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Enforcement of Arbitration Awards in France

Winning is only half the battle – enforcing the "wrong" award in France can reap rewards

Arbitration is often recommended by lawyers as a dispute resolution mechanism because of the relative ease with which arbitration awards can be enforced in states that are signatories to the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (the "1958 Convention").

One of the reasons for this is because the 1958 Convention provides for limited grounds on which the court of a signatory state may refuse to enforce a foreign arbitration award.

However, in the recent decision of *Société PT Putrabali Adyamulia c/ SA Rena Holdings, Cour de cassation, 1ere civ 29 juin 2007*, the French Cour de Cassation (The French Supreme Court) re-opened a longstanding and controversial debate relating to the enforcement in France of awards that were "annulled" in their countries of origin.

Background

PT Putrabali Adyamulia ("Putrabali"), an Indonesian company, sold a cargo of Muntok White Pepper to Société Est Epices (now Rena Holdings SA) ("SEE"), a French company, for shipment in January 2000.

The sale was on C&F terms pursuant to Contract N° 5 of the International General Produce Association ("IGPA"). Putrabali, as sellers, were thus obliged to arrange shipment. Putrabali sent to SEE a declaration of shipment on board the "Intan 6 v.360a SN". SEE did not dispute the declaration of shipment within the required 3 day time frame under the contract.

The Intan 6 v.360a SN sank off Bangka Island in February 2000 and the entire cargo was lost. Putrabali tendered the requisite documents for payment. However SEE refused to pay the price on the basis that the goods had been lost. Putrabali commenced arbitration proceedings before the IGPA claiming that, under a C&F contract, SEE were obliged to pay the price.

The Arbitration Proceedings

On 30th October 2000 the IGPA tribunal found in favour of Putrabali and ordered SEE to pay damages equivalent to the full contractual price for the cargo (the "First Award"). SEE appealed to the IGPA Board of Appeal who, on 11th April 2001, overturned the First Award and found in favour of SEE (the "Second Award").

Putrabali appealed to the English Court pursuant to s.69 of the Arbitration Act arguing that the IGPA Board of Appeal erred in law in finding that SEE was entitled to refuse to pay the contract price.

In a judgment that provides a valuable re-iteration of the position of English law in relation to the respective obligations of buyers and sellers under CIF and C&F contracts, Judge Havelock-Allen QC found in favour of Putrabali (see *"The Intan 6 v.360a SN" [2003] 2 Lloyd's Rep. 700*). The matter was remitted back to the IGPA Board of Appeal In its award dated 21st August 2003 the IGPA Board of Appeal found in favour of Putrabali (the "Remitted Award").

The Enforcement Stage

Having obtained a final and binding award in its favour, Putrabali sought to enforce the Remitted Award in France. However, in September 2003 i.e. a month **after** publication of the Remitted Award by the IGPA Board of Appeal, SEE applied to the President of the

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July 2008

Energy, Trade & Commodities

Tribunal de Grande Instance in Paris and obtained an enforcement order (*Exequatur*) in relation to the Second Award.

SEE were able to obtain the *exequatur* because summary enforcement of arbitration awards in France is a simple process involving an ex parte paper application before the President of the Tribunal de Grande Instance. All that is required is a valid original arbitration award together with its translation in order for the *exequatur* to be granted. It is then served on the other party. It is only at this point that the other party can contest the exequatur by appealing to the Court of Appeal.

Notwithstanding the fact that an *exequatur* in respect of the Second Award had already been obtained, Putrabali were also able to obtain an *exequatur* order in February 2004 in respect of the Remitted Award.

This bizarre situation of conflicting awards being enforced within the same jurisdiction set the stage for a stand off which was to last a further four years until it was finally resolved by the French Supreme Court in June 2007.

The decision of the Cour de Cassation

The decision of the Cour de Cassation follows a long line of French case law, the most (in)famous of which is *Société Hilmarton v Société O.T.V* ("Hilmarton"). In *Hilmarton* the Cour de Cassation permitted the recognition and enforcement of an ICC arbitration award which had been annulled by the Court of Justice of the Canton of Geneva, whose decision was then affirmed by the Swiss Federal Tribunal, the highest court in Switzerland.

The Cour de Cassation looked to Article 1502 of the French Procedural Code and to Article VII of the 1958 Convention to reason its decision. Article 1502 of the French Procedural Code lists the grounds on which a French court may refuse to enforce an arbitration award. This list does not include the ground contained in article V(1)(e) of the 1958 Convention, namely the annulment of the award in its country of origin.

The Cour de Cassation then turned to Article VII of the 1958 Convention which allows a party to avail itself of an award in the manner and to the extent allowed by the law of the country of enforcement to conclude that "it was permissible for Rena Holdings [SEE] to present in France the award made in London on 10th April 2001……and to rely on the provisions of French law of international arbitration, which do not provide that the annulment of an arbitration award in its country of origin as a valid ground to refuse the recognition and enforcement of the award rendered abroad".

Hence the Cour de Cassation doggedly applied the Hilmarton reasoning to the Putrabali case and in so doing ignored the fact that *Putrabali* was not a case of "annulment". Rather, unlike the Hilmarton case, which concerned an award and a competing court judgment annulling that award, Putrabali involved two competing awards, only one of which - the Remitted Award – marked the conclusion of the arbitral process. The Cour de Cassation also ignored the fact that the parties had opted not to contract out of the automatic right of appeal under s.69 of the Arbitration Act, thus overlooking the principle of the parties' autonomy, one of the cornerstones of international commercial arbitration.

The Practical Implications of the Cour de Cassation's decision

The Putrabali case highlights the difficulties that may sometimes arise, even in so called "arbitration - friendly" jurisdictions. Some view the French court's approach as an exercise in judicial protectionism. Others see it as a strict application of "delocalisation" of international arbitration, a principle that is supported by many influential academics.

Energy, Trade & Commodities 

Whatever the reasons, the practical implications of Putrabali cannot be ignored. Any rights to challenge or appeal from an arbitration award that is available at the seat of arbitration are undermined and virtually made defunct, at least as against French companies or companies with assets in France.

Therefore, when engaged in arbitration proceedings against a French company or a company with substantial assets in France, the issue of enforcement should be carefully considered at a very early stage of any arbitration proceedings.

If you find that an opponent has obtained an *exequatur* of a prior award before you have the chance to enforce the "final" award, then it is important to seek advice promptly and to seek appropriate remedies from the arbitral tribunal if still constituted or the courts of the place of arbitration, including possibly in respect of a breach of the arbitration agreement.