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Recent decision confirms France's readiness to enforce international arbitral awards annulled at place of arbitration

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On 27 September 2005, the Cour d'appel de Paris (the Paris Court of Appeal) rendered a decision confirming the readiness of French courts to enforce international arbitration awards which have been annulled at the place of arbitration.[1] The decision—rejecting an appeal against a French execution order (*ordonnance d'exequatur*) of an award rendered in Dubai but subsequently annulled by the UAE's highest civil court—employs novel reasoning in fortifying the position taken by the Cour de Cassation (the French Supreme Court) in the famous *Hilmarton* case.[2]

DAC decision

A contractual dispute between Direction Générale de l'Aviation Civile de l'Émirat de Dubai ('DAC') and International Bechtel Co ('Bechtel') was submitted to a UAE law-governed arbitration in Dubai. On 20 February 2002, the sole arbitrator rendered an award against DAC. On 21 October 2003, the tribunal de grande instance de Paris (the Court of First Instance in Paris) issued an order enforcing the award against DAC. However, on 15 May 2004, the UAE's highest civil court, the Court of Cassation in Dubai, annulled the arbitral award on the grounds that the witnesses had not been sworn in, in breach of the procedural provisions of the UAE's arbitration law.

As a result, DAC lodged an appeal in the Paris Court of Appeal against the execution order. Among other arguments, DAC asked the Court of Appeal to recognise the decision of the Court in Dubai annulling the arbitral award. 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').[3] 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 capable of being enforced in its country of origin. 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').

The Paris Court of Appeal rejected DAC's arguments. At the outset, the Court of Appeal 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 decision of the Court of Cassation in Dubai, which annulled an

arbitral award rather than a judicial decision, did not have to be recognised. The Court further held that the public policy ground cited by DAC would not apply even if Article 13(1)(c) were to apply.

Of most interest, though, is the Court of Appeal's ruling stifling the effect of the annulment decision of the Court of Cassation in Dubai. The Court noted that 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—is incompatible with fundamental principles of arbitration law in France. The Court said that one of the aims of the NCPC is the elimination of obstacles to the effectiveness of international arbitral awards, a principle reinforced—not negated—by the France-UAE Treaty. Moreover, it was 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:

'...[l'arrêt de la Cour de cassation de Dubai]...ne peut faire l'objet d'une reconnaissance en France, que les décisions rendues à la suite d'une 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 décisions émises par un juge étranger à l'occasion d'un procès indirect;...'

'...[the annulment decision of the Court of Cassation in Dubai] . . . 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;...[4]'

Endorsement (and extension?) of the Hilmarton decision

Consistent with the French NCPC—which provides that an award will be recognised and enforced once it is proven to exist (so long as it is not manifestly contrary to international public policy)[5]—the *DAC* decision is a potent reminder of France's liberal approach to recognition and enforcement of foreign arbitral awards.

The *DAC* decision endorses the 1994 judgment of the French Supreme Court in the much-discussed *Hilmarton* case. In that case, an award was rendered in Switzerland in favour of OTV, which then obtained an execution 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 applications for execution. Hilmarton argued that the first award had been annulled and 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 second arbitral award could not be recognised in France, ruling 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'.[6]

The result, pursuant to which the original award—invalid in the country of its rendering—prevailed over the later award, surprised many.

Hilmarton was the French forerunner to the 1996 *Chromalloy* decision, in which the US District Court for the District of Columbia, employing what to many was a novel analysis, granted enforcement of an award that had been rendered in Egypt but subsequently annulled by Egyptian courts.[7]

It can be argued that the *DAC* decision is particularly aggressive in confirming—and possibly extending—the outcome in *Hilmarton* due to its novel reasoning, focusing on the effect of the judicial decision annulling an award rather than the status of the award itself in international law.[8] In *Hilmarton*, the French Supreme Court reasoned that the arbitral

award was dispensed into an international legal system independent of Switzerland, the country in which it was issued; as a result, the award was 'untouchable' by any annulment decision of the Swiss Supreme Court and consequently capable of enforcement in France. Appearing to go one step further, the Paris Court of Appeal in *DAC*, instead of justifying the sanctity of the award, concentrates on the legitimate, considered judicial decision annulling the award. In the circumstances, it found that the decision of the Court of Cassation in Dubai has no international effect beyond the territorial boundaries of the UAE and that, accordingly, this domestic decision in no way binds judges deciding related proceedings in foreign countries, including France.

Practical problems and lessons

By refusing to recognise—even in the presence of the France-UAE Treaty—the annulment decision of the Court of Cassation in Dubai, the Paris Court of Appeal in the *DAC* case gave no weight to a judicial decision of the highest court of the UAE. Arguably, this approach ignores the fact that a country expects an arbitration within its jurisdiction to comply with its laws, some of which might be enacted out of specific national concerns or political considerations.

The *DAC* decision is, in the first instance, a sobering reminder for all concerned in arbitration to be vigilant and ensure compliance with all of the laws applicable to arbitration proceedings.

In the meantime, arbitration practitioners must be wary of incongruous results when seeking enforcement in France in light of the practical problems that may arise under current case law. For example, although unlikely, there is every possibility that the surprising *Hilmarton* scenario may be repeated, i.e. where an enforcement order of an award remains on foot even when the courts of the host state annul that award and a second, inconsistent award—considered to be 'the' award in the place of its rendering—is not capable of being enforced in France.

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1 *La Direction Générale de l'Aviation Civile de l'Émirat de Dubaï v Société International Bechtel Co* (Paris Court of Appeal, Chamber 1C, 29 September 2005).
2 *Société Hilmarton Ltd v Société OTV* (Cour de cassation, 23 March 1994) YB Comm Arb, Vol XX (1995) 663.
3 The UAE is not a signatory to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Awards.
4 White & Case informal translation.
5 NCPC, Arts 1498 and 1502.
6 *Société Hilmarton Ltd v Société OTV* (Cour de cassation, 23 March 1994) YB Comm Arb, Vol XX (1995) 663 at 665.
7 *Chromalloy Aeroservices Inc v The Arab Republic of Egypt* (District Court of District of Columbia, 31 July 1996) YB Comm Arb, Vol XXII (1997) 1001.
8 The Court's 'aggressiveness' is even confirmed by the fact that, in its enthusiasm to enforce the award, it appears to have interpreted the France-UAE Treaty in an inconsistent fashion. On the one hand, it ruled that Article 13(1)(c) of the France-UAE Treaty applied to judicial decisions only and not to arbitral awards, which are covered by Article 17. However, on the other hand, the Court was very quick to assume that the purpose of Article 13(1)(e) of that same Treaty, which prohibits a judicial decision from being contrary to public policy, is necessarily imported into Article 17 and thus also applies to arbitral awards.