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Expert Analysis

Laos' Challenge to Arbitration Award Highlights Complexities in Enforcement

In 2009, Thai and Laotian companies secured a favorable arbitral award against the Government of the Lao People's Democratic Republic. The arbitration tribunal determined that Laos had wrongfully terminated an agreement with Thai-Lao Lignite (TLL), a Thai mining company, and awarded \$56 million in damages, plus \$1 million in legal fees in favor of TLL and its Laotian partner, Hongsa Lignite (HL). However, Laos has yet to pay the amount due under the award. Almost four years after the award was rendered, the companies are still trying to force Laos to satisfy the award, which with interest to date amounts to more than \$70 million. Their attempts to enforce the award have included proceedings in England, the United States, France and Singapore, in addition to annulment proceedings in Malaysia, the place where the award was rendered.

The latest setback in this enforcement saga came from the Paris Court of Appeal, which refused to enforce the award against Laos based on its finding that the arbitral tribunal had exceeded its powers. This decision is in line with the decision of the Malay-



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sian court that set aside the Laos award, but contrary to the decision of courts in the United States, which have confirmed the same award. While the companies have appealed the award annulment in Malaysia, the Laos government continues to challenge enforcement of the award in the United States, where TLL and HL have been most successful thus far.

This case highlights the complexities involved in navigating multi-jurisdictional attempts to enforce an arbitral award, and demonstrates that courts in different jurisdictions may make conflicting decisions on the enforcement of an arbitral award. At the end of the day, the award creditor only needs to enforce the award in one jurisdiction where the award debtor's assets can be taken in satisfaction of the award. While France may not be that jurisdiction for TLL and HL, it will soon be clear whether the United States is.

The Dispute

In 1994, Thai-Lao Lignite and the Laotian government entered into a project development agreement (PDA). That agreement granted TLL the exclusive mandate and right to implement the project—extracting lignite coal reserves in the Hongsa region and developing an on-site power plant to sell electricity to Thailand (the Hongsa project). TLL had previously entered into other mining contracts with Laos, also related to the Hongsa project. Pursuant to one of these earlier agreements, TLL formed Hongsa Lignite. TLL and HL worked together on the development of the Hongsa project. When the Laotian government terminated the PDA, both companies, TLL and HL, launched arbitration proceedings under the UNCITRAL Arbitration Rules pursuant to the arbitration clause of the PDA.

Claimants sought return of their investment costs expended on the Hongsa project. The arbitration was conducted in Kuala Lumpur, Malaysia, before a panel of three arbitrators, and resulted in an award favorable to TLL and HL. Laos, however, has failed to pay the award voluntarily. Therefore, the companies initiated enforcement proceedings in the United States, England, France and Singapore, while Laos defended against these enforcement efforts and commenced annulment

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proceedings in Malaysia to vacate the unfavorable award.

Laos has challenged the arbitral award on the ground that the tribunal exceeded its jurisdiction. The arbitration tribunal decided that TLL had standing to bring claims under the PDA as a signatory to the contract, and that HL, a non-signatory, had standing as an “intended beneficiary” of the PDA. Laos has contended that the tribunal improperly extended its jurisdiction to HL and improperly relied not only on the PDA, but also on other mining contracts.

Laos’ challenge raises an important issue about the tribunal’s authority to determine its own jurisdiction. The question is whether a national court reviewing an arbitral award should defer to the tribunal’s decision on its own jurisdiction, or make an independent finding on the validity of the arbitration agreement and the tribunal’s jurisdiction. As TLL and HL have experienced, courts in different jurisdictions may answer this question differently.

Malaysia

The Laos government sought annulment of the award in Malaysia, the seat of the arbitration. On Dec. 27, 2012, the High Court in Malaysia annulled the award, finding that the tribunal had exceeded its authority. TLL and HL have appealed this decision.

England and Singapore

In England, the High Court of Justice, Queen’s Bench Division, observed that the award is “manifestly valid.”¹ However, the court did not make a final determination on validity.² Given that the Malaysian court was scheduled to hear the government’s annulment application six weeks hence, the court did not order immediate enforcement of the award. Instead, the High Court exercised its discretion to adjourn the enforcement proceedings. But the court ordered Laos to pay security in the full

amount owed under the award, failing which TLL and HL would be “permitted to enforce the award as a judgment of the English court.”

Laos failed to post security. Therefore, on Nov. 19, 2012, the High Court entered judgment against the Laos government. Laos did not appeal this decision. In the meantime, the enforcement proceedings have been adjourned in Singapore, while the companies appeal the Malaysian court’s decision to annul the award.

This case demonstrates that courts in different jurisdictions may make conflicting decisions on the enforcement of an arbitral award.

France

On Feb. 19, 2013, the Paris Court of Appeal refused to enforce the Laos award, overruling an earlier decision by the Paris Court of First Instance that confirmed the award in 2010.³ Under the New York Convention on the Recognition of Foreign Arbitral Awards (the New York Convention), a court asked to enforce an arbitral award “may” refuse to do so if the award has been annulled by the courts in the jurisdiction where the award was made.⁴ However, the courts in France generally do not refuse to enforce foreign awards on this ground, and thus, the Paris Court of Appeal’s decision was not based on the fact that the award had been set aside in Malaysia. Rather, the court refused enforcement because of its finding that the tribunal had exceeded its powers. Specifically, the court determined that the tribunal had failed to distinguish among the various contracts involved in the case and improperly exercised jurisdiction over disputes arising under other mining contracts.

The United States

At the same time, however, the same award has been confirmed in the United States. On Aug. 3, 2011, the U.S. District Court for the Southern District of New York confirmed the award and entered judgment in favor of TLL and HL in the amount of \$57 million, plus interest.⁵

A court in the United States may refuse to enforce an award that is based on a subject matter outside the tribunal’s jurisdiction. This means that, generally, the court, not the arbitral tribunal, makes the final determination on whether there was an effective agreement to arbitrate the dispute. However, when the dispute is properly before the arbitral tribunal, the court does not second-guess the tribunal’s conclusions, including the tribunal’s construction of the parties’ agreement to arbitrate.

The federal court determined that Laos’ objections had not raised the issue of the tribunal’s jurisdiction, because there was no question that Laos was a signatory to the PDA. Nor did Laos claim that the arbitration agreement was invalid. The district court noted that Laos was merely challenging the arbitral tribunal’s interpretation of the PDA and calculation of damages, which lies beyond the scope of judicial review.

Further, the parties had specifically delegated to the tribunal the power to decide its own jurisdiction. The PDA states that any arbitration will be governed by the UNCITRAL Arbitration Rules, which in turn provide that the “arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”⁶ Therefore, the tribunal had the power to decide the scope of its own jurisdiction, including whether other parties, like HL, had standing as third-party beneficiaries, because

the parties had clearly submitted this question to the tribunal. Hence, the district court deferred to the tribunal's conclusions, and confirmed the award.

Laos has also been unsuccessful in its appeal of the district court decision. On July 13, 2012, the U.S. Court of Appeals for the Second Circuit affirmed the district court's confirmation of the award, and on Feb. 25, 2013, the Supreme Court denied Laos' petition for a writ of certiorari.⁷ Since the confirmation of the award and the entry of judgment in their favor, TLL and HL have engaged in discovery proceedings aimed at identifying Laotian government assets in the United States that could be used to satisfy the award.

Still, the enforcement battle did not end here, as Laos has shown that it is in no mood to satisfy the district court judgment which with interest to date amounts to more than \$70 million. Laos has vigorously opposed the district court's asset discovery orders and has failed to comply with some of these orders. Most recently, Laos sought an emergency stay of the discovery proceedings based on the Malaysian High Court's decision to vacate the award.⁸ The New York district court has not yet ruled on Laos' stay motion.⁹

Although TLL and HL have not yet lost their enforcement battle in other jurisdictions, currently all efforts seem to be concentrated in the United States, where TLL and HL have been most successful thus far. On Feb. 11, 2013, relying on the New York Convention and the annulment of the award in Malaysia, Laos sought to vacate the district court's judgment confirming the award and to bar related enforcement proceedings.¹⁰ Indeed, federal courts in New York have refused to enforce foreign awards that have been set aside by a court in the jurisdiction where the award was made.¹¹ However, this time the federal district court will need to decide whether annulment of the award in Malaysia, which TLL and HL have since appealed, is a ground for vacating

the district court's judgment confirming the award, even if it may be a ground for refusing enforcement of the award.

Whether or not to seek confirmation of the award in the jurisdiction where the award was rendered is an important decision: Award confirmation may enhance the prospects for enforcement in other jurisdictions.

Meanwhile, TLL and HL have added a new twist to the enforcement story by initiating a new proceeding in the United States. On Feb. 27, 2013, the companies filed a petition in the federal court in New York seeking enforcement of the English High Court judgment confirming the arbitral award against the Laotian government.¹² Notably, federal courts in New York have held that the New York Convention does not apply when a party seeks confirmation of a foreign judgment, even if that judgment is based on confirmation of an arbitral award.¹³ Hence, the Laotian government may not be able to challenge confirmation of the English court judgment on the ground that the award has been annulled in Malaysia.

In the coming weeks or months, it should become clear whether TLL and HL will continue to make progress in their efforts in the United States to satisfy the award. Stories like the one surrounding the Laos award are not so infrequent.

This case highlights the importance of strategic moves when the enforcement of an arbitral award is hotly contested and the award creditor has to move across a number of jurisdictions in its efforts to enforce the award. From the judgment creditor's perspective, the game is not only identifying the jurisdictions where the judgment creditor's assets may be located, but also identifying enforcement-friendly jurisdictions. Whether or not to seek confirmation of

the award in the jurisdiction where the award was rendered is also an important decision: Award confirmation may enhance the prospects for enforcement in other jurisdictions.

From the award debtor's perspective, seeking annulment of the award in a timely manner in the jurisdiction where the award was rendered may make a difference in certain cases, since annulment of the award "may" hinder enforcement of the award in some jurisdictions. In all events, the fact that the parallel and conflicting proceedings are possible under the New York Convention regime highlights the inherent uncertainties in the system, which must be carefully navigated in accordance with the specifics of each case.

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1. *Thai-Lao Lignite & Hongsa Lignite v. Gov. of the Lao People's Democratic Republic*, [2012] EWHC 3381 (Comm), High Court of Justice, Queen's Bench Division (Oct. 26, 2012).

2. The court stated that ultimately, whether or not the award is valid, was a question for the Malaysian court as the court with supervisory jurisdiction where the award was rendered. In addition, the court noted that it agreed with the decision of the U.S. courts on the award's validity, and that the U.S. courts' decision on Laos' objections had a preclusive effect in England.

3. RG No. 12/09983, Paris Court of Appeal (Feb. 19, 2013).

4. United Nations Convention on the Recognition of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, Art. V(1)(e).

5. *Thai-Lao Lignite & Hongsa Lignite v. Gov. of the Lao People's Democratic Republic*, 10 Civ. 5256, 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011) (Opinion and Order).

6. The UNCITRAL Model Rules, Art. 21.

7. *Thai-Lao Lignite & Hongsa Lignite v. Gov. of the Lao People's Democratic Republic*, No. 11-3536-cv, 2012 WL 2866275 (2d Cir. July 13, 2012), reh'g denied (Oct. 18, 2012), cert. denied (U.S. Feb. 25, 2013, No. 12-878).

8. *Thai-Lao Lignite & Hongsa Lignite v. Gov. of the Lao People's Democratic Republic*, No. 13-cv-0545, Docket #17-2, Feb. 19, 2013 (S.D.N.Y.).

9. The district court has granted a temporary stay while the discovery motions are being filed by the parties. *Id.* Docket # 56.

10. *Thai-Lao Lignite & Hongsa Lignite v. Gov. of the Lao People's Democratic Republic*, No. 10 Civ. 5256, KMW, DF, Docket #204, Feb. 11, 2013 (S.D.N.Y.). As noted above, Article V(1) of the New York Convention provides that a court "may" refuse to enforce an award if it has been annulled by the courts in the jurisdiction where the award was rendered.

11. *Baker Marine (Nig.) v. Chevron (Nig.)*, 191 F.3d 194, 197 (2d Cir. 1999) (noting that when an arbitral award has been lawfully vacated in the jurisdiction where it was rendered, it should not be enforced absent exceptional circumstances); *Spier v. Calzaturificio Tecnica*, 71 F.Supp.2d 279, 287-89 (holding that the award rendered in Italy and vacated by the Italian courts could not be enforced in the United States).

12. *Thai-Lao Lignite & Hongsa Lignite v. Gov. of the Lao People's Democratic Republic*, 1:13-cv-01332-KMW, Docket #1, Feb. 27, 2013 (S.D.N.Y.).

13. *Waterside Ocean Navigation v. Int'l Navigations*, 737 F.2d 150, 154 (2d Cir. 1984) ("[W]e have held that the [New York] Convention applies only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards."); *Ocean Warehousing v. Baron Metals & Alloys*, 157 F.Supp.2d 245, 249 ("[The [New York] Convention defenses simply do not apply to a [state law] proceeding seeking recognition and enforcement of a foreign judgment, even if that judgment was based on a foreign arbitral award").