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On July 20th, the Second Circuit issued its opinion in *Thai-Lao Lignite (Thailand) v. Government of the Lao People’s Democratic Republic*, a significant case about the enforcement of arbitral awards annulled by foreign courts. It affirmed the District Court’s decision to vacate its former judgment enforcing an arbitration award, after it had been annulled by a Malaysian court. This decision is in-line with previous case law in holding that the New York Convention mandates different approaches for the review of arbitral awards in the primary jurisdiction (the state in which or under the law of which the award was made), as compared to review in a secondary jurisdiction (states where recognition and enforcement are sought). In Thai-Lao Lignite, the Second Circuit has now broadened the range of factors courts will consider when deciding whether to enforce an annulled award. Not only are courts directed to look to the principle of international comity, as previously explained in *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción* (“Pemex”), but are now to include considerations like timeliness of the filed motion and finality in their decisions.

The case stems from an agreement between Petitioners, Thai-Lao Lignite and its subsidiary Hongsa Lignite, and the Lao government, granting them the right to mine lignite and develop a power plant in the Hongsa region of Laos. A dispute over performance culminated in a $57 million award issued against Laos by an arbitral tribunal in Malaysia. It was only after the award was confirmed in the Southern District of New York that the Malaysian High Court annulled it. Laos subsequently asked the District Court to set aside its judgment and recognize the Malaysian annulment.

The Second Circuit agreed with the District Court’s decision to vacate its judgment, basing its findings on the Federal Rule of Civil Procedure (“FRCP”) 60(b)(5) and Article V(1)(e) of the New York Convention. Under FRCP 60(b)(5), district courts may vacate a final judgment when it “is based on an earlier judgment that has been reversed or vacated.” Article V(1)(e), similarly, states that a court of a secondary jurisdiction may refuse to enforce an award when that award has been set aside by a competent authority in the primary jurisdiction. Because courts considering FRCP 60(b)(5) motions are “generally, and correctly, solicitous of a movant seeking relief,” Article V(1)(e) considerations “may readily be incorporated into the ordinary course of a court’s Rule 60(b) analysis.” District courts are now to use “the full range” of FRCP 60(b) considerations when...
an arbitral party is seeking to enforce an annulled award. These are: whether the motion was made within a reasonable time, whether the movant acted equitably, and whether vacatur would strike an appropriate balance between serving the ends of justice and preserving the finality of judgments.

The bar for enforcing awards annulled in the primary jurisdiction, however, remains very high. A concern for international comity, as explained in Pemex, is still a significant factor constraining judicial discretion. As also explained first in Pemex, a court may refuse to recognize an annulment where giving effect to it would offend “the fundamental notions of what is decent and just” in the United States, and this will occur only under very rare circumstances. Similarly under the additional FRCP 60(b) considerations, the facts would have to be extreme. In considering finality, for example, the Second Circuit noted that “had ten years elapsed before the set-aside proceedings were concluded, and more time elapsed before Laos moved to vacate the Award,” judicial interests of finality “might well outweigh” the deference to the primary jurisdiction. Even though the Second Circuit has opened the door a bit further for opportunities to enforce annulled awards, it remains unlikely that a court would enforce an award annulled in the primary jurisdiction.

*Julia Grabowska, Summer Associate and student at Columbia Law School, also contributed to this publication.*

## Contacts

Oliver (Ollie) J. Armas  
Office Managing Partner

Samaa A. Haridi  
Partner

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