“Judgments on Awards” in “Secondary Jurisdictions”: The D.C. Circuit Decision in Commisimpex v. Congo

Over fifteen years ago, on the 40th anniversary of the of the New York Convention, Jan Paulsson wrote that it was high time for the Convention “to discover its full potential.” *See* Paulsson, *Enforcing Arbitral Award Notwithstanding Local Standard Annulments*, 6 Asia Pac. L. Rev. 1 (1998). He “propose[d]” that “the annulment of an award by the courts in the country where it was rendered should not be a bar to enforcement elsewhere unless the grounds of that annulment were ones that are internationally recognized.” In his view, an “enforcement judge . . mak[es] a decision which will have practical consequences on resources located in his or her jurisdiction,” and need not take another enforcement court’s assessment of local or even international standards as “controlling.”

This week, before the United States Court of Appeals for the D.C. Circuit, we see somewhat of an opposite scenario. A party wins an international arbitration in Paris in 2000. It successfully enforces the award in London in 2009—thus making that award an English judgment. But the creditor is unable to collect on the judgment in England, and pivots west to the United States. But the three-year statute of limitations has run under the Federal Arbitration Act (“FAA”), meaning that the award can’t be enforced there. The applicable statute of limitation for foreign judgments, however, is 10 years, so it seeks to enforce that instrument instead. Though Professor Paulsson says that each enforcement court must make its own decision on the enforceability of foreign arbitral awards, does the conversion of that award into a national court judgment take it out of the arbitration context altogether? Stated more bluntly, can a litigant “launder” the award in this manner?

Earlier this year, the District Court said no. In its view, enforcement of a judgment pregnant with an arbitral award “would create an obstacle to the accomplishment and execution of the full purposes and objectives” of the FAA and

the New York Convention which it sought to codify. In its view, the "maneuver" attempted by the award-judgment-creditor here would "outsource[e]" the question of timeliness to litigants and foreign states and "upset the balance between promoting arbitration, on the one hand, and protecting potential defendants' interest in finality," on the other.

Just last week, the D.C. Circuit disagreed. Siding with the United States as amicus curiae, and prior decisions of the Second Circuit—the only other court to address the issue—it observed that "the overriding purpose of [the] FAA . . . is to facilitate international commercial arbitration by ensuring that valid arbitration agreements are honored and valid arbitral awards are enforced. . . . [The purpose] is not undermined — and frequently will be advanced — through recourse to parallel enforcement mechanisms that exist independently of the FAA." "Although an arbitral award and a court judgment enforcing an award are closely related, they are nonetheless distinct from one another, and that distinction has long been recognized." In a nod to Professor Paulsson's view, the Circuit acknowledged that England is a "secondary jurisdiction" with respect to the French arbitral award, so its decisions "have 'no preclusive effect' in recognition proceedings in the United States." But in this context, the U.S. court is not being asked to "automatically to accord preclusive effect to the English Court's determinations on the Award under the Convention, but rather to assess the English Judgment under the separate (and clearly distinct) factors for judgment recognition under [state] law."

Parallel coverage by Ted Folkman is on Letters Blogatory today, too.