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Recognition and Enforcement of Arbitral Awards in Vietnam

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In a shipowner's application supported by the Club, a Singaporean arbitration award was sought to be enforced against a Vietnamese defendant. Whilst the First Instance Court in Vietnam decided to enforce the Award, an Appeal Court overturned that decision and the Supreme Court would not allow a further appeal.

The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") entered into force on 7 June 1959. It requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. The Convention applies to international arbitrations and there are presently about 159 contracting states including Vietnam, Singapore and all the major maritime jurisdictions.



Vietnam has been a contracting state since 1995 with minimal reservations. As such, it ought to recognise foreign arbitration awards as binding and enforce them in accordance with local rules of procedure, and should not impose substantially more onerous conditions than are imposed on the recognition or enforcement of domestic arbitral awards.

There are no public or official databases on the recognition and enforcement of foreign awards by Vietnamese courts. Therefore statistics are not available, and this may explain why the New York Convention's website, which provides information regarding the Convention's interpretation and application by courts (containing more than 1750 court decisions from around 65 countries), shows no entries for Court decisions applying the Convention in Vietnam. The member's Vietnamese lawyers, a prominent maritime firm in the country, were themselves unaware of any other attempts to enforce a foreign ad hoc award in the shipping context, so the following case is probably a rarity, and perhaps the first of its kind.

The case was an Owner member's claim under a voyage charterparty subject to English law, providing for arbitration in Singapore. When the Vietnamese Charterer failed to pay demurrage due to the Owner, arbitration was commenced according to the contractual provisions.

In default of the Charterer's appointment of their own arbitrator under the charterparty terms, the arbitrator appointed by the Owner was made sole arbitrator. During the proceedings, the Charterer responded to the arbitrator's directions in writing but also requested the arbitrator not to contact them any further. Despite the arbitrator's directions and reminders, as well as suggestions for the Charterer to seek their own legal advice, the Charterer failed to file any defence and finally chose not to participate in the proceedings. A Final Award was issued in Singapore in favour of the Owner based on the evidence to hand, ordering the Charterer to pay the Owner's demurrage claim plus interest and costs.

When the award was not honoured, an application was made in Vietnam (the Charterer's place of residence) for an order for recognition and enforcement of the Singapore Arbitration Award. The Court of First Instance in Vietnam made a favourable judgment allowing enforcement, but this was subsequently overturned by an appeal court. The Owner then appealed to the Supreme Court for a judicial review but the court refused to consider the application, holding that the local procedural law applicable at the material time (the Civil Procedure Code of 2004 – "CPC 2004") did not grant the Supreme Court jurisdiction to review an appeal court decision relating to the recognition and enforcement of foreign awards. As a result, over five years of attempting to enforce the Award had been rendered futile with this final, non-appealable, decision.

The reasons for the second tier, Appeal Court's rejection of the recognition can be summarised as follows:

1. The Court construed the contractual arbitration clause, which read "All disputes, controversies or differences which may arise between the parties out of or in relation to or in connection with the charter party or for the breach thereof shall be finally settled in Singapore by English Law. The Award rendered by arbitrator(s) shall be final and binding upon both concerned parties" as an agreement between the parties that any dispute shall be settled by an arbitration conducted by the Singapore International Arbitration Centre. The Court considered there was no contractual agreement on any particular person, or indeed the arbitrator who actually issued the Award in question, to arbitrate the dispute. Therefore the Award issued by the particular arbitrator in question was not, according to the Court, eligible to be considered for recognition and enforcement in Vietnam.
2. The Court accepted the Charterer's submission that under Singaporean law, an award can only be enforced if it has been approved by a Court in Singapore.
3. The burden of proof on whether the Award is effective or not shall be borne by the Award Creditor (i.e. the Owner)

Commentary

The Appeal Court seems to have ignored the fact that, after the quoted provisions above, the contractual arbitration clause continued, "...otherwise as per GENCON Charterparty 1994...", Part II, Clause 19(a) of which reads, in part:

".....Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final."

Reading the contractual provisions and also the GENCON 1994 provision together:

- (a) the substantive law of the dispute was English law;
- (b) the place of arbitration was Singapore;
- (c) the procedural law of the reference was Singaporean law; and
- (d) the number of arbitrators was three, although if the respondent failed to appoint their own arbitrator within 14 days, the Claimant's arbitrator would be sole arbitrator and could render an award.

The Award itself stated clearly that:

- (a) the charterparty contained an arbitration clause providing for arbitration in Singapore and English law to apply;
- (b) the respective notices of appointment of the arbitrator and composition of the tribunal with a sole arbitrator had been tendered to the Charterer; and

(c) the Award was issued in Singapore.

It seems that the Appeals Court did not give sufficient, if any, weight to the Owner's submissions, originally made to the Court of First Instance in the form of evidence from Singaporean and English lawyers, demonstrating the regularity and enforceability of the Award in relation to the following aspects under Singaporean and English law:

- (a) the setting up and composition of the arbitral tribunal under the contractual terms;
- (b) that all the procedural steps taken by the arbitrator prior to deciding the dispute were set out in the Award. The Charterer's allegation that they did not receive any notice of arbitration proceedings or other documents from the Owner or the sole arbitrator was not borne out by the documentary evidence or the terms of the Award itself;
- (c) the Award was made wholly pursuant to the charterparty terms;
- (d) contrary to the Charterer's argument, there was no requirement under the International Arbitration Act of Singapore to register the Award with a court in Singapore in order for the Award to be enforceable; and
- (e) the appointment of the arbitrator was valid, the conduct of the arbitration proceedings was proper and the Award was enforceable as a matter of Singaporean law, being the law of the seat of the arbitration.

The grounds for refusal of recognition and enforcement are laid down in Article V of the New York Convention and consist of items such as irregularity of notice of appointment of arbitrator or of the arbitration proceedings, dealing with subject matter not falling within the agreement to arbitrate, improper composition of the tribunal or procedure, lack of finalisation of the award, and public interest considerations. None of these grounds was, on any reasonable basis, arguable in this case. Furthermore, contrary to the Vietnamese Court's conclusion, under the Convention it is clearly the respondent, not the claimant, which bears the burden to prove that one of the grounds for non-recognition and enforcement exists.

Conclusion

The basic notion underlying the New York Convention is that a contracting state should recognise and enforce an arbitration award issued in another contracting state, unless any of the circumstances laid down in Article V arises. However, in practice the recognition and enforcement of awards under the Convention varies from country to country depending on differing factors, such as the existence of reservations imposed by contracting states in signing the Convention, local laws, procedures and practices and the experience and attitudes of local judges.

In the case described here, an arbitrator who was appointed validly was made sole arbitrator in accordance with the contractual terms. An award, which set out methodically the procedural steps taken by the arbitrator prior to deciding the dispute, was issued in the contractual jurisdiction. The conduct of the proceedings was proper and the award issued was enforceable as a matter of Singaporean law, which was the law of the seat of arbitration. The country where the recognition application was made should, in accordance with the Convention, have complied with the relevant requirements and recognized and enforced the award locally. Unfortunately, the member's experience was not as straightforward as one would have hoped for and expected.

Amongst other issues, the Vietnamese courts incorrectly interpreted the parties' agreement as being one to settle disputes through institutional arbitration, rather than an ad hoc process. This is an undesirable finding given that most maritime disputes are resolved in ad hoc references, and not through arbitral institutions.

In Vietnam a new Civil Procedure Code (of 2015) became effective from 1 July 2016. This replaced the previous Code, CPC 2004, under which the Appeal Court in this case rejected enforcement on grounds wider than, and in contradiction of, the terms in the Convention. It is to be hoped that the new Code will result in the recognition and enforcement of foreign arbitral awards in Vietnam being simplified, and the New York Convention being implemented in accordance with its clear terms and intent.

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For more information on recognition and enforcement of foreign arbitration awards please refer to the Club's previous articles: [England and Wales \(2009 and 2012\)](#), [Dubai](#), [China](#) and [Australia](#).



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