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French Supreme Court on Track to Annul a US$15 Billion Award against Malaysia

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On November 6, 2024, the French Supreme Court rejected the enforcement of an interim award on jurisdiction in the legal saga opposing Malaysia to the heirs of the Sultan of Sulu and spanning several jurisdictions. The Supreme Court ruled that the arbitration clause in an 1878 agreement – and on the basis of which a US$15 billion award has since been issued against Malaysia – is null and void. This decision will presumably lead the French Supreme Court to annul the US$15 billion award itself next.

Factual background

In 1878, the Sultan of Sulu signed an agreement with British and German explorers, granting them the right to access and exploit resources in a territory under its control located along the north coast of the island of Borneo (today known as Sabah, Malaysia) in exchange for annual payments. In this agreement, the parties agreed to refer disputes to the British Consul General to Borneo.

Almost a century later, Malaysia became the ultimate successor to the foreign explorers upon its independence from the United Kingdom in 1963. Malaysia maintained payments to the Sultan of Sulu's heirs (Filipino nationals) until 2013. When payments ceased, the heirs started legal proceedings.

After the United Kingdom refused the heirs' request to appoint an arbitrator to fulfill the role of British Consul General to Borneo, the heirs applied to the Madrid high court for the appointment of an arbitrator, which was granted in March 2018 based on a *prima facie* review of the arbitration clause. The sole arbitrator issued an award on jurisdiction on May 20, 2020 in which he designated Madrid as the seat and UNIDROIT principles as well as general principles of international law as the *lex causae*.

Shortly thereafter, at Malaysia's request, the Madrid high court on June 29, 2021 annulled the arbitrator's appointment due to a deficient notification of the claim. The court annulled all acts since the notification, thereby in effect annulling the interim award as well.

Despite this decision, the heirs obtained the interim award's exequatur from the Paris first instance court on September 26, 2021. Malaysia appealed the exequatur order, following which the Paris Court of Appeal reversed said order on June 6, 2023 on the ground that the sole arbitrator lacked jurisdiction. This decision was upheld by the recent November 6, 2024 French Supreme Court decision.

Following the Madrid high court's decision to in effect annul the sole arbitrator's interim award, the sole arbitrator chose to move the arbitral seat from Madrid to Paris. While the move to Paris was controversial, it was not referenced by the French courts in connection with their decision to refuse the recognition of the award on jurisdiction.

On February 28, 2022, the sole arbitrator rendered the final award at the Paris seat, finding that Malaysia breached the 1878 international private lease agreement when it stopped making payments to the heirs, and awarding the heirs damages constituting "restitution value" of the rights over the leased territory of US$14.92 billion (including pre-award interest). Malaysia has applied for the annulment of the final award before the Paris Court of Appeal, but the proceedings were stayed earlier this year at the heirs' request, pending the French Supreme Court's decision on the interim award's exequatur.

Why did the interim award obtain exequatur in France when it had been annulled at its seat?

The annulment of a foreign award at its seat does not prevent the French judge from granting an exequatur order. Exequatur is obtained via an *ex parte* proceeding, during which the French judge's scrutiny of the award is limited and consists in a *prima facie* review to ensure that the award is not manifestly contrary to the French public order (article 1514 CPC).

The annulment of a foreign award at its seat also has no consequence after exequatur is obtained, when the award debtor opposes its enforcement in France. This is a key component of France's highly favorable arbitration law, which goes beyond what is required by the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. French courts have long adopted the position that international awards are, by nature, international. Because they are not part of a domestic legal order, they continue to exist in the international legal order "despite [their] annulment [at the seat]" (Hilmarton 1994 decision). And indeed, article 1520 of the French code of civil procedure (CPC), which lists the five grounds under which an exequatur order can be challenged (*via* article 1525 CPC), does not include the setting aside of the award at the seat.

Why did the French courts reverse the exequatur order?

Malaysia challenged the exequatur order based on all five grounds under article 1525 CPC, but the Paris Court of Appeal and the French Supreme Court focused on only one: whether the arbitral tribunal had jurisdiction to rule on the dispute. After assessing several translations of the litigious clause from 1878 (originally drafted in Jawi, *i.e.,* Malay written in Arabic characters) and contextual elements, the courts concluded that the clause was indeed an arbitration agreement, as it evidenced the parties' intent to establish a mechanism to resolve disputes. The courts also found, however, that the designation of a trusted third party, the British Consul General to Bruneo, as arbitrator, was inseparable from the parties' intent to arbitrate. As this position no longer exists, the Paris Court of Appeal ruled that the arbitration agreement became null and void, and that the sole arbitrator had no jurisdiction to rule on the parties' dispute. The court therefore reversed the exequatur order under article 1520 1° CPC, and its reasoning was upheld by the French Supreme Court.

What consequences for the final US$ 15 billion award against Malaysia?

In its decision granting the heirs' request for a stay of the proceedings Malaysia commenced to annul the final award, the Paris Court of Appeal explained that the pending decision on the jurisdictional award exequatur order "will have a direct impact on the course of the present proceeding" as Malaysia seeks the annulment of the final award in part on the ground that the sole arbitrator lacked jurisdiction. In light of the French Supreme Court's November 6 ruling, the annulment of the final award seems like a foregone conclusion.

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