Supreme Court rules recognition of international arbitral awards not subject to appeal

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In a March 31 2017 decision, the Supreme Court rigorously applied Article III of the New York Convention and ruled that a decision recognising an international arbitral award is no more subject to appeal than a decision recognising a domestic arbitral award. Further, the court rejected the plea that such an appeal should be available under Article 6 of the European Convention on Human Rights.

Asymmetric appeal rule

As regards the possibility to appeal enforcement proceedings relating to a domestic arbitral award, Dutch law distinguishes between granting and refusing leave to enforce (ie, exequatur). Where exequatur is granted, the respondent will have no right to appeal. Where it is refused, the decision can be appealed up to the Supreme Court. This rule is called the 'asymmetric appeal' rule because of the lack of symmetry in appeal options.

2010 precedent

In its June 25 2010 decision in *Yukos v Rosneft*, the Supreme Court ruled that, under Article III of the New York Convention, this asymmetric appeal rule for domestic awards should equally benefit the victorious party in an international arbitration. As such, the court refused to hear the appeal of a decision granting enforcement under the New York Convention rules.

The second sentence of Article III provides that:

> *"There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."*

The conditions referred to in Article III concern procedural rules and not the substantive conditions for recognition and enforcement, which are exclusively governed by the New York Convention (unless the request is made under national law, as provided by Article 1076 of the Civil Code of Procedure. The option to use Dutch law is set out under Article VII of the New York Convention).

On this occasion, the Supreme Court ruled that, as an exception to this main rule, denying an appeal of the counterparty to the party relying on recognition should not put that counterparty at a substantial disadvantage. In such cases, the equality of arms principle set out in Article 6 of the European Convention on Human Rights (ECHR) should prevail. The court ruled that there is no basis to apply Article 6 in case setting-aside or revocation proceedings are available to the respondent at the seat of arbitration.

In addition, the court found that Article 6 of the ECHR does not autonomously or independently provide a legal remedy.

Facts

Nelux Holdings International NV and Lawton Corporation NV (Nelux cs) had provided loans to the respondents since 1992. The respondents failed to pay off these multimillion-dollar loans as well as the associated interest. In 2001 the parties entered into a forbearance and settlement agreement, which provided that disputes concerning the performance under the settlement agreement should be subject to arbitration.

In 2012 an arbitral tribunal (comprising one arbitrator) handed down a final award determining that Nelux cs was "not entitled to any further payments under the Settlement Agreement" and ordering financial compensation to be paid to the respondents.

The respondents requested recognition and exequatur of the final award, primarily based on Article 1075 of the Dutch Civil Code of Procedure, making the New York Convention, rather than domestic law (ie, Article 1076 of the code), applicable. The court granted recognition of the final international award, but refused leave to enforce on the basis of lack of interest, as the parties had already settled the matter of compensation.

The respondents were satisfied with the granting of recognition and did not appeal the refusal of exequatur (as they might have under the asymmetric appeal rule). However, Nelux cs appealed the granting of recognition before the Amsterdam Appeal Court.

The parties to this conflict were no strangers to the Dutch courts. In 2015 and 2016 they had also engaged in litigation regarding:

- the validity of the final award;
- the possibility of starting setting-aside proceedings in the Netherlands; and
- the seat of arbitration.

At that time, it had been decided that the seat of arbitration was New York and that the Dutch courts were therefore incompetent to hear a setting-aside claim brought by Nelux cs.

Decision

The Amsterdam Appellate Court dismissed Nelux cs's appeal following the *Yukos* precedent. Nelux cs had argued that the domestic asymmetric appeal rule could, by its nature and according to its wording, apply only to the granting of exequatur and not to the recognition decision itself. Under Dutch law, a domestic arbitral award will be recognised *eo ipso* (ie, by that very act) and have binding force on the parties. Recognition is required before exequatur can be granted only for international arbitral awards. As an obvious consequence, the domestic legal provision regarding the asymmetric appeal rule refers only to exequatur decisions and not to recognition decisions. In the absence of an explicit provision on appealing a decision to grant recognition, there is no legal basis to allow such a non-existent national provision to prevail as a result of Article III of the New York Convention.

This was a rather mechanical approach to the issue considering that:

- there was no reason for the Dutch legislature to refer explicitly to recognition in the asymmetric appeal rule; and
- it would be rather arbitrary to suppose that the legislature would have wanted to limit the asymmetric appeal rule in this way.

The Supreme Court did not affirm this approach and simply confirmed that:

- the *eo ipso* recognition of a domestic arbitral award cannot be appealed; and
- the binding force may be lost only as a result of a setting-aside award or revocation.

The court concluded that Article III of the New York Convention consequently entails that the recognition of an international arbitral award is equally not subject to appeal (including Supreme Court appeal).

ECHR exception

Following the options provided in *Yukos*, Nelux cs made the subsidiary claim that refusing appeal on this basis would constitute a violation of the equality of arms principle set out in Article 6 of the ECHR, because a suitable alternative to safeguard equality of arms was unavailable before the New York courts (ie, the seat of arbitration) or elsewhere.

The Supreme Court dismissed this argument. It referred to Nelux cs's prior submissions confirming that remedies had been available under US law, such as asking for the setting aside of the award. The issues regarding whether this remedy would still be available or would have any direct effect on the Dutch recognition were not considered to necessitate an alternative decision in this respect.

The Supreme Court explicitly held that parties agreeing to arbitration should not voluntarily choose the seat of arbitration and, when doing so, should anticipate the possible remedies and actions available under the laws of that country and the nature thereof.

Comment

Consistent with and in addition to its 2010 *Yukos* decision, the Supreme Court confirmed that it is impossible to appeal a decision granting recognition of an international arbitral award (such appeal being available only in case of refusal).

In addition, the decision underlines the need for parties to an arbitration agreement to consider diligently the remedies available under the law of the seat of arbitration which they intend to choose. Even though recognition and enforcement may seem to be at the end of a sometimes long and costly road to a final arbitral award, the seat of arbitration should be considered at the outset, as it may be decisive for recognition and enforcement and the helpful impact of Article 6 of the ECHR may appear to be limited at the executionary phase.

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