

**Fordham University**

---

**From the Selected Works of Fernando Leila**

---

2010

## Setting Aside An Arbitration Award

Fernando Leila, *Fordham University*



Available at: [https://works.bepress.com/fernando\\_leila/2/](https://works.bepress.com/fernando_leila/2/)

Re: Setting Aside an Arbitration Award

“The issue relating to setting aside or annulment of arbitral awards are amongst the most difficult ones to be settled in the Model Law.”<sup>1</sup>

## 1 – FACTS

Most arbitration rules stipulate that the arbitral awards that result from arbitration under those agreements or rules are ‘final.’ Yet there is almost always the possibility for a party to challenge the award, whether or not the parties have agreed. According to the United Nations Commission on International Trade Law (“UNCITRAL”), a successful challenge will usually result in the award being ‘set aside,’ ‘vacated,’ or ‘annulled,’ and therefore ceasing to exist, at least within the jurisdiction of the court setting it aside.<sup>2</sup>

To set aside an award means to ‘declare the award to be disregarded in whole or in part.’<sup>3</sup> An arbitration award set aside usually is not enforceable and is considered invalid. Under Article 34 of the Model Law, the losing party is entitled to act, and the action must be brought before a designated court in the forum state. The Model Law does not provide an appeal or judicial review of the merits. However, some countries that have adopted the UNCITRAL Model Law

---

<sup>1</sup>Report of the United Nations Commission on International Trade Law: A/CN.9/207, PARA.107.

<sup>2</sup>Michael McIlwraith and John Savage, *International Arbitration and Mediation*, page 328)

<sup>3</sup> See Redfern, A., Hunter, M., Blackaby, N. and Partasides, C., *Law and Practice of International Commercial Arbitration*, 2004, Sweet & Maxwell, London, at 404 (defining setting aside).

allow an appeal on the law or on the facts.<sup>4</sup>

There are different kinds of challenges of international arbitration awards. Among them are appeals, special review procedures, and review permitted by arbitration rules or by party agreements. But the most important type of challenge of an arbitral award by far is an action to set aside conducted before a court in the place of arbitration. The local arbitration law will invariably allow an action to set aside (also referred to as ‘recourse against’ or ‘review’ of the award, or as an action to ‘vacate’ or ‘annul’ the award).<sup>5</sup>

## **II – Question Presented**

Under what circumstances can a court in the forum state set aside an arbitration award assuming the UNCITRAL Model Law applies?

## **III – Conclusion**

Under the UNCITRAL Model Law (and most modern arbitration laws), a dissatisfied party may challenge the arbitration award, but only in an action to set aside in limited grounds that preclude a review of the merits, and only in the court of the place of arbitration; therefore, only the court in the forum state can set aside the arbitration award.<sup>6</sup>

---

<sup>4</sup> **Vindobona Journal of International Commercial Law & Arbitration. 10 VJ 287**

<sup>5</sup> **Michael McIlwraith and John Savage, International Arbitration and Mediation, page 331**

<sup>6</sup> **Michael McIlwraith and John Savage, International Arbitration and Mediation, page 332)**

## IV – Discussion

There are contrary opinions to the setting aside procedures. Some scholars believe that eliminating this procedure would improve the efficacy of international arbitration. This opinion is based on the perspective that all arbitration works in a satisfactory way. However, eliminating the setting aside procedure is not an option today, nor a persuasive idea. No arbitration procedure guarantees due process and justice in every instance. Hence, the claimant would need the opportunity to file to set the award aside.<sup>7</sup>

Under judicial control over arbitration awards, the interpretation of setting aside within whatever appropriate application is beginning to obtain consensus. Due to the lack of treaties harmonizing this claim, the UNCITRAL Model Law is obtaining recognition around the world, even in countries which have not adhered or ratified the Model Law.

The “Vindobona Journal of International Commercial Law & Arbitration” journal accurately explains the intention of the drafters of the UNCITRAL Model Law at the time they drafted the setting aside clause: The explanatory note to the UNCITRAL Model Law states that the Model Law contains an 'exclusive list' of 'limited grounds' to set an award aside. It further notes that both the setting aside and enforcement grounds under the UNCITRAL Model Law were taken directly from the New York Convention. The only modifications were drafting changes. The drafters of the Model Law intentionally incorporated the New York Convention's grounds to 'help prevent... an international award [from] fall[ing] victim to local particularities of law.' The drafters of the UNCITRAL Model Law decided that this policy choice enhances 'predictability and expeditiousness' and contributes to a 'harmonized system of limited recourse against awards and their enforcement.'

After being vacated, the award can be enforced neither in the arbitral forum nor outside of the arbitral forum. The scope of the set aside action covers the procedural defect, but not its

---

<sup>7</sup> **American Society of International Law Proceedings Should International Arbitration Awards Be Reviewable?**

substance. There is no appeal under the UNCITRAL Model Law on the facts or judicial review on the merits.<sup>8</sup> However, as explained below, this is not true in all the cases. Some countries accept enforcement of arbitration awards that were set aside in the forum state.

#### A – Importance of the Procedural Law in an Action to Set Aside

The law of procedure in an international arbitration process need not necessarily be from the same country as the substantive law governing the dispute.

The UNCITRAL Rules do not indicate or specify the applicable law. Still, there are doubts as to whether parties can exclude the mandatory procedural law of the forum. The UNCITRAL Rules, therefore, are ambiguous.

#### B – Article 34 of the UNCITRAL Model Law

The Model Law set of legislative provisions regulates the setting aside rule in one single article, Article 34: application for setting aside as exclusive recourse against arbitral award.

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
- (2) An arbitral award may be set aside by the court specified in article 6 only if:
  - (a) the party making the application furnishes proof that:

---

<sup>8</sup> **Vindobona Journal of International Commercial Law & Arbitration. The ICSID Grounds for Annulment in a Comparative Perspective: Analysis. 10 VJ 287**

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

**(b)** the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.

**(3)** An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been

disposed of by the arbitral tribunal.

- (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

At the core of the arbitration process resides the idea of avoiding judicial intervention. In order to minimize interference in international commercial arbitration, on every occasion where such intervention is permitted, it has to be scrutinized closely. It is submitted, however, that still no state would allow a binding award to be rendered within its territory without being able to review the award.<sup>9</sup>

### C – Grounds for Setting Aside

The seven grounds of Article 34 for setting aside arbitral awards can be grouped into (1) those stemming from a defect in the arbitral agreement itself, (2) grounds implying fundamental procedural deficiencies, and (3) grounds including fundamental mistakes concerning the merits of the case.<sup>10</sup>

The grounds to set aside under the UNCITRAL Model Law are the same as those found in the New York Convention, Article V, for recognition and enforcement on an award. They differ, however, in that only the winner requests the enforcement of an award, whereas a setting aside is

---

<sup>9</sup> Dr. Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, page 376.

<sup>10</sup> American Society of International Law Proceedings Should International Arbitration Awards Be Reviewable?

requested by the losing party. With respect to enforcement and recognition of the awards, there is a tendency around the world to legislate national laws according to the standards of Article V of the New York Convention. The Model Law setting aside rule is seen in the same way, as a confluence of laws.

The UNCITRAL Secretariat explained the necessity of regulating the setting aside rule. According to the Secretariat, the Model Law attempts to ameliorate the situation in which national laws on arbitration provide different recourses against arbitral awards, which complicates the harmonization of the international commercial arbitration due to the difference between legal systems. The question of the importance of uniformity is the major focus of this regulation.

Time limitations: Section 3 of Article 34 requires that the action of setting aside has to be within three months of the date on which the party making the application received the award. There are countries which have shorter deadlines, like Switzerland, where the application to set aside must be made within 30 days of notification of the award.<sup>11</sup>

In the case of Article 33, the time limit must be introduced within three months from the date “on which this request has been disposed of by the arbitral tribunal.’ Nevertheless, some authors, like Professor Pieter Sanders, suggest that it would be more appropriate to state the time limit starting ‘upon receipt of the decision of the arbitral tribunal.’<sup>12</sup>

There is one exception to this time limit, which occurs when the setting aside is based on public policy. Frequently this ground is discovered after the three-month period following the receipt

---

<sup>11</sup> Michael McIlwraith and John Savage, *International Arbitration and Mediation*, page 332.

<sup>12</sup> Pieter Sanders. *The Work of UNCITRAL on Arbitration and Conciliation*, 2004, Page 34.

of the award. In order to regulate this issue, there are countries that have domestic regulations or remedies, in which it is possible to start an action for setting aside on the ground of the public policy, within three months after the fraud or forgery has been discovered. Several countries that adopted the UNCITRAL Model Law introduced modifications in their own laws to fill this gap. For instance, Ireland states in its International Arbitration Act:

“The time limit specified in Article 34 (3) shall not apply to an application to the High Court to have an arbitral award set aside on the grounds that the award is in conflict with the public policy of the State.”<sup>13</sup>

In a setting aside action, courts are restricted to the reasons offered by Article 34(2), mainly to procedural issues. The court may not review the merits of the award.<sup>14</sup>

#### D – Court in which the action should be filed

The action can be filed only in the courts of the place of arbitration. Article 6 of the Model Law establishes that actions to set aside are to be heard by the court identified in that provision by each country enacting the law. In Singapore the forum identified in article 6 is the High Court.<sup>15</sup> On the contrary, the United States does not have one central court to deal with setting aside actions.

Unfortunately, there are cases where courts vacated arbitration awards without being the place of the arbitration. In “*Pertamina v. Karaha Bodas*”<sup>16</sup> an Indonesian court ‘set aside’ an award

---

<sup>13</sup> **Pieter Sanders. The Work of UNCITRAL on Arbitration and Conciliation. 2004. Pag. 128.**

<sup>14</sup> **A/CN. 9/216, para. 107.**

<sup>15</sup> **art. 8 of the Singapore International Arbitration Act.**

<sup>16</sup> ***Pertamina v. Karaha Bodas*, 543 U.S. 917, 125 S.Ct. 59 (Mem) U.S.,2004**

where the place of arbitration was in Switzerland, despite there being no indication that the parties had agreed on the law of the arbitration being other than that of the Swiss seat.<sup>17</sup>

According to art. 34(2) (a), the losing party, which is the one that rises the setting aside question, has the burden of the proof. If it fails to prove its point, the court will confirm the award.

If one or both parties do not comply with a formality of the applicable law, the arbitration agreement may be invalid. Article 34 (2) (a) (i) relates to the case where one of the parties was incapacitated. To determine that incapacity, general legal provisions in the contract must be consulted.<sup>18</sup>

The second case is article 34 (2) (a) (ii), when an applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the case. This ground addresses the case of unfair treatment of one of the parties to the arbitration. This clause is based on the principle of due process. The standards in this case are not uniform, but if the tribunal gives the parties a fair hearing allowing equal opportunity at each stage of the arbitration, it is enough.<sup>19</sup>

In *Wuzhou Port Foreign Trade Development Corp v. New Chemic Ltd*,<sup>20</sup> the High Court of Hong Kong, held that the defendant in this case submitted that the award should be set aside on

---

<sup>17</sup> **Michael McIlwraith and John Savage, International Arbitration and Mediation, page 333)**

<sup>18</sup> **Dr. Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, page 382.**

<sup>19</sup> **Idem**

<sup>20</sup> **Wuzhou Port Foreign Trade Development Corp v. New Chemic Ltd. A/CN.9/SER.C/ABSTRACTS/45; (2001) 3 HKC 395**

the ground that the arbitral procedure was not in accordance with the agreement of the parties, based on articles 34(2)(b)(iv) and 36(1)(a)(iv) of the Model Law. The court, however, decided to exercise its discretion found in art. 36(1) of the Model Law in favor of the plaintiff and held that the defendant had not raised the issue before the arbitral tribunal, which was therefore unable to make a ruling upon the issue. The defendant also argued that it had been unable to properly present its case based on articles 34(2)(a)(ii) and 36(1)(a)(ii) of the Model Law and that it was also “otherwise unable to present the case” due to the fact that it had not seen certain documents submitted by the plaintiff.<sup>21</sup>

Article 34 (2) (a) (iii) deals with an award that is not contemplated by or does not fall within the terms of the submission to arbitration, including issues from outside of the jurisdiction of the tribunal. In such a case, the court can set aside only that part of the award that can be separated from the scope of the agreement. The scope of review of the tribunal is governed by article 16(2), which also establishes the tribunal’s competence.<sup>22</sup>

In *Quintette Coal Ltd V. Nippon Steel Corp.*,<sup>23</sup> the Canada/British Columbia Court of Appeal stated that Quintette, relying on articles 5 and 34 of the Model Law, sought to set aside the award on the grounds that the arbitrators had exceeded their jurisdiction by dealing with a matter not contemplated by or falling within the scope of the submission to arbitration. Upholding the arbitral award, the court noted the worldwide trend towards restricting the scope of judicial intervention into commercial arbitration and stated that the award could be justified under the

---

<sup>21</sup> **Id.**

<sup>22</sup> **Dr. Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, page 382.**

<sup>23</sup> **Quintette Coal Ltd V. Nippon Steel Corp. A/CN.9/SER.C/ABSTRACTS/1; Canada Supreme Court Reports 1990 vol.2**

terms of the contract, and, consequently, the court was prevented from intervening under art. 34(2)(a)(iii) of the Model Law.<sup>24</sup>

According to article 34 (2) (a) (iv) in a case where the arbitrators don't have the attributes specified in the agreement, the award can be set aside. Countries that do not apply the Model Law, like France, applied the same rule in identical cases. In *Agence Transcongolaise des Communications v. Campaignie Miniere de L'Ogooue – Comilog S.A.*,<sup>25</sup> the Paris Court of Appeal annulled an award rendered by a truncated tribunal, holding that the composition of the tribunal was no longer in accordance with the parties' agreement.<sup>26</sup>

The grounds specified in article 34 (2) (b) (i) concern the arbitrability of the claims raised in the arbitration. It is related to article 1(5) of the Model Law which provides that any law of the adopting state which excludes certain issues from being settled by arbitration will not be affected by the Model Law. For instance, there are many disputes not capable of arbitration, even though it will vary from state to state; matrimonial and family disputes and criminal matters are among them.

In Germany/ Hanseatisches Oberlandesgericht (Hamburg),<sup>27</sup> the court in these setting aside proceedings held that the inclusion of arbitration agreements in statutes of association is permissible under the German Code of Civil Procedure, so that no consent in the written form (art. 7 of the Model Law) is required. Furthermore, the court found that despite the effects the

---

<sup>24</sup> <http://www.canlii.org/en/bc/bcca/doc/1991/1991canlii5708/1991canlii5708.html>

<sup>25</sup> *Agence Transcongolaise des Communications v. Campaignie Miniere de L'Ogooue – Comilog S.A* Paris Court of Appeal, 1 Jul. 1997, *Yearbook Commercial Arbitration XXIV (1999)*: 281 et seq.

<sup>26</sup> Michael McIlwraith and John Savage, *International Arbitration and Mediation*, page 337)

<sup>27</sup> *Germany/ Hanseatisches Oberlandesgericht (Hamburg)*. A/CN.9/SER.C/ABSTRACTS/50; Reports of the OLG Hamburg (OLGR) 196

award had on other members of the association, the dispute was arbitrable in the light of art. 34(2)(b)(i) of the Model Law.<sup>28</sup>

The most troublesome grounds in article 34 (b), the conflict with public policy, because there is not a uniform definition of public policy. However, it is possible to find guidance in the Commission Report:

“In discussion the term ‘public policy’ it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice. It was noted, however, that in some common law jurisdictions that term might be interpreted as not covering notions of procedural justice while in legal systems of civil law tradition, inspired by the French concept of ‘ordre public’, principles of procedural justice were regarded as being included...”<sup>29</sup>

A problem arises when a court construes a public policy so broadly that it becomes indistinguishable from the laws of the jurisdiction. In that case, to avoid any conflict of the award with the law, the court will set aside that award. In some countries this situation prevails, like India, creating a confused situation that is against of the harmonization of the arbitration process. In the ‘Saw Pipes’ case,<sup>30</sup> the Supreme Court of India broadly interpreted public policy of India, to include the interests of India, morality, as well as patent illegality.<sup>31</sup> Other courts interpret the case of public policy narrowly. This narrow interpretation is referred to as international public policy. This concept is less broad than the one applied for public policy under the national law. The concept of international public policy, even though still not clear,

---

<sup>28</sup> **Online Database on Arbitration Law - <http://www.dis-arb.de>**

<sup>29</sup> **A/40/17, para. 296.**

<sup>30</sup> **Oil and Natural Gas Corporation v. SAW Pipes Ltd (2003) 5 SCC 705**

<sup>31</sup> **Michael McIlwraith and John Savage, International Arbitration and Mediation, page 338)**

includes only the most basic notions of morality and justice.<sup>32</sup>

In the case Zimbabwe/Harare High Court: Zimbabwe Electricity Supply Commission v. Genius Joel Maposa,<sup>33</sup> the court found that an award which violates public policy would have to be one that would undermines the integrity of the system of international arbitration as put in place by the Model Law. This would include cases of fraud, corruption, bribery and serious procedural irregularities. In the case at hand no moral turpitude was attached to the arbitrator's conduct and thus the award could not be said to be in conflict with public policy (art. 34 of the Model Law). The court found that the arbitrator's error which had occurred was clearly one of computation for which art. 33 of the Model Law make adequate provision.

Even though neither the New York Convention nor the Model Law list corruption as a ground to set aside an award, an arbitration panel that acted with bias might be set aside under the Model Law. In *Transport de Cargaison v Industrial Bulk Carriers*,<sup>34</sup> the Quebec Court of Appeals in Canada noted that a bribe is "intrinsically immoral" and, as such, violates public policy the UNCITRAL Model Law. Approval by the arbitrator of bribes by a party violates the public policy ground under Art. V(2)(b) of the New York Convention.<sup>35</sup> Following the opinion of *Vindobona Journal of International Commercial Law & Arbitration*,<sup>36</sup> the drafter of the UNCITRAL Model Law did not intend to combine national and international public policy

---

<sup>32</sup> Michael McIlwraith and John Savage, *International Arbitration and Mediation*, page 338)

<sup>33</sup> Zimbabwe/Supreme Court: Judgment No. SC 114/99; A/CN.9/SER.C/ABSTRACTS/30

<sup>34</sup> *Transport de Cargaison v Industrial Bulk Carriers*. A/CN.9/SER.C/ABSTRACTS/13; *Revue de droit judiciaire* (1990) 418; 1990 CanLII 3028 (QC CA)

<sup>35</sup> *Vindobona Journal of International Commercial Law & Arbitration*. The ICSID Grounds for Annulment in a Comparative Perspective: Analysis 2006. 10 VJ 287

<sup>36</sup> *Id.*

concepts. Some countries relate concepts like fair dealing and honesty with public policy.

In the United States, for example, contracts entered into by unlicensed contractors may be void as a matter of public policy, and any arbitration award premised upon such a contract may itself be set aside as contrary to public policy. Similarly, a public works contract that is procured by corruption may not be the proper subject of arbitration, and any resulting award is liable to be unenforceable on grounds of public policy. The extent to which domestic public policy concerns will provide the basis for refusing to enforce an international arbitration under article V(2) of the New York Convention and any applicable state law is an open question. From a comparative perspective, as reflected in subsection 5 of Article 1502 of the French International Arbitration Law and in decisions of courts in the United States, for example, many countries distinguish between domestic public policy and international public policy. Only international arbitration awards that contradict the latter, which is more narrowly defined than the former, are subject to nonenforcement.<sup>37</sup>

The following case is “In *In re Iida*,”<sup>38</sup> under United States Bankruptcy Appellate Panel of the Ninth Circuit:

“But the debtor relied on to argue that recognition nevertheless should be denied because recognition would be manifestly contrary to the public policy of the United States.”

“There is no merit to the assertion by the *Iidas* that recognition would be, as provided in, “manifestly contrary to the public policy of the United States.” This public policy exception is narrow and, by virtue of the qualifier “manifestly,” is limited only to the most fundamental policies of the United States. The *Iidas* have not articulated a fundamental policy of the United States that is offended by recognizing the Japanese bankruptcy proceeding.”<sup>39</sup>

---

<sup>37</sup> **John Hinchey and Troy Harris International Construction Arbitration Handbook.**

<sup>38</sup> ***In re Iidas* 377 B.R. 243. 9th Cir.BAP (Hawai‘i) 2007.**

<sup>39</sup> ***In re Iidas* 377 B.R. 243. 9th Cir.BAP (Hawai‘i) 2007.**

After stating that a mere error in an award did not constitute a ground for setting it aside, a German Court, in the case *Oberlandesgericht Koln*,<sup>40</sup> concluded that the decision in the case at hand was so arbitrary that public policy could be deemed to have been violated. It held that the award was so clearly based on completely distorted facts that its enforcement would violate generally accepted fundamental judicial principles.<sup>41</sup>

Outside the Model Law several national laws adopted similar grounds to those established by the UNCITRAL Model Law. However, there are countries that have different approaches to the matter. Section 69 of the English Arbitration Act 1996 allows a party to appeal an award to the English courts on question of law, and the court may confirm, vary, or set aside the award as a result, and remit it to the tribunal for reconsideration. The court will grant permission only if “the decision of the tribunal on the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all circumstances for the court to determine the question.”<sup>42</sup>

In conclusion, the public policy ground is the most difficult to determine and remains problematic, being the most frequently raised in the courts.

Section 4 of article 34 inserts “where appropriate and so requested by a party...” a court may suspend the proceeding and give it to the Arbitral Tribunal to eliminate the grounds for setting aside.

---

<sup>40</sup> **Oberlandesgericht Koln: 9 Sch 19/02. A/CN.9/SER.C/ABSTRACTS/61**

<sup>41</sup> **Online Database on Arbitration Law – <http://www.dis-arb.de>**

<sup>42</sup> **Michael McIlwraith and John Savage, International Arbitration and Mediation, page 339**

Even though this remedy is generally known in common law countries, it is new for civil law ones. The procedure described in section 4 of article 34 is not detailed, but it is presumed that the court will hear both parties. After that, the court can suspend the setting aside period, during which the Arbitral Tribunal has the opportunity to eliminate the grounds for setting the award aside.<sup>43</sup>

It is possible to infer from article 34, section 4 of the UNCITRAL Model Law, the remission procedure may be “in whole or in part.”<sup>44</sup> Therefore the new award after the remission has to contain both parts, the remitted and the non-remitted part.

Time Limit: Only within three months from when a party has received the award, is possible to start an action to set aside an award under the UNCITRAL Model Law. In case there was a correction or interpretation of the award by the arbitration tribunal, the time limit begins from the moment the tribunal disposed of the request. This is an exception that was criticized because it can cause delaying tactics.<sup>45</sup>

Suspension of the setting aside proceeding: The setting aside proceeding, according article 34 (4) can be suspended by request of a party (if it is appropriate) giving the tribunal the opportunity to “resume the arbitral proceedings or to take such other action as... eliminate the grounds for setting aside.”

The Quebec Court of Appeal, in *Transport de cargaison (Cargo Carriers) v. Industrial Bulk*

---

<sup>43</sup> Pieter Sanders. *The Work of UNCITRAL on Arbitration and Conciliation*. 2004. Page 128.

<sup>44</sup> Pieter Sanders. *The Work of UNCITRAL on Arbitration and Conciliation*. 2004. Page 131.

<sup>45</sup> Pieter Sanders. *The Work of UNCITRAL on Arbitration and Conciliation*. 2004. Pag. 128.

Carriers,<sup>46</sup> on June 15, 1990, rejected the argument (raised in enforcement proceedings) that the award was said to order payment of a sum greater than that expended by the respondent as this was within the exclusive jurisdiction of the tribunal under art. 34 of the Model Law.<sup>47</sup>

The award can be set aside in part as well. This partial nullity is possible only where it is separable from the other parts. In that case the award remains valid. As described in *International Arbitration and Mediation*,<sup>48</sup> “One well known example of an award set aside in part only was in *Metalclad v. Mexico*, a NAFTA award brought by Mexico before the Supreme Court of British Columbia. The court found that the NAFTA tribunal, in its conclusions on the existence of a concept of transparency, had decided upon matters beyond the scope of the submission to arbitration under NAFTA Chapter Eleven. The court therefore struck down this portion of the award, but upheld the remainder of it.”<sup>49</sup>

A different problem arises when the entire award has been set aside. It is not a problem concerning the jurisdiction of the court that set aside the award, but rather in a different jurisdiction where the winner of the award tries to enforce the award even though the award was set aside in the forum state. This is the case where a party argues that it did not receive a fair hearing from the court deciding the set aside action.

“Courts enforcing awards set aside elsewhere rely primarily on Article VII of the New York Convention, which is construed as allowing parties to rely on the enforcement provisions of local law if they are more favourable than the rights granted under the Convention. Certain laws, and notably French law, are more

---

<sup>46</sup> *Transport de cargaison (Cargo Carriers) v. Industrial Bulk Carriers*, **Revue de droit judiciaire (1990) 418; 1990 CanLII 3028 (QC CA); A/CN.9/SER.C/ABSTRACTS/13;**

<sup>47</sup> <http://www.canlii.org/fr/qc/qcca/doc/1990/1990canlii3028/1990canlii3028.html>

<sup>48</sup> **Michael McIlwraith and John Savage, *International Arbitration and Mediation*, page 341**

<sup>49</sup> **Id.**

favourable than the Convention as they allow the enforcement of an award made elsewhere even if it has been set aside (or, put another way, French law does not include the setting aside of the award as a grounds for refusing enforcement). So, under this approach, if none of the other grounds for refusing enforcement under local law are available to the award debtor, enforcement of an award set aside elsewhere should be permitted... The underlying rationale in this approach is that the court of the arbitration should not be judged of the validity or enforceability of the award outside its own borders, and that the international award is not anchored in the legal system of the state where the place of arbitration is located, so that it does not cease to exist when it is annulled by the courts of that state. ...It should be for each enforcement court to evaluate whether under its own laws the award should be admitted into the legal order of that jurisdiction and enforced there.”<sup>50</sup>

The problem arises here because of the unpredictability of the enforcement when a party enters in a contract, because the party bases its expectations on the approach to the arbitration law applied in the place of arbitration. But if some courts, after arbitral awards have been set aside, enforce them, it seems that those courts “ignored the parties’ expectations at the time of entering into their contract.”<sup>51</sup>

In the United State jurisdiction, an unexpected enforcement of set aside award was made by the United States Court of the District of Columbia in *Chromalloy Aeroservices v. Arab Republic of Egypt*,<sup>52</sup> decided in 1996. The court's decision was unwelcomed by the international bar that it was ominously dubbed the "Chromalloy Problem."<sup>53</sup>

Article V(1)(e), also provides that the respondent can resist the recognition and enforcement of the award by establishing that it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made". This provision establishes a

---

<sup>50</sup> Michael McIlwraith and John Savage, *International Arbitration and Mediation*, pag 356. Also see J. Paulson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment”)

<sup>51</sup> *Id.*

<sup>52</sup> *Chromalloy*, 939 F. Supp. 907.

<sup>53</sup> University of Miami *Inter-American Law Review Current Issues In The Enforcement Of International Arbitration Awards Fall 2004*.

connection between the review of the award by the judicial authorities of the seat of the arbitration and its recognition abroad. The reference to the "under the law of which" the award has been rendered refers to a (geographical) delocalization, which is no longer applicable in any of the states considered here

For instance, according to the Comparative Law of International Arbitration, the US Court of Appeals for the 5th Circuit considered the "assigning of different roles to national courts to carry out the aims of the treaty" (i.e. the New York Convention) and distinguished between "primary" and "secondary" jurisdictions, and held:

"Articles IV and V of the Convention specify the procedures for courts of secondary Jurisdictions to follow when deciding whether to enforce a foreign arbitral award ... Article V, in turn, enumerates specific grounds on which the court may refuse enforcement if the party contesting enforcement provides proof sufficient to meet one of the bases for refusal. In contrast to the limited authority of secondary-jurisdiction courts to review the arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. By its silence on the matter, the Convention does not restrict the grounds on which primary- jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction's local law the decision whether to set aside an award. Consequently, even though courts of a primary jurisdiction may apply their own domestic law when evaluating an attempt to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the limited grounds specified in Art.V."<sup>54</sup>

The court refused to grant an anti-suit injunction to prevent a setting aside of the award in the courts of Jakarta, notably because the annulment of the award in Indonesia did not prevent its enforcement in the United States: "... an Indonesian annulment is wholly ineffective in curtailing the ability of any court of secondary jurisdiction, including US courts, to enforce the arbitral award. As an enforcement jurisdiction, our courts have discretion under the Convention to

---

<sup>54</sup> Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration, Chapter 10. Recognition and Enforcement of Arbitral Awards.*

enforce an award despite annulment in another country, and have exercised that discretion in the past". In that respect, the court explicitly referred to the *Chromalloy* decision.<sup>55</sup>

Different decisions allowing the enforcement of awards that were set aside have been made by French, Belgian and US courts. In recent cases some US courts have refused to enforce awards on the ground that the award had been set aside by the forum state courts.

Today, most courts around the world are likely to refuse enforcement of an award that has been set aside in another country, even though some courts have enforced set aside awards based on local annulment standards. If the attempt to set aside the award in the forum state results unsuccessful, that situation would harm the award debtor's chances of resisting enforcement in other jurisdictions.<sup>56</sup>

#### D – New York Convention

As explained above, under the New York Convention the enforcement court may refuse the recognition only upon the grounds expressly provided by Article V. The list is exhaustive and excludes any revision of the merits of the award, and the court may decline the request for refusal even when there are certain grounds to set the award aside.

This Convention and the Model Law distinguish between grounds that must be raised by the opposing party and those that can be raised by the court. In this latter case, the court may raise either the non-arbitrability of the subject matter or the recognition and enforcement will be contrary to the public policy.<sup>57</sup>

---

<sup>55</sup> **Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, Chapter 10. Recognition and Enforcement of Arbitral Awards.**

<sup>56</sup> **Michael McIlwraith and John Savage, International Arbitration and Mediation, pag 357**

<sup>57</sup> **Loukas Mistelis and Julian Lew. "Pervasive Problems in International Arbitration." Pag. 178.**

## F – Process of Denationalization

Article 1717 of the Belgian Judicial Code of 1985 provides:

“The Belgian courts can only hear an action to set an award aside if at least one of the parties to the dispute decided by the arbitral award is either an individual having Belgian nationality or residence, or legal entity constituted in Belgium or having a subsidiary or other establishment in Belgium.”

Swiss law is similar, but not identical. Under the Swiss Private International Law, parties have the option to exclude one or all grounds for setting aside only if they expressly agreed to do so.

The Belgian law then changed, adopting a less radical approach.<sup>58</sup>

## G – The Post Setting Aside Situation

The Model Law does not deal with the effect of setting an award aside. After the award is set aside, the arbitration agreement is still operative. Countries like Germany in its new arbitration law included this concept.

“Setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again in respect to the subject matter of the dispute.”<sup>59</sup>

Therefore, German Law renders the arbitration agreement operative again. Hence, the dispute should be submitted to a newly established arbitral tribunal.<sup>60</sup>

## H – Setting Aside an Award in China

Finally, because the role of China in world trade has steadily grown, and through its market liberalization has moved the economy forward, it is necessary to review the Chinese arbitration

---

<sup>58</sup> Loukas Mistelis and Julian Lew. “Pervasive Problems in International Arbitration.” Page 178.

<sup>59</sup> German CCP, section 1059, Paragraph 5.

<sup>60</sup> Pieter Sanders. *The Work of UNCITRAL on Arbitration and Conciliation. 2004.* Page 132.

rules.

In order to adapt to the new economic conditions, China enacted the Arbitration Act in 1994(CAA), establishing a system to set aside arbitration awards, influenced by the UNCITRAL Model Law. This Act gives the court the option to remit the case to the arbitral tribunal for re-arbitration during proceedings to set aside an award. Some academics see this as an alternative to setting aside the award.

This act covers domestic and foreign awards, with the exception that in order to refuse enforcement of a foreign award it has the pre- reporting system that is not required with respect to domestic awards.

The time limit for applying to set aside an award is 6 months from the date of receiving the arbitration award. The competent court is the court where the arbitration tribunal sits. (Art. 58 of the CAA)

The court that accepted the setting aside action must report to the High People's Court in its own area which may agree to set aside or notify the tribunal to re-arbitrate, reporting its view to the Supreme Court of China, and after receiving its review can a ruling be made. When the People's Court accepts the application, it must submit the report within 30 days. The High People's Court has 15 days to submit its opinion to the Supreme People's Court.<sup>61</sup>

Article 70 of the CCA 1994 in its first paragraph, establishes the grounds to refuse to enforce a foreign arbitration award:

- I. If the party against whom the enforcement is sought presents evidence which proves that the arbitration award involves one of the following circumstances, the People's Court

---

<sup>61</sup> **Parker School of Foreign & Comparative Law; Li Hu, American Review of International Arbitration Setting Aside An Arbitral Award In The People's Republic Of China 2001.**

shall, after examination and verification by a collegiate bench formed by the People's Court, refuse to enforce the award where:

- (1) the parties have neither included an arbitration clause in their contract nor subsequently concluded a written arbitration agreement;
- (2) the party against whom the enforcement is sought was not notified to appoint an arbitrator or to take part in the arbitration proceedings, or the party against whom the enforcement is sought was unable to state his opinions due to reasons for which he is not responsible;
- (3) the formation of the arbitral tribunal or the arbitration procedure was not in conformity with the rules of arbitration; or
- (4) matters decided in the award exceeded the scope of the arbitration agreement or were beyond the authority of the arbitration institution.

II. If the People's Court determines that enforcement of the said award would be contrary to the social and public interests of the People's Republic of China, it shall rule to refuse enforcement.

The court that intervenes in an action to set aside cannot review the substance of the award but just procedural issues. Again, the issue here arises out of the clause that refers to the “violation of social and public interest.”

The general concept of order publique derives from civil law countries and was adopted by the majority of countries as a ground to refuse the enforcement of an arbitration award.

“In fact, the norm of public policy is affected deeply by the judicial practice of the state, and it evolves and develops constantly with a judge's specific interpretation in each separate case. Thus, public policy is relative. What constitutes a violation of public policy largely revolves around the facts and is to be decided on an ad

hoc basis... the ground of a violation of social and public interest is, in practice, construed strictly by the courts... The Chinese courts have concluded that only in very serious cases would this ground be applied."<sup>62</sup>

Subjects that are non-arbitrable in most countries are similarly non-arbitrable in China. For example, marital, adoption, and administrative disputes are not arbitrable in China.

Also, most of the claims are rejected because of the lack of proof of bias from the arbitrators.

The CAA does not list public policy as a ground for setting an award aside, but that does not mean it is excluded. If public policy is raised with respect to a foreign arbitral award, the court should apply Article V (2) of the New York Convention because China ratified it in 1987.

However, comparing setting aside, in domestic awards with enforcing foreign awards, in the latter case it must be interpreted more strictly.

"In the field of international commercial arbitration, "international public policy" has been separated as distinct from "domestic public policy" and accepted worldwide. "According to this distinction, what is considered to pertain to public policy in domestic cases does not necessarily pertain to public policy in international cases, meaning that the number of matters considered to fall under public policy in international cases is smaller than in domestic cases. This distinction is justified by the differing purposes of domestic and international relations."<sup>63</sup>

In practice, the Chinese courts are reluctant to apply the violation of public interest as a ground to refuse to enforce a foreign arbitral award. Actually, the CAA 1994 is similar to French and Swedish Laws, giving special treatment to foreign arbitration awards.

Another problematic issue is whether parties can exclude the arbitration agreement a setting aside procedure. In the CAA there is not provision that allows or prohibits this clause. On the

---

<sup>62</sup> Parker School of Foreign & Comparative Law; Li Hu, American Review of International Arbitration Setting Aside An Arbitral Award In The People's Republic Of China 2001.

<sup>63</sup> Parker School of Foreign & Comparative Law; Li Hu, American Review of International Arbitration Setting Aside An Arbitral Award In The People's Republic Of China 2001.

other hand, under the ICC Rules the parties shall be deemed to have waived their right to any form of appeal insofar as such waiver can validly be made.<sup>64</sup>

In case a conflict between those provisions (CAA and ICC) arises, and the venue is China, and even if the parties had agree to exclude any ground for setting aside the award, it is still under the jurisdiction of the CAA. A clause waiving any ground to challenge an award under the CAA would violate the public interest of China.

Fernando Leila

LLM Student

Exam. Number: E74946068

---

<sup>64</sup> See ICC Arbitration Rules 1998, Art. 28(6).