

ENFORCEMENT OF ARBITRAL AWARDS SET ASIDE AT THE SEAT OF ARBITRATION: THE WAY FORWARD FOR ART. V(1)(E) IN SINGAPORE

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I. INTRODUCTION

A. Singapore's Pro-Enforcement Policy

The Singaporean courts interpret the statutory grounds for setting aside awards narrowly¹ and with strict scrutiny.² This approach is consistent and seeks to protect the sanctity of the arbitral

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¹ See, "Trends of the 2017 Singapore review" (16 March 2017), *Global Arbitration Review Know-How: Commercial Arbitration* (blog), online: <http://globalarbitrationreview.com/know-how/results?question_ids=1000341&jurisdiction_ids=1004606&edition_id=1000012> (accessed 13 December 2017).

² Paul Tan & Alessa Pang, "The International Arbitration Review – Edition 8 (Singapore)" (August 2017), *The Law Reviews* (blog), online: <<https://thelawreviews.co.uk/edition/the-international-arbitration-review-edition-8/1145747/singapore>>.

award.³ In *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*,⁴ Chan Seng Onn J summed up the Singapore position that “the power ... to set aside awards, must and should only be exercised charily”. Singapore’s approach represents the mainstream curial philosophy across the globe.⁵

B. Extent of Singapore’s Pro-Enforcement Judicial Attitude

For the Singapore courts, dealing with a seat court’s setting aside of the award raises the question of whether to focus on: (a) the award itself; as opposed to (b) the process and effects of the seat court’s decision to set aside.

French courts have demonstrated a clear deference to the arbitral award, which is perceived as self-sufficient, constrained only by French law.⁶ On the other hand, the US courts have refused enforcement based on why the award was set aside.⁷

Given Singapore’s standing as a global-leading arbitration centre, the approach that the Singapore courts take is crucial in contributing to the international jurisprudence on this matter, for which there is no clear litmus. Singapore’s position could possibly nudge the divided international community towards a more uniform enforcement of arbitral awards.

³ See Michael Hwang SC & Su Zihua, “Egregious Errors and Public Policy: Are the Singapore Courts too arbitration friendly?” (delivered at the Singapore Academy of Law Conference 2011 – Singapore Law Developments (2006–2010)) at pp. 19–55. For examples of Singapore’s firm pro-arbitration approach, see also David Williams QC, “Defining the Role of the Court in Modern International Commercial Arbitration” (Herbert Smith Freehills SMU Asian Arbitration Lecture, delivered at the Singapore Management University in 2012), online: < <http://www.arbitrationconference.com/download/file/218/>>.

⁴ [2013] 4 SLR 972 at [1].

⁵ See Sundaresh Menon SC (as His Honour then was), “International Arbitration - The Coming of a New Age for Asia (and Elsewhere)” (Conference paper delivered at the ICCA Congress 2012, Opening Plenary Session) at [5].

⁶ See François-Xavier Train, “Interpretation and Application of the New York Convention in France”, in George Bermann ed., *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer, 2017) 281 at 304.

⁷ 191 F (3d) 194 at 197 (2nd Cir 1999).

II. THE APPLICABLE LAW

The relevant provision is Article V(1)(e) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958)⁸ [*New York Convention*], which formed Article 36(1)(a)(v) of the *UNICTRAL Model Law on International Commercial Arbitration*⁹ [*Model Law*]. The latter was incorporated in Singapore's legislation through Section 31(2)(f) of the *International Arbitration Act*¹⁰ [*IAA*]. Therefore, these provisions should be interpreted harmoniously.

III. APPLICATION OF THE LAW IN SINGAPORE

A. *Grounds for Refusal in the International Arbitration Act*

The IAA sets out three (3) grounds for refusal within Section 31(2)(f), where the award:

- (a) has not yet become binding;
- (b) has been suspended; or
- (c) has been set aside.

At present, Section 31(2)(f) has not been pleaded as a ground for non-enforcement.¹¹

B. *Grounds for Refusal in Case Law*

⁸ 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

⁹ 24 June 2002, 24 ILM 1302 (1985).

¹⁰ Cap 143A, 2002 Rev Ed Sing.

¹¹ Jean Ho, "The Interpretation and Application of the New York Convention in Singapore", in George Bermann ed., *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer, 2017) 813, at 828.

The Singapore Court of Appeal expressed “tentative thoughts” on this issue in *PT First Media TBK v Astro Nusantara International BV*¹² [*PT First Media*], which are *obiter*.¹³

(1) *Rejection of the french authorities*

Reviewing the French authorities of *Hilmarton Ltd v Omnium de traitement et de valorisation*¹⁴ [*Hilmarton*] and *The Arab Republic of Egypt v Chromalloy Aeroservices, Inc*¹⁵ [*Chromalloy*], the Court of Appeal rejected¹⁶ the wider notion of “double control” as adopted by the French courts which:¹⁷

- (a) Recognised that awards do not derive their validity from a particular local system of law.
- (b) Applied French legislation¹⁸ which did not contain the equivalent of Article V(1)(e) of the New York Convention.

(2) *Implication and purpose of enforcement*

In principle, the Court of Appeal in *PT First Media*¹⁹ “seriously doubted” enforcing an award set aside at the seat of arbitration on three grounds:

- (a) Since the award derives legal effect from the law of the arbitral seat, its annulment means there is no award to enforce to begin with (the “*legal order ground*”).
- (b) Singapore’s domestic law do not confer “more favourable right[s]”²⁰ of enforcement than Section 31(2)(f) of the *IAA*.

¹² [2013] 1 SLR 372 at [76].

¹³ *Ibid* at [77].

¹⁴ (1995) XX Yearbook Comm Arb 663–665.

¹⁵ (1997) XXII Yearbook Comm Arb 691–695.

¹⁶ *Supra* note 11, at [76].

¹⁷ *Ibid* at [77].

¹⁸ Article 1502 of the French New Code of Civil Procedure, as referred to in the judgment.

¹⁹ *Supra* note 11.

²⁰ See *supra* note 9, Article VII of the *New York Convention*.

- (c) A purposive interpretation of the Article V(1)(e) of the *New York Convention* requires that the provision must have legal effect outside of the seat court (the “*purposive interpretation ground*”).

In addition to rejecting the French approach, the Court of Appeal appears to have adopted the US approach itself by considering enforcement based on the effects of the setting aside decision. Ground (b) is non-contentious. Grounds (a) and (c) will be explored below.

IV. THE PURPOSIVE INTERPRETATION GROUND FOR REFUSING ENFORCEMENT

A. *Purposive Interpretation of Article V(1)(e) of the Convention*

Ascertaining the provision’s purpose is crucial, given the Article 31(1) of the *Vienna Convention*²¹ requirement of purposive interpretation.

The *Vienna Convention* sought in general to make the enforcement of arbitral awards easier²² and internationally uniform,²³ as mentioned by the English High Court in *Dowans Holding S.A. v Tanzania Electric Supply Co. Ltd.*²⁴ [*Dowans Holdings*]. The particular purpose of Article V(1)(e) was to make enforcement less burdensome by removing the requirement of “double exequatur”.²⁵ As explained by the Chairman of the Working Party, “it would be unrealistic to delay the enforcement of an award until all the time limits provided ... had expired or all possible means of recourse ... have been exhausted and the award had become ‘final’.”²⁶

²¹ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

²² Nadia Darwazeh, “Article V(1)(e)”, in Kronke et al., eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 301, at 333.

²³ *Ibid* at 332.

²⁴ [2011] EWHC 1957 (Comm).

²⁵ *Supra* note 22, at 306.

²⁶ “United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting,” UNESCOR, 1958, UN DOC E/CONF.26SR.17.

Hence, while the prior *Geneva Convention*²⁷ required an award to be “final”, a deliberate choice was made to use the word “binding” in Article V(1)(e) instead. The drafters’ particular intent to eliminate “double exequatur” behind Art V(1)(e) has received judicial acceptance, not only in the English High Court’s decision in *Dowans Holdings*,²⁸ but also by the Swiss Federal Tribunal in *Y v X*.²⁹ It follows that enforcement cannot be *automatically* defeated merely because the seat court refuses to enforce the award.

B. Purpose of Article V(1)(e) in Relation to the Discretion of the Enforcement Court

Sundaresh Menon CJ opined in *PT First Media*³⁰ that “[i]f [setting aside the award] would only ever be of efficacy in relation to enforcement proceedings in the seat court, then it seems to have been devised for little, if any, discernible purpose.” What then, is the implication of the setting aside of an award?

(1) Basis for the enforcement court’s discretion to enforce the award

Menon CJ’s opinion appears to proceed on the assumption that in the enforcement court, the award must be enforced even if the Article V(1)(e) ground is present, rendering the setting aside ineffectual outside the seat court. However, Article V(1)(e) uses the word “may” and thus confers discretion to enforce. The setting aside by the seat court does not automatically defeat the enforcement of the award elsewhere.

This poses a tension with the fact that the seat court’s setting-aside cannot be strictly ignored. The drafters of Article V(1)(e) did not intend for the setting-aside by the seat court to be completely immaterial to the enforcement court. This tension was explored by the Convention delegates:

²⁷ *Convention on the Execution of Foreign Arbitral Awards*, 26 September 1927, 92 UNTS 301 (entered into force 25 July 1929).

²⁸ *Supra* note 24.

²⁹ Swiss Federal Tribunal, Switzerland, 3 January 2006, 5P.292/2005.

³⁰ *Supra* note 12, at [77].

“[Article V(1)(e)] reflects the inability of the Conference to agree on the solution to the problem of the “double exequatur”. No one wanted the Convention to require judicial proceedings in confirmation of the award in both the rendering and enforcing State. At the same time, an award which had been set aside ... should hardly be granted enforcement in another State.”³¹

It is therefore unlikely that Article V(1)(e) was intended to be ignored in favour of compulsory enforcement by the enforcement courts. While the delegates proposed limiting the seat courts' control,³² these limits were unspecified.³³

(2) *Exercising the discretion accorded to enforcement courts*

Taking the US approach of scrutinizing the basis for the seat court's setting aside, how much discretion does the enforcement court have resulting from its “tug-of-war” with the seat court, and how should it be applied?

(a) Awards set aside on local standards of annulment

The delegates considered eliminating local standards for annulment, while retaining international standards for annulment such as the *Vienna Convention's* grounds. That was intended to concentrate power in the hands of the enforcement courts, imposing a more uniform regime for the annulment of awards.³⁴

³¹ Leonard V. Quigley, “Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1961) 70:7 Yale LJ 1069.

³² ECOSOC, 1958, 11th Mtg, UN Doc E/Conf.26/SR.11 at 6.

³³ Emmanuel Gaillard & John Savage, eds, *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at 979.

³⁴ ECOSOC, *Comments on Draft Convention on The Recognition and Enforcement of Foreign Arbitral Awards – Note of the Secretary-General*, UN Doc E/Conf.26/2, March 1958) at 16-19.

Proponents of the “territorialist” approach have argued conversely that since the drafters wanted the seat court to conduct the principal review of the award,³⁵ the enforcement court should defer to the seat court’s judgment instead. However, adopting this “territorialist” approach undermines arbitration as an effective international dispute resolution mechanism. It would require giving international legitimacy to local standards by importing them into the *Convention*, notwithstanding that local standards for setting aside awards may be inconsistent with the internationally-accepted standards³⁶ – the sole standards the *Convention* purports to enforce. Consequently, recognising local standards would then result in internationally inconsistent application, as well as inconsistency in the law of the *Convention* itself. With respect, it is clear that asserting a “territorialist” position would be inconsistent with the *Convention*’s purpose of effecting greater uniformity of enforcement internationally.³⁷

Additionally, local standards themselves could be perceived as improper or objectionable by the international community. Jan Paulsson illustrates this with a hypothetical example where an award is annulled because it violates a local rule that all members of the tribunal be men or of a particular religious confession.³⁸

Therefore, enforcement courts should not refuse enforcement only because the award has been annulled according to local standards.³⁹ Respecting the sovereignty of the seat should entitle the seat court to adopt local rules regarding the set-aside of awards to comply with local preferences, without necessarily having international effect.⁴⁰

(b) Awards set aside on international standards of annulment

³⁵ *Supra* note 22, at 327.

³⁶ Marike Paulsson, “Chapter 6: Resisting Enforcement of Awards”, in *The 1958 New York Convention in Action* (United States: Wolters Kluwer, 2016) 157-216, at 212.

³⁷ *Supra* note 22, at 332.

³⁸ Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)” (1998) 9:1 ICC Intl Ct Arb Bull 14 at 17.

³⁹ *Ibid* at 25, 29.

⁴⁰ *Ibid* at 22.

Conversely, courts have refused to enforce awards because they were annulled according to international standards.

In the United States, the Federal District Court for the District of Columbia enforced the award in *Re Chromalloy Aeroservices Inc. v The Arab Republic of Egypt*⁴¹ [*Chromalloy* (US)] because the annulment grounds were domestic in that the award was “not properly grounded under Egyptian law”.⁴² However, the US Court of Appeals for the Second Circuit refused enforcement in *Baker Marine (Nig.) Limited v. Chevron (Nig.) Limited, Chevron Corp., Inc and others v. Danos and Curole Marine Contractors, Inc.*⁴³ [*Baker Marine*] because the award was annulled on the international grounds in Article V(1)(c) and (d).⁴⁴

The court in *Baker Marine* stated that enforcement according to domestic law “would seriously undermine finality and regularly produce conflicting judgments.”⁴⁵ It is submitted that this should also apply to seat courts’ refusing enforcement according to their own domestic law.

For reasons of practicality, a compromise should be made between enforcing awards annulled on local grounds and refusing enforcement if the award was annulled on international grounds.

V. THE LEGAL ORDER GROUND FOR REFUSING ENFORCEMENT

Menon CJ opined in *PT First Media*⁴⁶ that “the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce”.

A. The Territorial Approach

⁴¹ 939 F Supp 907 at 911 (D.D.C. 1996).

⁴² *Ibid.*

⁴³ *Supra* note 7.

⁴⁴ This distinction is buttressed by the refusal to enforce in *TermoRio S.A.E.S.P. (Colombia) and LeaseCo Group, LLC. V Electranta S.P (Columbia)* (District of Columbia 2007), in Yearbook Commercial Arbitration XXXIII (2008) (United States no. 621), at 955-969, where the award was annulled under Article V(1)(a) and (2) of the Convention.

⁴⁵ *Supra* note 7, at 197.

⁴⁶ *Supra* note 14, at [77].

This is the starting point of the “territorial” approach.⁴⁷ Van den Berg argues that “[t]he fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of origin.”⁴⁸ Professor Pieter Sanders, a key drafter, appears to have agreed with the result.⁴⁹

B. Issues with the Territorial Approach

(1) Problems with the territorial approach in general

The first objection is that the territorial approach is in direct opposition to the text of Article V(1)(e) of the *Convention*, which confers discretionary power to enforce the award.⁵⁰

In addition, the territorial approach is grounded on an outdated assumption that the law of the seat court provides the award’s legal force.⁵¹ In 1958, when the *Convention* was drafted, the role of the arbitral seat was arguably more substantial than it is today.⁵² The seat of arbitration is agreed upon by parties mainly out of convenience or compromise, instead of the inherent importance of the arbitral seat itself.

Further, the parties’ agreement did not include submitting to the exclusive jurisdiction of a particular court. By agreeing to extra-curial arbitration, they arguably intended to avoid the reach of the seat court in the first place.⁵³ The territorial approach contradicts the parties’ intentions as

⁴⁷ *Supra* note 22, at 326.

⁴⁸ Van Albert Jan van den Berg, “Annulment of Awards in International Arbitration” in Richard B. Lillich & Charles N. Brower, eds, *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity?: Twelfth Sokol Colloquium* (Irvington, NY: Transnational Publishers, 1994) 161.

⁴⁹ Pieter Sanders, “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1994) 6:55 *Nethl Intl L Rev* 199.

⁵⁰ *Supra* note 38, at 20.

⁵¹ *Ibid.*

⁵² *Supra* note 22, at 313.

⁵³ Pierre Lastenouse, “Why Setting Aside an Arbitral Award is not Enough to Remove it from the International Scene” (1999) 16:2 *J Intl Arb* 25 at 43.

it allows seat courts to interfere with the legal effect of the award. It is doubtful if seat courts should arrogate to themselves powers to do this, and the territorial approach may assume too great a significance on the part of the seat court here.

(2) *The Article VII(1) exception*

The enforcement courts are empowered relative to the seat courts by Article VII(1) of the *Convention*, which allows for ‘opting’ out of the *Convention* and into the relatively more pro-enforcement domestic law provisions of the enforcement court. Since Article VII(1) empowers the enforcement court to determine, unilaterally, whether the award would be enforced, the assumption that the award truly derives its legal effect solely from the legal order of the seat court is invalid.

In *Hilmarton*,⁵⁴ the Paris Cour d’appel held that Article VII(1) prevailed over Article V, and thus applied⁵⁵ Article 1502 of the *New Code of Civil Procedure* to enforce the award.

While Article VII(1) might be interpreted in an uncertain manner,⁵⁶ it is undergirded by the interests of sovereignty which must prevail as a recognised pillar of the *New York Convention*. Uncertainty is thus a necessary but surmountable procedural cost. For example, the enforcement court is not bound by foreign judgments if they are not contrary to domestic public policy.⁵⁷ More importantly, sovereignty is an inalienable principle of international law, while consistency is merely a desirable outcome. Uncertainty should not be inflated as an obstacle to the use of Article VII(1).

Inconsistency is less of a problem, given that enforcement courts are less deferential to foreign judgments that set aside the award than foreign judgments that decide the merits of the underlying dispute.⁵⁸ Just as the US Supreme Court recognised the principle of international *res judicata* in

⁵⁴ *Supra* note 14.

⁵⁵ Article 1502 of the NCCP did not contain grounds to the effect of Article V(1)(e).

⁵⁶ Steven L. Smith, “Enforcement of International Arbitral Awards Under the New York Convention” in Rufus von Thülen Rhoades, Daniel M. Kolkey & Richard Chernick, eds, *Practitioner’s Handbook on International Arbitration and Mediation* (Huntington, NY: JurisNet, 2007) I.8.

⁵⁷ *Supra* note 38, at 212.

⁵⁸ *Supra* note 22, at 332.

Hilton v Guyot,⁵⁹ the enforcement courts should defer to the authority that decides the merits of the case instead to avoid re-litigating the dispute elsewhere.⁶⁰

(3) *Burden of having endless enforcement proceedings all over the world*

The application of Article VII(1), as noted in *Baker Marine*,⁶¹ has the result that “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.’”

The practical extent of such enforcement actions is, however, limited. The award creditor will only seek enforcement in the countries containing assets of the award debtor.⁶² In fact, in *Yukos Capital S.A.R.L v. OAO Tomskneft VNK*,⁶³ the lack of assets was undeniably relevant even in the early stages of enforcement. In *(1) X1, (2) X2 v (1) Y1, (2) Y2*,⁶⁴ the Dubai International Financial Courts held that the lack of assets may be a ground to refuse the enforcement.

Further, the judgment creditor is likely to narrow the scope of his enforcement actions to countries where the judgment debtors’ assets are easier to be enforced against. For instance, it is particularly difficult to satisfy the judgement debt with illiquid assets.

C. *The Delocalised Approach*

The alternative to the territorial approach does lend support to the idea of focusing the inquiry on the award itself. The award was considered by the French Court of Cassation in *PT Putrabali*

⁵⁹ *Hilton v Guyot*, 159 U.S. 113, AT 227 (1895) (Supreme Court, US).

⁶⁰ Gary H. Sampliner, “Enforcement of Nullified Foreign Arbitral Awards – Chromalloy Revisited” (1997) 14:3 J Intl Arb 141 at 160.

⁶¹ *Supra* note 43, at 197.

⁶² Andrew Waters & Kimberley Smith, “Enforcement of Foreign Arbitration Awards”, *Arbitration: What In-House Lawyers Need to Know*, (King & Wood Mallesons, 2016).

⁶³ [2014] IEHC 115.

⁶⁴ [2013] DIFC 2.

*Adyamulia (Indonesia) v Rena Holding*⁶⁵ to be “not attached to any state legal order”, but a “decision of international justice whose regularity is examined according to the rules applicable in the country where its recognition is sought”. This view ought to be followed, because parties who agree to international arbitration in *Convention* States assume that it is the *Convention* that serves as the basis for enforcement, and not another country’s domestic law.⁶⁶

This is buttressed Professor Gaillard’s view that arbitrators “do not derive their powers from the State in which they have their seat, but rather from the sum of all the legal orders that recognise ... the validity of the arbitration agreement and the award. ...” Arguably, the “sum of legal orders” is embodied by the signatories’ ratification of the *Convention* itself.

⁶⁵ Cass civ 2°, 29 June 2007, (2007) Rev. de l’Arb 515 at [2].

⁶⁶ *Supra* note 22, at 333.

VI. CONCLUSION

A. Implications in General

While the territorial approach has its difficulties, the delocalised approach finds little support internationally. Given that a compromise can be reached between the difficulties arising from scrutinizing the seat court's decision to set aside, there is insufficient reason in principle for Singapore to contradict the weight of comity and uniformity by departing from the US approach. This is buttressed by the purposive interpretation of Article V(1)(e).

While sovereignty is the main feature of the delocalised approach, sovereignty is indeed respected even in the scrutiny of the seat court's decision to set aside, without the same severe expense of certainty and uniformity in enforcement.

B. Implications for Singapore

As one of the world's top international arbitration centres, the Singapore courts' decisions inexorably drive the development of international arbitration jurisprudence. In this particularly divided area, with the French, US and other courts taking seemingly irreconcilable positions, Singapore's answer is particularly pertinent in advancing international arbitration as a desirable mechanism of international dispute resolution.

The course charted by the Singapore Court of Appeal appears consistent with the goal of attaining uniformity through comity, but it remains to be seen how the Singapore courts will apply the approach. Should the Singapore courts adopt an "internationalist" stance on this matter, it would be highly persuasive in moulding the global enforcement regime to become more modern and cohesive.