirement set down in Article 13 (1) (c) of the mutual enforcement treaty concluded on 9 September 1991 between France and the UAE (the ''France-UAE Treaty'').[15] This provision provides that a judicial decision can be recognised in France only once it can no longer be appealed in the UAE and is accordingly capable of enforcement in its country of origin.

The DAC argued also that recognition and enforcement of the award would be contrary to international public policy, a ground for refusal to grant recognition and enforcement of an international arbitral award under Article 1502 (5) of the French Code of Civil Procedure (''NCPC'').[16]

The Paris Court of Appeal rejected the DAC's arguments. At the outset, the court held that the requirement of exhaustion of all avenues of appeal under Article 13 (1) (c) of the France-UAE Treaty applied to appeals of *judicial decisions* only. This meant that the parties were under no obligation to wait for the decision of the Dubai Court of Cassation, which concerned an *arbitral award* rather than a judicial

decision. The court further held that the public policy ground cited by the DAC would not apply even if Article 13 (1) (c) of the France-UAE Treaty were to apply.

Of perhaps most interest, though, is the Court of Appeal's stifling of the effect of the annulment decision itself. The court held that the DAC's basic contention—that an arbitral award must not be subject to appeal in the country in which it was issued before it can be recognised in France—was incompatible with fundamental principles of French arbitration law. The court said that one of the aims of the NCPC was the elimination of obstacles to the effectiveness of international arbitral awards, a principle reinforced—not negated—by the France-UAE Treaty. Moreover, it ruled that in any case the judicial effect of an annulment decision was strictly limited to the UAE and did not have to be recognised or be given any weight by the (French) Court of Appeal.[17] In other words, these decisions, by their very nature, *could not* be recognised abroad!

As has been discussed above, this position can be contrasted with that of the United States where, in an action for confirmation and enforcement of the *same* arbitral award in the *DAC/Bechtel Dubai* case, a US court of first instance refused to do so.[18] (The matter went on appeal to the US Court of Appeals for the District of Columbia Circuit but was, the writer understands, settled amicably.)

In France, the question still remained whether, in any subsequent case, the French Supreme Court (*Cour de Cassation*) would endorse the Paris Court of Appeal's reasoning in this regard, or would it revisit its own reasoning in *Hilmarton?*

Such a decision was not long in coming. On 29 June 2007, the French Supreme Court handed down two decisions in which it again held that an (annulled) international award could be executed in France.[19]

The case concerned an Indonesian company that had sold white pepper to the French defendant, which cargo was lost during shipping. When the defendant refused to pay the claimant, the latter submitted an arbitration claim under the auspices of the International General Produce Association (''IGPA''). The arbitral tribunal, based in London, issued a first award on 10 April 2001 in favour of the defendant (''First Award''). Pursuant to its rights under the English Arbitration Act 1996, the unsuccessful claimant appealed to the High Court in London which partially set aside the award on 19 May 2003, holding that the defendant's refusal to pay the price of the transaction was a breach of contract. The dispute went back to arbitration and a second award was issued on 21 August 2003, this time in favour of the claimant (''Second Award'').

In September 2003, the French defendant requested and obtained, a decision from the Paris *Tribunal de Grande Instance,* accepting the First Award for enforcement in France. This, of course, was despite the setting aside of that award by the London High Court and the issue of the Second Award in the meantime.

The claimant appealed to the Paris Court of Appeal, arguing that the defendant's request to enforce the First Award was tantamount to fraud. The Paris Court of Appeal, however, confirmed the lower court's decision in March 2005.[20]

Meanwhile, the claimant in turn had managed to obtain from the Paris *Tribunal de Grande Instance* an order that the Second Award be accepted for enforcement in France.

The Paris Court of Appeal, however, overruled this decision on 17 November 2005. It held that the Second Award could not be enforced in France, since the First Award related to the same matter between the same parties and had already been accepted for enforcement in France. In other words, the Second Award could not be enforced for reasons of *res judicata.*

In June of this year, the French Supreme Court confirmed both decisions of the Paris Court of Appeal.

In its first decision (relating to the Paris Court of Appeal decision to enforce the First Award, rendered in March 2005), the Supreme Court confirmed the court's findings and held that an international arbitration award is not connected to any state legal system. As such it is, the court held, a decision of ''international'' justice, whose validity should be

assessed pursuant to the rules applicable in the country where its recognition and enforcement are sought. The court added that, pursuant to Article VII of the New York Convention, the defendant was entitled to request the enforcement of the First Award in France, in accordance with the arbitration clause and the IGPA rules. The defendant further had the right, it was held, to invoke the French law of international arbitration (Article 1504 of the French New Code of Civil Procedure), which does not provide at any time, as the claimant had argued, that the setting aside of an award in its country of origin prevented the enforcement of this award in France.[21]

In its second decision relating to the Paris Court of Appeal decision of November 2005, the Supreme Court again confirmed the lower court's (''*res judicata*'') decision. In so doing, it expressly held that the first Paris Court of Appeal decision (of March 2005, which enforced the First Award), had *res judicata* effect, therefore preventing the enforcement of the arbitral tribunal's Second Award.[22]

Whereas this second decision of the French Supreme Court is consistent with French procedural law regarding the force and effect of *res judicata,*[23] the holdings of the court continue to attract a good deal of attention.

As Professor Emmanuel Gaillard well summarised in his commentary of the Paris Court of Appeal decisions of 31 March 2005, many authors criticise this jurisprudence on two principal grounds.[24]

First, some authors question the notion that the validity and the enforceability of an international award should be assessed by the country where such enforceability is sought, rather than the country where the award was issued.[25] The response this usually meets is that to do otherwise would not only contradict the New York Convention (which specifically allows each member state where execution is sought a degree of control over the enforceability of the awards), but would, it is said, also deny the country of enforcement a legitimate control over assets located on its territory.[26]

Secondly, some authors[27] argue that the solution adopted by the French Supreme Court contradicts the principle of procedural good faith in the performance of the arbitration agreement, which is simultaneously (and fiercely) defended by the French courts.[28] In this respect—and the writer is involved in just such a case—allowing the enforcement of an (annulled) award creates a type of ''chase for *exequatur*'',[29] where a party will seek to obtain the enforcement of a favourable award as soon as there is a threat that the award is about to be set aside.

In the present case, the violation of the principle of procedural good faith (Article 30 of the French New Code of Civil Procedure) was actually raised in the appeal by the claimant. The Supreme Court, however, did not even consider the merits of the argument, satisfying itself with a more conventional reasoning based on civil procedure rules. While such reasoning is legally sound, one may question its consistency and legitimacy with regard to the principle of procedural good faith, which nowadays permeates both French procedural and substantive law.

To these concerns, although this gives rise to more of a philosophical rather than juridical debate, are added the reservations expressed by the US court in *Baker Marine,* whereby the same dispute may (indeed will) give rise to different results in different countries (and where, even if everyone were to follow the French example, that difference would still exist between the place of annulment and that of enforcement). Given that the French approach is, on one level at least, geared to respect of the (extraterritorial) effect of an arbitral award over that of a national court, one can still wonder whether this type of situation was in reality envisaged by the drafters of the New York Convention or, as in Bechtel, of a bilateral treaty geared to the recognition and enforcement of *national court* decisions.

However, regardless of these concerns, the French Supreme Court shows no sign of overruling the principles espoused in *Hilmarton* and lawyers will continue to scramble to the steps of the *palais* to beat the others to the enforcement courts. This writer is buying himself a new set of trainers.

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The information in this article is for educational purposes only; it should not be construed as legal advice.

1 Victor Hugo (1802 – 85), *Tas de Pierres* (1842).
2 Cour de Cassation, 1st Civil Chamber, *Hilmarton,* 23 March 1994, Rev Arb 1994.327, note Ch Jarosson; JDI, 1994.701, note E Gaillard; Rev Crit DIP, 1995.356, note B Oppetit; RTD Com, 1994.702, obs. J C Dubarry and E Loquin.
3 The principle was first applied implicitly in the *Norsolor* case (Cour de Cassation, 1st Civil Chamber, 9 October 1984, Rev Arb 1985.431, note B Goldman, JDI, 1985.679, note Ph Kahn) and *Polish Ocean Line* case (Cour de Cassation, 1st Civil Chamber, 10 March 1993, Rev Arb 1993.255, note D Hascher).
4 YB Comm Arb, Vol XX (1995), p. 663.
5 *Chromalloy Aeroservices v. Arab Republic of Egypt,* 939 F Supp 907, 909 (DDC 1996).
6 *Ibid.* 909.
7 71 F Supp 2d 279 (SDNY, 1999).
8 191 F 3d 194 (2nd Cir, 1999).
9 Unlike the facts of *Chromalloy,* the court noted, defendants did not violate any contractual promise not to appeal an arbitral award, and recognition of the Nigerian judgment would not conflict with US public policy. By contrast, the defendant in *Chromalloy* violated its promise not to appeal the arbitral award, such that adherence to the nullification of the award would violate the public policy of the US favouring arbitration.
10 See footnote 7, at 197 n. 2 (quoting Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation,* p. 355 (1981)).
11 *Termorio SA ESP* v. *Electranta SP,* 487 F 3d 928 (DC Cir, 2007).
12 *Ibid.* at 931. Note that Art V (1) (f) speaks of a court's power (not obligation) to refuse enforcement by virtue of the article's use of the term ''may''. This, of course, is the crack in the door through which the appellant sought to pass.
13 The court made it clear that this notion of ''repugnance'' was high and infrequently met.
14 *International Bechtel Co Ltd* v. *Department of Civil Aviation of Government of Dubai,* case No 288/2002 (Court of First Instance), at 6–8. The court rejected Bechtel's arguments that DAC had waived its objection to the form of the oaths by failing to object on that ground during the arbitration, or by agreeing in advance that the arbitration award would be final and binding and that there would be no appeal to any court. The court explained:
''[T]he party who is originally required to comply with the procedures stipulated under the law, is the arbitrator, but not the litigants. Administering oath on witnesses is an imperative requirement under Article 211 of the Civil Procedures Law, which the arbitrator should comply with even if the litigants have agreed otherwise…
Article 216/2 of the Civil Procedures Law…provides that 'The acceptance of a request to invalidate an award shall not be affected by the waiver of a litigant of its right to such invalidation prior to the issuance of the award'. Moreover, it may not be held to the request to invalidate the award before the arbitrator himself but such request may be held thereto either under a separate suit or during the hearing of the suit brought before the court to confirm such award.''
15 The UAE is not a signatory to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Awards.
16 It should perhaps be noted in passing that the French courts routinely apply Article 1502–5 as being more favourable to arbitration than the New York Convention.
17 Informal translation:
''[…l'arrêt de la Cour de cassation de Dubaï]…ne peut faire lóbjet dúne reconnaissance en France, que les décisions rendues à la suite dúne procédure d'annulation, à l'instar des décisions d'exequatur, ne produisent pas d'effets internationaux car elles ne concernent qu'une souveraineté déterminée sur le territoire où elle s'exerce, aucune appréciation ne pouvant être portée sur ces d'ecisions émises par un juge étranger à l'occasion d'un procès indirect; […the annulment decision of the Court of Cassation in Dubaï] …cannot be made the object of recognition in France; judgments delivered pursuant to an annulment proceeding, like execution orders, do not have international effects because they apply only to a defined territorial sovereignty, and no consideration can be given to these judgments by a foreign judge pursuant to an indirect proceeding;…''
18 *Department of Civil Aviation of the Government of Dubai* v. *International Bechtel Company Ltd,* 360 F Supp 2d 136 (DDC 2005).
19 Cour de Cassation, 1st Civil Chamber, 29 June, 2007, 2 decisions, *Société Putrabali Adyamulia* c. *SA Rena Holding et autre,* No 05–18.053 and No 06–13.293, Dalloz, 2007, note X Delpech.
20 Paris Court of Appeal, March 31, 2005, *Société Putrabali Adyamulia* c. *SA Rena Holding et autre,* Rev Arb 2006, No 3.665s, note E Gaillard.
21 Cour de Cassation, n. 19, above, No 05–18.053.
22 Cour de Cassation, n. 19, above, No 06–13.293.
23 Pursuant to Art 480 of the French New Code of Civil Procedure and Art 1351 of the French Civil Code, a decision has *res judicata* as long as it is not overruled.
24 E Gaillard, Rev Arb 2006, No 3.665s.
25 E.g., S Bollée, ''Les methodes du droit international privé à l'épreuve des sentences arbitrales'', *Economica 2004,* No 369; H Muir Watt, commentary of Paris Court of Appeals 29 September 2005, *Bechtel,* Rev Arb 2006, p. 695.
26 See E Gaillard, *op. cit.* n. 24, and in ''L'éxecution des sentences annulées dans leur pays d'origine'' JDI (Clunet) 1998; Ph Fouchard, ''La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine'', Rev Arb 1997, p. 329; J Paulsson, ''L'éxecution des sentences arbitrales en dépit d'une annulation en fonction d'un critère local (ACL)'', ICC Bull, May 1998, p. 14.
27 E.g., X Delpech in his commentary of the present decisions in Dalloz, 2007.
28 See, e.g., Paris Court of Appeal, 18 November 2004 and 23 June 2005, Dalloz. 2005, pan. 3059, note Th Clay; Paris Court of Appeal, 12 September 2002, *Macron et SARL International Display Design* c. *Société des cartonnages de Pamfou*, Rev Arb 2003, p. 173; see also on the principle of estoppel in international arbitration: Cour de Cassation, 1st Civil Chamber, 6 July 2005, *Golshani* c. *Gouvernement de la République Islamique d'Iran* (pourvoi No 01–15912), JCP No 42, 19 October 2005, p. 1948.
29 E Loquin in his commentary of the *Hilmarton* case, in RTD Com 1994, p. 702.