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Study on the Legal Consequences of Revocation of the Appellate Award in the Internal Appellate Mechanism for Arbitration

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Abstract

The traditional principle of finality in arbitration has certain drawbacks, and the huge risk costs it may lead to make some international commercial parties no longer use arbitration as their first choice for dispute resolution. However, the appellate mechanism for arbitration is not yet well developed, and the legal consequences of revocation of the appellate award need to be further clarified. In this article, I will analyse the academic opinions in China and abroad, and discuss the validity of the appellate award and the original award, the validity of these two kinds of awards after the appellate award is set aside, and the understanding of the principle of "non bis in idem" after being revoked, so as to draw conclusions on how to determine the validity of the arbitration award after the appellate award is set aside under different circumstances. Based on analysis above, my suggestion is that the same dispute after the revocation of the appellate award should be arbitrated by entering into a new arbitration agreement or by bringing a lawsuit.

Keywords: appellate mechanism for arbitration, revocation of the arbitration award, validity of the arbitral award, principle of non bis in idem

1. Introduction

The appellate mechanism for arbitration refers to a remedy in commercial arbitration whereby the parties may enter into an arbitration agreement allowing for appealing, and where a party is not satisfied with the original award, it may submit the original award to another institution for reviewing, and the appellate award is final. As any arbitration agreement between the parties is a form of autonomy, the parties are completely free to agree to any terms in that agreement relating to a second hearing of the dispute. (G. Hartwell, 1998) In recent years, institutions such as Madrid Court of Arbitration, International Arbitration Chamber of Paris and American Arbitration Association have issued provisions for internal appellate procedures either on a stand-alone basis or contained in arbitration rules. There are three

models for classifying this mechanism for arbitration, applying to the courts, to arbitral institutions, and to the transnational appellate arbitral review body. Practically, in most cases, the parties will choose to apply the arbitration rules of arbitral body providing the internal appellate procedure and have the reviewing conducted by the same arbitral of the same arbitration institution, so for the purposes of this article only the application for appeal to an arbitral body is considered.

With regard to the revocation of the award, Article 34 (2) of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as "Model Law") provides for the revocation of the arbitral award, and Article 6 of Model Law provides for the court or other authority competent to set aside an award. However, after the introduction of the appellate mechanism, controversy has arisen as to what rules should apply to the revocation of an appellate award, which has special features compared to the ordinary arbitral award. The current literature shows that there are few studies on this issue in China, while the majority of foreign literature has discussed the rationality of the appellate mechanism and analysed the issue of revocation of the appellate award in a more general way, with conclusions similar to those of setting aside of the general arbitral award. As the mechanism for the revocation of the appellate award is a relatively large proposition, it involves various issues such as whether the appellate award can be set aside, which kind of appellate awards can be set aside, the institutions, conditions, and legal consequences of revoking the appellate award. In terms of the limitation of length, this article will only discuss the legal consequences of revocation of the appellate award with the assumption that it can be set aside.

2. Determination of the Validity of the Appellate Award and the Original Award

The substantive effect of an arbitral award consists mainly of its definitive and enforceable effects. In international commercial arbitration, the legal effect of an arbitral award generally occurs with its definitive and enforceable effects. An appellate award, which is the result of the second hearing of an arbitration case, is still within the scope of arbitration, and its effects include both certainty and enforcement.

Firstly, a discussion of definiteness. Determinative force in international commercial arbitration means that an arbitral award made by an arbitral tribunal becomes binding on the parties only if it cannot be varied or set aside by the parties through its internal appellate mechanism, or, in the absence of such internal appellate mechanism, the award becomes binding on the parties once it has been made. In other words, after the internal appellate proceedings have begun, the undermined effect of the original award can be divided into two circumstances: Firstly, when the appellate tribunal confirms the original award or the appellate proceedings are withdrawn, in which the original award is final and definitive; secondly, when the appellate tribunal modifies or sets aside the original award and makes a new award with different content, in which the original award does not have binding effect and the appellate award is final and conclusive. Generally, arbitration rules that provide for an internal appellate procedure will provide for the certainty of the arbitral award. For example, according to the American Arbitration Association Arbitration Rules for Appellate Proceedings, judicial proceedings against the original award shall stay for the duration of the appellate proceedings. By filing an application for appealing, the parties agree that the original award cannot be considered final regarding to any judicial proceedings to modify, enforce, correct, or set aside the original award. If the appellate proceedings are withdrawn, the original award shall be deemed final as of the date of withdrawal of the appellate proceedings.

Secondly, enforceability refers to the effect of an award with a payment element that, after it has entered into force, may be enforced by people's court upon the application by the other party if the party obliged to pay fails to perform its obligations within the period set out in the award. (Xiao Jianhua & et al., 2004) The enforcement of an original award and appellate award is also determined in two cases: firstly, in the case of an internal appellate mechanism, the appellate tribunal is reconstituted from the same arbitral institution, i.e., the original award and the appellate award are made by the same arbitral institution. In such a case, once the appellate award has been made, the effect of the original

award shall be completely overridden by the appellate award and thus completely invalidated, and the appellate award shall be final and enforceable; secondly, when the original award and the appellate award are made by different arbitral institutions, the provisions of the arbitration rules applicable to the original award regarding the validity of the arbitral award are likely to be contrary to the appellate procedure, so that the determination of the enforceability of the original award and the appellate award to a large extent is dependent on the level of recognition of the law of the country of enforcement to the internal appellate procedure of the arbitration. If the country where the courts of enforcement are located do not recognise the internal appellate procedure, the original award may be recognised and enforced in accordance with the provisions of the arbitration rules applicable to the original award. Conversely, if the law of the State of enforcement recognises the internal appellate procedure, the court of the State of enforcement should review the arbitration agreement between the parties and, after confirming the existence of an agreement of internal appellate procedure between the parties, should refuse to recognise and enforce the original award on the grounds that "the award has not yet become binding" as provided for in Article 5(1)(e) of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "New York Convention").

In summary, once an appellate award is made, it overrides the original award and is a definitive award, but its enforceability may depend on whether the courts of the country of enforcement recognise the legality of the internal appellate proceedings if the arbitration rules applicable to the original award are inconsistent with the arbitration rules applicable to the appeal.

3. Effect of These Two Kinds of Awards Following the Revocation of the Appellate Award

In the case of the setting aside of an appellate award discussed in this article, the question of the validity of the appellate award in relation to the original award is also analysed in two circumstances because of the particularity of enforceability.

In the first case, the court of the State of enforcement does not recognise the legality of the internal appellate procedure. In this case, in terms of certainty, the appellate award loses its certainty because it is set aside, and the original award has no certainty from the time the original award was made; in terms of enforceability, if the country of enforcing courts do not recognise the internal appellate procedure or if it is contrary to the mandatory legal provisions of the State of enforcement, then the entire appellate procedure is illegal for the State of enforcement, whether it is set aside or not, it has no enforceability from the beginning. The original award is enforceable both before and after the setting aside of the appellate award and will be recognised and enforced provided that there are no circumstances in which recognition and enforcement may be refused.

In the second case, the court of the State of enforcement recognises the legality of the internal appellate procedure. The certainty stays the same as it is in the first case, and in terms of enforceability, if the court of the country of enforcement recognises the internal appellate procedure, the majority view is that the appellate award is enforceable until it is set aside and loses its enforceability "with general effect" worldwide after it is set aside. As van den Berg, who is well known for his work on New York Convention, notes: "Refusal to enforce an arbitral award has only territorial effect (i.e., in most cases its effect is limited to the country of the court that made the refusal). Other countries may decide to the contrary in respect of the same award and grant enforcement of the award in their territory. Conversely, the setting aside of an arbitral award has an erga omnes effect, and once an award has been set aside in the country where it was made, it is ineligible for recognition and enforcement in any member state of New York Convention. The mechanism of setting aside of awards thus provides legal certainty". (A. J. van den Berg, 2010) On the question of the enforceability of the original award, is it not enforceable until the award is set aside, but can it be restored after the award is set aside? The first view is that it cannot be reinstated because, firstly, an appellate award can be set aside for a variety of reasons, mostly procedural defects, which do not mean that the original award was just and reasonable, and

reinstating the original award directly after it has been set aside may result in a more serious substantive injustice, which is contrary to the parties' intention to bring an action for annulment, deepens their losses, and is too rigid and unrealistic. Secondly, after the award has been made, the original award has been overturned by the appellate award, which should be final. What happens to the appellate award afterward should have nothing to do with the original award. The second view is that this should be decided by the courts of the country of enforcement in the light of the actual circumstances because, firstly, efficiency is one of the primary values pursued by international commercial arbitration, and it is in the interests of efficiency to decide on the basis of the actual circumstances to avoid a situation where the original award is correct in content but is prohibited from being reinstated across the board, and must be enforced only after an award with the same content as the original award has been made by way of a further arbitration or litigation. Secondly, judging on the basis of the actual circumstances is more likely to be in line with substantive justice and may avoid the influence of other factors that may arise in the event of another arbitration or litigation; however, this approach may also have the suspicion of giving excessive discretionary power to the courts of the country of enforcement, whose judgement criteria may be vague, making arbitration excessively judicial and even dependent on justice, which is contrary to the fundamental nature of arbitration.

With regard to the two views over whether the enforcement of the original award can be restored, I believe that, at the current level of development of international commercial arbitration, it would be more operational to provide that the enforcement of the original award cannot be restored in such circumstances. Firstly, giving the courts of the country of enforcement too much discretionary power is a measure of high risk that may undermine the fairness, as the level of development of the arbitration industry varies from country to country, and the courts may have different standards of adjudication in such cases, which is of high risk for the protection of parties' rights and interests. Secondly, it may also be inefficient to leave it to the country of enforcing court to decide on a case-by-case basis, as the court's decision in the country of enforcement may lead to greater controversy, with the parties arguing and seeking other means to resolve their dispute, ultimately making it even less efficient to resolve dispute. Lastly, refer to the litigation, it can be noted that when an error is made in a second instance judgment, it must be heard in a retrial procedure and a new judgment must be rendered, rather than a direct reinstatement of the first instance judgment. Thus, the original award cannot be directly reinstated by the country of enforcing court after the appellate award has been set aside.

In addition, with regard to the enforceability of an appellate award in the second situation, a relatively new view has emerged in recent years, which holds that an award is not necessarily unrecognisable and unenforceable even after it has been set aside. This view is mainly based on the ambiguity of New York Convention on this issue and the new study of the concept of "place of arbitration" in recent years, as New York Convention currently only restricts the conditions for refusal to recognise and enforce a foreign arbitral award in the country where the award is to be enforced and does not and cannot provide for a regime for setting aside an award in the country of origin. New York Convention currently only restricts the conditions for refusal to recognise and enforce a foreign arbitral award in the country where the award was made and does not and cannot provide for a regime for setting aside an award in the country of origin. At the same time, recent studies have argued that the place of arbitration is not the only connection point between arbitration and the national legal order, and it is then entirely appropriate to enforce an arbitral award that has been set aside in another country, since the law of the place of arbitration does not take precedence over the law of the country of enforcement. (E. Gaillard, 1999) In other words, the courts of the country of enforcement, when dealing with an application for enforcement of a set-aside award, need to apply the methods of private international law to determine whether there is a close connection between the place of arbitration and the arbitration or whether there is only an accidental connection between the place of arbitration and

the arbitration, in order to decide whether an award set aside in the place of arbitration can be recognised and enforced in the country of enforcement. (Shen Juan, 2019) Spanish law, for example, provides that even if an award is set aside after a court hearing, there is no evidence to prevent the losing party from enforcing the award in another jurisdiction. (A. López, 2011) In addition, Paulsson has divide standards into "local standards" and "international standards" for the revocation of awards. In his view, the fact that the award has been set aside by the court in the place of arbitration should not be an obstacle to its successful enforcement in other countries, unless the decision to set aside the award was made on internationally recognised grounds. In his view, the international standard for setting aside an award was subordinate in scope to the first four grounds listed in Article 5 (1) of New York Convention and Article 36 (1)(a) of Model Law, and any other grounds would be a local standard for setting aside an award, the result of which would have legal effect only locally. (J. Paulsson, 1998) Thus, in his view, for an arbitral award that has been set aside, the court of the State of enforcement should take into account the specific grounds on which the award has been set aside and, if the award has been set aside on the basis of local criteria, the court of the State of enforcement can use its discretion to disregard the fact that the award has been set aside. (Fu Panfeng, 2017)

In this regard, the author believes that such a new view is progressive and reasonable. Because accepting the view that "the setting aside of an arbitral award has universal effect" would mean accepting that the finality of an arbitral award depends on the will of the sovereign of the place of arbitration, which would logically reduce arbitration to a subordinate to the judicial system of the place of arbitration and is incompatible with the trend towards the virtualisation of the place of arbitration in contemporary international commercial arbitration practice. (See G. Kaufmann-Kohler, 2003) It is undesirable to seek too much certainty and consistency in the setting aside of awards, i.e., to seek too much formal rationality in the mechanism of setting aside awards. To analyse the substance of the outcome of the setting aside an award on a case-by-case basis is more conducive to achieving a balance between efficiency and fairness. Therefore, there is a great deal of room for discussion as to whether an award that has been set aside can be recognised and enforced in the country of enforcement. Whether an award that has been set aside is completely unenforceable is not yet conclusive, and a case-by-case analysis is a desirable approach.

4. Understanding of the Principle of Non Bis in Idem Following the Revocation of the Appellate Award

4.1 Dispute Resolution Following the Revocation of the Appellate Award

In light of the above analysis, can a party submit the same dispute to arbitration or court again in circumstances where the original award may not be restored after the award has been set aside? According to Article 9 in Arbitration Law of the People's Republic of China (hereinafter referred to as "Arbitration Law"), the answer is yes. Similar provisions can be found in Civil Procedure Code of German 1998 and the Arbitration Law of Taiwan. It follows that in most countries or regions, under the principle of 'Finality', an award that is set aside can be referred to arbitration or litigation again. Because when the award is set aside and the original award has not been reinstated, the parties hereto still have a dispute that has not been resolved and their rights have not been remedied, and a complete prohibition from referring the dispute to arbitration or court again would block the way for them to defend their rights.

However, it has also been argued that the new appellate mechanism, which is equivalent to giving the parties a second chance for redress, has significant particularity regarding to the arbitration award under current Arbitration Law. Originally, following the traditional principle of 'Finality', when the first award was made, it is final, which is one of the main reasons for the development of arbitration, namely its "efficiency" in resolving issues, and it is widely regarded by arbitration academics and practitioners as the cornerstone of arbitration. Even if the parties disagreed with the substance of the award, they could no longer request the arbitration institution to arbitrate, which led to an

objective situation where parties were dissatisfied with the substance of the award and appealed to the courts on the substance of the award. (See Shen Sibao & et al., 2019) The mechanism of internal appellate mechanism was created to address such problems by giving parties a second chance to resolve their disputes. If parties were to be allowed to refer to arbitration or court again after an appellate award has been set aside, this would amount to granting a third opportunity for relief, which would have several negative effects. Firstly, it would undermine the principle of efficiency, as the value of arbitration would be greatly reduced by having the same dispute heard three times; secondly, it would not be conducive to ensuring certainty and consistency in adjudication, as going through multiple hearings, and producing multiple decisions with contradictory results would make the outcome extremely unstable, which would affect people's trust in arbitration and the development of the arbitration industry.

In the author's opinion, after weighing the pros and cons of the two types of views, it is more reasonable to allow the parties to have the opportunity to deal with the unresolved dispute again. Although to a certain extent, it may affect the efficiency and certainty and consistency of adjudication, the essence of arbitration as a form of dispute resolution is a fair and reasonable solution to the dispute. Then can we consider only allowing parties to go to court for the same dispute after an appellate award has been set aside, and prohibit them from applying to the arbitration institution for arbitration again? In the author's opinion, this may lead to arbitration losing its independence and even being subject to judicial intervention, which has similar disadvantages to the provisions of adjudication or litigation and adjudication before litigation that have emerged in practice. Therefore, after an appellate award has been set aside, if the original award cannot be restored to effect, the parties should be allowed to submit to arbitration again or to sue in court over the same dispute.

4.2 The Validity of the Original Arbitration Agreement After the Revocation of the Appellate Award

The agreement to appealing is a prerequisite for the case to be resubmitted and is evidence of the parties' agreement, then a new arbitration agreement need to be entered into if the case is to be resubmitted to arbitration after an appellate award has been set aside? An arbitration agreement is different from an award because of its independence, and the court's decision to set aside the award relates only to some or all the matters in the award and does not cover the validity of original arbitration agreement or arbitration clause in contract entered by the parties, and neither New York Convention nor Model Law is clear regarding to the validity of the original arbitration agreement. Throughout recent years, the provisions of laws of different countries can be mainly divided into the following four situations: firstly, the validity of original arbitration agreement is completely excluded; secondly, the validity of original arbitration agreement is determined by the courts; thirdly, the validity of original arbitration agreement is maintained, and fourthly, the validity of original arbitration agreement is restricted. For example, both Italian and Dutch law provide that once an arbitral award has been set aside, the court has jurisdiction over the dispute unless both parties object. It has been argued that, theoretically, arbitration agreements are invalid, generally because they do not meet the elements required by law, while they lapse because the parties have abandoned them or because the dispute between them has been settled. The revocation procedure referred to here is directed to a confirmation of a defect in the arbitration process, not a denial of the arbitration agreement, and these two facts has no conflict. The affirmation of the validity of original arbitration agreement following the revocation of the award is also out of respect for the parties.

In the author's view, however, the parties should be required to re-enter into a consensual agreement for this arbitration and make a new arbitration agreement in this case. This is because, firstly, of the complexity. The fact that the case has been reviewed and that the appellate awards have all been revoked proves that the dispute in this case is relatively complex and difficult to resolve by way of arbitration. If the validity of the old arbitration agreement is directly recognised and another arbitration is conducted based on the old arbitration agreement without considering the actual progress of the development of the case and its suitability for arbitration, it may result in the

parties being unable to take the case to court and resolve it by way of litigation, which will not be conducive to the handling of complex cases. Secondly, it is contrary to the principle of respect for party's autonomy of will. According to arbitration theory, autonomy of will is the foundation of arbitration, and an arbitral institution has the power to hear a case only if the parties have consensually decided to settle a particular case by arbitration. After the initial arbitration, the appellate procedure, and the revocation of the appellate award, the parties may have lost their will of submitting the case to arbitration, and since the consensus of arbitration has disappeared, the basis and premise of arbitration also disappears.

5. Conclusion

To summarize, the validity of the awards in appellate mechanism for arbitration should be analyzed in the light of specific conditions. If the the country of enforcing court does not recognise internal appellate procedure, then the appellate award will be unenforceable for the country of enforcement both before and after revocation, whereas the original award will always be recognisable and enforceable before and after the revocation of appellate award. If the country of enforcement courts recognises internal appellate proceedings, the appellate award is generally considered to be enforceable before revoking and loses its enforceability "with general effect" after revocation, and it would be more reasonable, given the current level of development of international commercial arbitration, to provide that the enforceability of the original award cannot be restored in such cases. For this reason, the principle of non bis in idem after the setting aside of an appellate award should be interpreted in a lenient manner and disputes that have not yet been resolved should be given the opportunity to be resubmitted to arbitration or litigation, but if the dispute need to be resubmitted to arbitration, the parties should reach a new arbitration agreement.

Practice has shown that while it is true that international arbitration exists in various forms, there is overwhelming support for the finality of arbitral awards. However, equally importantly, the history has also shown that there is limited demand for the finality of awards. (Rowan Platt, 2013) The recent rise of the appellate mechanism represents both an opportunity and a challenge for the arbitration industry. The appellate mechanism is not yet well established, and for China to establish an internal appellate mechanism, key concepts must first be clarified, and key issues addressed. The revocation of an appellate award has significant particularity compared with the revocation of a general award. The issue of legal consequences of the revocation of an appellate award in the internal appellate mechanism needs to be further studied, as this is a necessity for the further spread of the internal appellate mechanism in China and worldwide.

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