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THE SULTAN OF SULU AWARD: IS IT ENFORCEABLE IN THE US UNDER THE NEW YORK CONVENTION?

by Gary J. Shaw & Rafael T. Boza

I. INTRODUCTION

The Sulu Sultanate is a small portion of the north-eastern corner of the island of Borneo, along with other small islands surrounding the Sea of Sulu. The Sultanate is the 13th State of the Malay Federation ("Malaysia").

The Sultanate's story recently took a turn with the issuance of the Final Award in the *ad hoc* arbitration against Malaysia for US$14.92 billion.[1] In recent years, the heirs of the former Sultan of Sulu have been pursuing an *ad hoc* arbitration against Malaysia for non-payment of rents allegedly due under a 150-year-old agreement. Malaysia did not participate in the arbitration, and while the proceedings were ongoing, a number of different courts from multiple countries issued conflicting decisions on whether the arbitration should proceed. This article will describe the history of the dispute, both factually and procedurally and assess whether the massive Award is enforceable in the US pursuant to the New York Convention.

II. BACKGROUND

The story begins in the mid-nineteenth century. The Spanish Kingdom, the British Empire, the Dutch Kingdom, and other colonial powers were vying for power in southeast Asia. The Spanish Kingdom had colonized the Philippines in the early 1500s, which is near Borneo and the Sultanate's islands. The Spanish Kingdom was expanding throughout the region. The British empire had control of India, the modern Myanmar, and many of its adjacent lands, including the Malay Peninsula, Singapore, and the western part of Borneo.

In April 1851, the Sultanate of Sulu and the Kingdom of Spain signed an agreement by which the Sultanate submitted to Spanish rule and secured Sulu's trade to the Philippine Islands. British influence continued to expand in neighboring areas however, including Brunei, which is also located on Borneo.

[1] Nurhima Kiram Fornan v. Malaysia, Final Award (Ad Hoc) (Feb. 28, 2022) (G. Stampa Arb.).

In January 1878, the then Sultan of Sulu Jamal A'lam either ceded or leased the Sultanate's property on Borneo to the British North Borneo Company for an annual payment of $5,000 in Mexican currency of the time.[2] These concessions were in many ways concessions to the British Crown since the Company had ties to the British Government.[3] Spain protested the deal as it was not consulted per the 1851 Treaty.[4] Ultimately, however, Spain ceded all sovereignty over the Sultanate's property as part of a larger agreement with the UK and Germany.[5]

For the next sixty years, the British North Borneo Company exercised control over the area with no serious issues. In 1942, Japan occupied the area, only to surrender it in 1945. In 1946 the territory became an actual British Colony.[6] North Borneo then gained independence from Great Britain in the 1960s, and formally joined the Federation of Malaysia around 1963.[7]

According to the heirs, Malaysia honored the 1878 Agreement up until 2013, when it stopped making payments. In late 2017, the heirs served the Malaysian Embassy in Spain with a notice of intention to commence arbitration, pursuant to an arbitration clause in the Agreement.[8] Malaysia did not respond to the notice.

Malaysia's inaction in the proceedings prompted the claimant-heirs to seek, in February 2018, an arbitrator appointment from the Superior Court of Justice of

[2] Some sources report that payment should be "$5,300 Mexican gold pieces." *See What Went Before: Sultan of Sulu's 9 principal heirs*, PHIL. DAILY. INQ., Feb. 23, 2013, https://globalnation.inquirer.net/65303/what-went-before-sultan-of-sulus-9-principal-heirs#ixzz7Rbp50b3v; *see also* NAJEEB M. SALEEBY, THE HISTORY OF SULU 225 (1908), *available at* https://www.gutenberg.org/files/41771/41771-h/41771-h.htm.

[3] ADA PRYER, A DECADE IN BORNEO 11 (2002) ("[T]he Sultan of Sulu was persuaded to sign the concessions once he saw them as carrying the weight of the British Government.").

[4] As a subject of the Spanish crown, the Sultan was obligated to request authorization to grant any rights over the land. *See generally* SALEEBY, *supra* note 2, 225.

[5] Final Award, ¶ 165.

[6] *See* George McT. Kahin, *The State of North Borneo 1881-1946*, 7 FAR E.Q. 43 (1947); *see also* John S. Galbraith, *The Chartering of the British North Borneo Company*, 4 J. BRIT. STUD. 102 (1965).

[7] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425, ¶ 8.

[8] Final Award, ¶ 21. The connection to Spain arises from the Sultanate's 1851 submission to the Spanish Crown. The Award describes Spain's sovereignty over the North Borneo region at the time the Sultan signed the Agreement with the British North Borneo Company. *Id.* ¶ 165. However, the alleged arbitration clause never mentions Spain as a seat or in any other way.

Madrid pursuant to the Spanish Arbitration Act.[9] Malaysia did not take part in these proceedings either. The Superior Court granted the request, and in March 2019 appointed Dr. Gonzalo Stampa as the Sole Arbitrator ("Arbitrator").

With the Arbitrator in place, the claimants filed their Notice of Arbitration in July 2019. In the Notice, they sought to terminate the Agreement as of 2013 and receive US$5 billion in unpaid rent, as well as US$26 billion in lost revenue they would have received off the region post-termination.[10] Over the next two years, the arbitration proceeded with little participation from Malaysia.[11] The Arbitrator issued a Preliminary Award in May 2020 confirming his jurisdiction and the validity of the arbitration agreement.[12] Later, he issued a Final Award on February 28, 2022, awarding the claimant-heirs US$14 billion, plus interest and costs.

Although absent from the arbitration, Malaysia actively opposed the proceedings in the courts of several countries, including Malaysia, Spain, and France. First, Malaysia tried to stop the arbitration in its own courts by seeking an injunction against the heirs and the Arbitrator. Neither the heirs nor Dr. Stampa took part in those proceedings.[13] The High Court of Sabah granted the injunction in March 2020, before the Preliminary Award was issued. The High Court found that an arbitration agreement did not exist in the Agreement,[14] and that the Malaysian courts had

[9] *Id.* ¶ 23; see also Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 182/2018, May 8, 2018 (ID CENDOJ No. 28079310012018200021) (Spain).

[10] Final Award, ¶ 8; Cosmo Sanderson, *Huge claim against Malaysia nears award*, GLOBAL ARB. REV., Feb. 17, 2022, https://globalarbitrationreview.com/huge-claim-against-malaysia-nears-award.

[11] In October 2019, Respondent informed the Arbitrator and heirs of the appointment of Dr. Arias and Mr. Capiel as its counsel for purposes of the arbitration. Final Award, ¶ 14. However, those appointments appear to have been withdrawn without explanation a month later. *Id.* ¶ 15. In December 2021, Respondent's representative, Mr. Portwood, confirmed to the Arbitrator that Malaysia had chosen not to participate and was challenging the arbitration proceedings entirely. *Id.* ¶ 157.

[12] Final Award, ¶ 26.

[13] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425, ¶ 4.

[14] *Id.* ¶ 12(1)("(r) Absence of any valid and enforceable arbitration agreement between the parties estopped the [heirs] from referring any alleged dispute to arbitration. (s) The act of the Defendants in persisting with the Spanish Arbitration despite no binding arbitration agreement established between the parties [*sic*] amount to a grave violation of the Plaintiff's legal rights and the Court must not stand idle to allow such abuse of process to persist.").

jurisdiction over any dispute arising out of the Agreement.[15]

The heirs pushed forward however, and the Arbitrator continued the arbitration. In June 2021—several months after the proceedings were closed—Malaysia moved to vacate all rulings from the Superior Court of Justice of Madrid, including its choice of arbitrator. The Superior Court granted the request, finding that the heirs did not serve Malaysia properly with the notice of the arbitrator appointment proceedings.[16] All of the Superior Court's prior decisions against Malaysia were vacated.[17] The Superior Court then instructed the Arbitrator to close the proceedings immediately further to its prior decision. The Arbitrator refused, finding that the Court's intervention was not allowed under the Spanish Arbitration Act.[18]

The heirs then took matters into their own hands and sought to confirm the Preliminary Award *ex parte* before the Tribunal de Grande Instance de Paris ("Paris Court"). At the time, the Final Award had not yet been issued. The Paris Court granted the request, after which, claimants asked the Arbitrator to relocate the place of arbitration from Spain to France.[19] The Arbitrator agreed, finding that the recent decisions from the Superior Court were "intrusions" in the proceedings that created "a certain risk for the Parties of incurring in a denial of justice in Madrid."[20] The proceedings were relocated to France in late October 2021.

In December, Malaysia appealed the Paris Court's confirmation order to the Paris

[15] *Id.* ¶ 12(3) ("(a) The Deed of Cession concerns the grant and cession in perpetuity of territories and lands on the former State of North Borneo which now constitute territories within the modern-day State of Sabah, Malaysia. (b) Thus, as rightly submitted by the Plaintiff, the High Court of Sabah is the natural and proper forum to adjudicate on any dispute arising out of the Deed of Cession.").

[16] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 594/2021, June 29, 2021 (ID CENDOJ No. 28079310012021200080) (Spain), p. 4; see Final Award, ¶ 109; see also Joint Statement by the Ministry of Foreign Affairs and Attorney General's Chambers on the Decision in the Arbitration Proceedings in Paris, https://www.kln.gov.my/web/guest/-/joint-statement-by-the-ministry-of-foreign-affairs-and-attorney-general-s-chambers-on-the-decision-in-the-arbitration-proceedings-in-par-1.

[17] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 594/2021, June 29, 2021 (ID CENDOJ No. 28079310012021200080) (Spain), p. 4.

[18] Final Award, ¶ 126.

[19] *Id.* ¶ 129, 132.

[20] *Id.* ¶¶ 141-42.

Court of Appeal.[21] The Court of Appeal stayed the confirmation and barred the claimants from availing themselves to the confirmation order.[22] Malaysia sent these decisions to the Arbitrator and requested that the arbitration be discontinued immediately, but the Arbitrator rejected Malaysia's request, finding that the Preliminary Award was already incorporated into the "French legal order" and that the stay decision had no effect on the arbitration.[23]

Several months later, in February 2022, Malaysia initiated criminal proceedings against the Arbitrator before the Madrid court, and subsequently reiterated its request that the proceedings be discontinued.[24] The Arbitrator refused and issued his Final Award on February 28, 2022.

Since the Award was issued, both parties have sought relief from the courts in Spain and France. The heirs brought a constitutional action in the courts of Spain challenging the Superior Court's decision to vacate Dr. Stampa's appointment. Meanwhile, Malaysia asked the French court to overturn the Award.[25] It is not entirely clear how the French court will rule. According to one observer, there is precedent for the Arbitrator's decision to move the arbitration.[26] "Considering the French legal system's view of international arbitration as a transnational and autonomous system," the Paris court will likely scrutinize the Madrid court decision and come to its own conclusion.[27]

III. IS THE AWARD ENFORCEABLE IN THE US?

A. *Sovereign Immunity Defense Act (FSIA).*

The Award might not be enforceable in the US for several reasons, first of which, because Malaysia may have sovereign immunity. The Foreign Sovereign Immunities

[21] *Id.* ¶ 146.

[22] *Id.* ¶ 148.

[23] *Id.* ¶ 150.

[24] *Id.* ¶ 151.

[25] Cosmo Sanderson, *Malaysia Challenges Mega-Award in French Court*, GLOBAL ARB. REV., Mar. 18, 2022, https://globalarbitrationreview.com/malaysia-challenges-mega-award-in-french-court.

[26] *Id.*

[27] *Id.*

Act (FSIA) generally provides States with immunity from suit in US courts,[28] but the FSIA also provides exceptions to that general immunity, including an exception to enforce arbitration awards (the "arbitration exception").[29]

To meet the standard for the arbitration exception, there must be (i) an arbitration agreement, (ii) an arbitration award, and (iii) a treaty governing the award before the exception will apply.[30] If an arbitration agreement does not exist—despite the existence of an award—then the exception does not apply, and the State retains its sovereign immunity.

Less than a year ago, the Fifth Circuit Court of Appeals dismissed an enforcement petition for this very reason.[31] The facts of the case are quite like the ones here. The plaintiffs were ancestors to a Saudi ruler who leased land to Saudi Aramco—later the Saudi Arabian Oil Company—in exchange for payment. Years later, the ancestors claimed back payment for the Company's use of the land. The ancestors began an arbitration in Egypt, which was described as an "irregular" proceeding.[32] The ancestors were ultimately awarded US$18 billion.[33]

The Fifth Circuit refused to enforce the award however, finding that that an arbitration agreement did not exist. Although an arbitration clause was presented before the Court, it was from a different agreement not involving the same parties. The Court did not rely on this outside clause.[34]

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[28] Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1976).

[29] *Id.* § 1605(a)(6) ("A foreign state shall not be immune . . . in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if . . . (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.").

[30] Process and Industrial Developments Limited v. Federal Republic of Nigeria, No. 21-7003 (D.C. Cir. 2022) 10 (quoting LLC SPC Stileks v. Republic of Moldova, 985 F.3d 871, 877 (D.C. Cir. 2021)).

[31] *Al-Qarqani v. Saudi Arabian Oil Co.*, No. 21-20034 (5th Cir. 2021).

[32] *Id.* at 3.

[33] *Id.*

[34] *Id.* at 10-11.

On this same basis, Malaysia may claim immunity from enforcement under the FSIA. Malaysia has already argued before its home courts that an arbitration agreement does not exist between the parties. The High Court of Sabah agreed on that point in fact when it enjoined the heirs from pursuing arbitration.[35] The text of the 1878 Agreement between the Sultan and the British North Borneo Company says that any dispute between the parties will be "brought for consideration or judgment of Their Majesties' Consul-General in Brunei." According to the High Court, this language is not a reference to arbitration.[36]

On the other hand, the Superior Court of Justice of Madrid came to the opposite conclusion. The Superior Court found that the parties "unequivocally agreed to submit to arbitration,"[37] although that decision was later vacated by the same court.[38] Dr. Stampa reached the same conclusion, finding that the 1878 Agreement contained a valid arbitration agreement.[39] Neither decision refers to the decision from the High Court of Sabah.

If Malaysia presents this issue to a US court, the court will not be bound by the rulings of the Malaysian courts, the Spanish courts, the French courts, or the arbitration Award. The court will need to examine the arbitration agreement itself pursuant to Chapter 2 of the Federal Arbitration Act (FAA). The FAA defines an arbitration agreement as a "written provision . . . to settle by arbitration a controversy thereafter arising,"[40] which suggests that the writing must contain a reference to arbitration. The heirs will need to argue that the reference to "consideration or judgment of Their Majesties' Consul-General in Brunei" fits the definition of "arbitration agreement" under the FAA. If they are successful, then the FSIA's arbitration exception most likely applies, and Malaysia is not immune from suit.

[35] Government of Malaysia v. Nurhima Kiram Fornan & Ors, [2020] MLJU 425, ¶ 12.

[36] "There is not an iota of evidence," says the Court, "to infer that such reference *ipso facto* means a reference to that entity to act as arbitrator." *Id.* ¶ 12(1)(k).

[37] Final Award, ¶ 25.

[38] *Id.* ¶ 109.

[39] *Id.* ¶ 26; The authors have not been able to access the Preliminary Award issued by Dr. Stampa, which addresses this question.

[40] Federal Arbitration Act, 9 U.S.C. § 202 (1970) (incorporating by reference 9 U.S.C. § 2).

B. *Challenges to Enforcement under Article V of the New York Convention.*

Assuming the State is not immune, the US court will need to decide whether the Award is enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), in particular Articles V(1)(a) and V(1)(b).[41] This is a defensive argument that Malaysia will have to make in each jurisdiction in which the claimants may attempt enforcement.

1. The Arbitration Agreement is Not Valid.

According to Article V(1)(a), enforcement may be refused when the arbitration agreement is "not valid under the law to which the parties have subjected it," or, in the absence a chosen law, the law of the seat of arbitration.[42] Should Malaysia raise this defense, the analysis will once again focus on whether an arbitration agreement exists between the parties. But, unlike the FSIA analysis, the court will need to assess the validity of the arbitration agreement, not just its existence.[43]

At the outset, it is not entirely clear which law would govern this question because the 1878 Agreement is silent as to the law governing the arbitration agreement.[44] An obvious choice is Spanish law since Spain was the seat of arbitration. As explained above, however, Malaysia objected to the Spanish-based arbitration, and the Superior Court of Justice of Madrid ultimately vacated its orders advancing the arbitration.[45] The fact that the heirs chose Spain as the seat may not be enough for a US court to rely on Spanish law, as this may be considered forum shopping.

The outcome under Spanish law is also unclear. Although the decision was later vacated, the Superior Court of Madrid found that the parties "unequivocally agreed

[41] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 330 U.N.T.S. 3.

[42] *Id.* at Art. V(1)(a).

[43] *Id.* ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) … the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made[.]").

[44] Final Award, ¶ 67.

[45] *Id.* ¶ 109.

to submit to arbitration," implying that the arbitration agreement was valid.[46] The reason that decision was vacated had nothing to do with the validity of the agreement, but rather a lack of proper notice to Malaysia.[47] A US court could reasonably look to this decision as factual evidence of the agreements validity and declare the Award enforceable on that basis.

Another option is Malaysian law given that the territory in question is now part of Malaysia. In the absence of an express choice of law, US courts oftentimes choose the law of the state (or State) having the "most significant relationship to the transaction and the parties."[48] It is hard to imagine any other State having more significant a relationship to the 1878 Agreement than Malaysia. The Spanish court considered that they had jurisdiction because in 1878, when the agreement was signed, the territory was under Spanish jurisdiction.[49]

Even so, the outcome under Malaysian law is not clear either. The Malaysian High Court ruled that no valid arbitration agreement existed,[50] and a US court might look to the Malaysian decision as evidence of invalidity, same as the Spanish decision. On the other hand, a US court may also look to Malaysia's Arbitration Act, which defines "arbitration agreement" broadly and delegates questions of arbitrability to the arbitrator.[51] If the Malaysia Arbitration Act applies, then a US court may rely on the Arbitrator's ruling that the arbitration agreement is valid.

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[46] *Id.* ¶ 25; *see also* Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 182/2018, May 8, 2018 (ID CENDOJ No. 28079310012018200021) (Spain) (where the Spanish court indicated that the "parties agreed to arbitration ('the judgment') by the British Consul General in Borneo," which is not what the 1878 agreement says, and it is not a correct interpretation of the word "judgment." The word used in the treaty is "juicio" which means "judgment," but also "consider" or "adjudicate." This may not be sufficient to meet the "unequivocal" standard).

[47] Final Award, ¶ 109; *Joint Statement by the Ministry of Foreign Affairs and Attorney General's Chambers on the Decision in the Arbitration Proceedings in Paris*, MINISTRY OF FOREIGN AFFAIRS, Mar. 2, 2022, https://www.kln.gov.my/web/guest/-/joint-statement-by-the-ministry-of-foreign-affairs-and-attorney-general-s-chambers-on-the-decision-in-the-arbitration-proceedings-in-par-1.

[48] RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 188, 218 (1971).

[49] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 182/2018, May 8, 2018 (ID CENDOJ No. 28079310012018200021) (Spain), p. 3.

[50] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425, ¶ 12(1).

[51] Arbitration Act 2005 (Act 646) (Malaysia) §§ 9, 18.

A third option is US law, as the law of the enforcement forum.[52] The US has its own standard for determining the validity of arbitration agreements. To be valid, the FAA requires that the agreement make some reference to arbitration and arise out of a commercial, legal relationship between the parties.[53] It is unclear however whether the 1878 Agreement refers the parties to arbitration—as mentioned in the last section—or to some other form of dispute resolution. Dr. Stampa certainly believed the 1878 Agreement did refer the parties to arbitration.

A separate question is whether the Agreement is "commercial" in nature—a point that was raised and disputed in the arbitration. According to the heirs, the 1878 Agreement was a commercial land lease agreement between the Sultan and private individuals.[54] According to Malaysia by contrast the 1878 Agreement was a non-commercial "instrument for the permanent cession of territorial sovereignty over certain territories of North Borneo by the Sultan."[55] The Award sides with the heirs.[56]

As mentioned above, US courts will not be bound by any prior decision from the Arbitrator or the courts of Spain or Malaysia. US courts have the power at the enforcement stage to make an independent determination, a *de novo* determination, as to the validity of an arbitration agreement.[57] The heirs could argue that Malaysia waived its right to argue invalidity at the enforcement stage since it could have raised it before the Spanish courts and in the arbitration. But the courts may reject that argument given Malaysia's insistence that the 1878 Agreement lacks any reference to arbitration.

[52] At times, US courts will apply US law in the absence of some other law. *See EGI-VSR, LLC v. Coderch Mitjans*, 963 F.3d 1112 (11th Cir. 2020); *GE Energy Power Conversion France v. Outokumpu Stainless USA*, 140 U.S. 1637 (2021).

[53] Federal Arbitration Act, 9 U.S.C. § 202 (1970) (incorporating by reference 9 U.S.C. § 2).

[54] Final Award, ¶ 186.

[55] *Id.* ¶ 187.

[56] *Id.* ¶¶ 212, 222.

[57] *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3rd Cir. 2003); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293 (11th Cir. 2004); *Belize Soc'y Dev. Ltd. v. Belize*, 5 F. Supp.3d 25 (D.D.C. 2013).

2. The Standard for Evaluating Article V(1)(b) Challenges to the Recognition and Enforcement of Foreign Arbitral Awards.

In addition to the Article V(1)(a) defense, Malaysia may argue that the Award should not be recognized and is unenforceable under Article V(1)(b) of the New York Convention.[58]

Under Article V(1)(b) a party may request the domestic court to refuse recognition and deny enforcement of an award issued in a proceeding in which "*the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.*"[59] Under this Article, there are 3 different and separate causes for a court to refuse recognition and enforcement of an award. Malaysia may use any of these three causes to challenge the heir's enforcement of the Award.

The standard to determine whether the party challenging the enforceability of the award is that of the forum state and is based on that state's principles and policies.[60] In the US, the application of this article and the recognition of the forum state's due process principles was established in the *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (*RAKTA) case.[61] In this case, the Second Circuit evaluated the enforcement of an award against Parsons & Whittemore issued in an ICC arbitration. Parsons & Whittemore fully participated in the arbitration. On enforcement, Parsons & Whittemore argued inter alia that the arbitral tribunal denied it an adequate opportunity to present its case by refusing to delay the proceedings. In rejecting that challenge, the Second Circuit stated that Article V(1)(b) of the Convention "essentially sanctions the application of the forum state's standards of

[58] New York Convention, *supra* note 41, Art. V(1)(b).

[59] *Id.*

[60] A court evaluating the recognition and enforcement of foreign arbitral award, will apply its own standards of "international public order." Montserrat Manzano & Rafael F. Alves, *The Ground for the Refusal of the Recognition and Enforcement of Foreign Arbitral Awards for Breach of Due Process: Analyzing Relevant Jurisprudence in Latin America*, TRANSNAT'L NOTES (July 22, 2019) (citing Milantic Trans S.A. v. Ministerio de la Producción (Astilleros Río Santiago y otro, Arg. Corte Suprema de Justicia (March 30, 2016)).

[61] Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974); *see also* Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention—Practice in U.S. Courts*, 3 INT'L TAX & BUS. LAW. 249, 266 (1986).

due process."[62]

The Seventh Circuit reached a similar decision in *Generica Ltd. v. Pharmaceutical Basics* when evaluating a challenge to an award.[63] The arbitrator had limited Pharmaceutical Basics' ability to cross examine an expert and claimed that that curtailment violated its "fundamental" due process rights.[64] In denying the challenge to the enforceability of the award, the Seventh Circuit concluded that the arbitrator's handling of the evidentiary hearing, including the challenged cross-examination was "quite fair" and not a "fundamental procedural defect" that would violate "our due process jurisprudence."[65]

More recently in 2018, the Southern District of New York in *Jak Kamhi v. BSH Hausgeräte GmbH* reached the same conclusion adding that the inquiry was "limited to determining whether the procedure used was fundamentally unfair."[66]

Other countries have reached similar conclusions. In *Petrotesting Colombia S.A. et al. v. Ross Energy S.A.* the Colombian Supreme Court decided that "enforcing courts often decide the question of due process under their legal system's principles regarding procedure."[67] Also in *Milantic Trans S.A. v. Ministerio de la Producción (Astilleros Río Santiago y otro)*, the Argentinian Supreme Court found that "the principle of due process given effect to in Article V(1)(b) of the New York Convention was applied in Milantic by reference to 'the Argentine international public order', which the court defines as consisting of the principles and guarantees enshrined in the Argentine Constitution."[68]

Therefore, the enforcement forum may apply its own fundamental principles of due process to determine whether to grant recognition and enforcement to the award before them. Should enforcement be sought in the US–most likely New York

[62] *Parsons v. Societe*, *supra* note 62, at 975.

[63] Generica Ltd. v. Pharmaceutical Basics, 125 F.3d 1123 (7th Cir. 1997).

[64] *Id.* at 1129-30.

[65] *Id.* at 1131.

[66] BSH Hausgeräte GMBH v. Kamhi, 291 F. Supp. 3d 437, 442 (S.D.N.Y. 2018).

[67] Montserrat Manzano, *The Ground for the Refusal*, *supra* note 61, at 5, 7.

[68] *Id.* at 8.

or Washington D.C.–the Award will be subject to the fundamental principles of due process applicable in the US.

3. The Challenging Party was Not Given Proper Notice of the Appointment of the Arbitrator.

Giving proper notice of the appointment of the arbitrator seems like a simple matter. However, it may be complicated when the parties have not agreed to a method of service. In such case, as described above, the enforcement forum's rules should apply.

Under US law, the process to accomplish effective service of process or legal notice to a state is governed by the FSIA, and international treaties regulating the matter. The applicable rules require that the serving party send the service or notice directly to the Minister of Foreign Relations, or the equivalent to the Secretary of State, of the foreign sovereign. In *Republic of Sudan v. Harrison*, the US Supreme Court, through Justice Alito, held that when civil process is served on a foreign state under the FSIA, a mailing must be sent directly to the foreign minister's office in the foreign state.[69]

The US enforcing court may also look at the related decisions of foreign courts as reference. The Superior Court of Justice of Madrid previously found that the heirs failed to properly serve Malaysia with the arbitrator appointing procedures in Spain.[70] This decision was taken before the case was moved to France, and thus it is a reference to the standard of service on a sovereign from the arbitral seat.

In the Sulu case, the heirs served Malaysia with the notice of intent to arbitrate and the notice of appointment of Dr. Stampa in the corresponding proceedings at the Malay Embassy in Madrid, Spain.[71] Under the standard of *Parsons & Whittemore*, *Harrison*, and the FSIA, such is not proper service on Malaysia. In addition, the seat of the arbitration, Spain had also decided on the matter.

[69] Republic of Sudan v. Harrison, 139 U.S. 1048 (2019); Foreign Sovereign Immunities Act, 28 U. S. C. §1608(a)(3) (1976).

[70] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 594/2021, June 29, 2021 (ID CENDOJ No. 28079310012021200080) (Spain), p. 2.

[71] *Id.* at 4.

Therefore, it seems to us that Malaysia was not given proper notice of the appointment of the Arbitrator and, as a consequence, the Final Award should not be enforceable in the US.

4. The Challenging Party had Notice of the Arbitration Proceedings and could have Presented its Case.

The two remaining bases for a US court to refuse recognition and enforcement under Article V(1)(b) are likely not applicable to the heirs' case. These are that the party opposing enforcement did not receive "proper notice of the arbitration proceedings" or "was otherwise unable to present his case."[72]

(i) Malaysia had Notice of the Arbitration Proceedings.

Although Malaysia did not participate in the arbitration, as discussed above, Malaysia actively opposed the arbitration. Malaysia filed several lawsuits in Malaysia and Spain to stop the arbitration from proceeding. Malaysia obtained an anti-suit injunction in its own courts, which was not enforced by the Spanish courts. Later, it obtained from the Spanish courts the annulment of all actions taken during the arbitration proceeding.[73] This prompted the heirs to request the Arbitrator, a Spanish national, to rebuke his own courts and move the arbitration to France. The Arbitrator complied.[74] In France, Malaysia has tried to vacate the Award, a process that is currently on going. These activities would likely be sufficient to prove that Malaysia had notice or at least knowledge of the arbitration and was aware of the proceedings, even though it disagreed with them. However, that is not necessarily "proper notice."

The Convention does not define "proper notice of the arbitration proceeding;" it is a concept that, as discussed above, relies on the local laws of enforcement and the rules of procedure.[75] The heirs' case was an *ad hoc* arbitration, subject to Spanish law first, and then French law. The rules of procedure were those established by the Arbitrator, Dr. Stampa, subject only to a very general, international standards of due

[72] New York Convention, *supra* note 41, Art. V(1)(b).

[73] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 594/2021, June 29, 2021 (ID CENDOJ No. 28079310012021200080) (Spain), p. 4.

[74] Final Award, ¶ 66.

[75] New York Convention, *supra* note 42, Art. V(1)(b).

process.

The standard rule in arbitration, unlike that of domestic courts, is that

> an arbitral tribunal has 'no authority to enter an award based on accepting as admitted claims which have not been denied.' Instead, an arbitral tribunal is required to review the evidence presented to it, satisfy itself that the case has been proven, and provide reasons for its conclusion in the final award.[76]

Thus, in case of a failure to appear—a default—the tribunal may continue the proceedings and render an award after the party who is present, typically the claimant, has satisfied its burden of proof. That is what Dr. Stampa apparently did.

The ICSID Arbitration Rules also provide for this process in Rule 42 and establish that the tribunal, after a grace period, certain discretionary proceedings, and the request of the party who is present, should proceed with the case and render an award.[77] The AAA and ICC Rules also have default rules which allow for the continuation of proceedings, although these require that a party be duly served or summoned before the arbitrator may proceed with the case.[78]

There are very few cases in which the respondent in an arbitration has wholly failed to appear to the proceedings, especially when having knowledge of the case. This was the case in *Kaiser Bauxite v. Jamaica*, an ICSID case. ICSID decisions are informative because ICSID is the preeminent forum for resolution of investor-state disputes.[79]

In *Kaiser Bauxite v. Jamaica*, Jamaica did not appear or act in the case at all. When the tribunal started undertaking an evaluation of its own jurisdiction *sua sponte*, Jamaica sent a communication to the tribunal, explaining that Jamaica had made reservations to any ICSID tribunal's jurisdiction over "investments related to minerals

[76] *See* Dr. Wolfgang Kühn, *Defaulting Parties and Default Awards in International Arbitration*, *in Contemporary Issues in* INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014, 400-401 (Rovine, A. ed. 2015).

[77] ICSID Rules of Procedure for Arbitration Proceedings, Rule 42 (Apr. 10, 2006) [hereinafter "ICSID Arbitration Rules"]; CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 720 et seq. (2d ed. 2009).

[78] *See* AAA Rules (2013), R-31; ICC Rules of Arbitration (2021), Arts. 6(8), 26(2).

[79] The authors consider that ICSID cases are informative because the heirs' case is like an investor-state case in that the arbitration claimant is a private party and the respondent is a sovereign state.

or other natural resources."[80] After analyzing the history of Jamaica's accession to the Convention and its disclaimer of jurisdiction, the tribunal concluded that the disclaimer was not effective for this case; Jamaica had consented to arbitrate with Kaiser before the disclaimer was effective. Therefore, the tribunal had jurisdiction.[81] Later the case was discontinued under Rule 44 of the ICSID Arbitration Rules at the request of a party, presumably Kaiser, before the tribunal had issued the final award.[82]

In this case, the tribunal applied the standard suggested above and left no stone unturned before deciding to continue with the proceedings in the absence of Jamaica. In the heirs' case, Dr. Stampa seems to have performed a similar exercise.

Thus, it is unlikely that a domestic court in the jurisdiction of enforcement, for our example Washington D.C. or New York, would consider that Malaysia did not have "proper notice of the arbitration proceeding."

(ii) Malaysia could have Presented its Case.

On the other hand, Malaysia will have a very difficult time alleging that it was unable to present its case. As Malaysia willfully remained outside the proceedings, not even trying to challenge the jurisdiction of the Arbitrator, before the Arbitrator itself, it is likely that an enforcement court will reject a challenge based on this argument.

An enforcement court could likely base its decision on an estoppel argument. As explained by Timothy Nelson, "'[e]stoppel' is a term familiar to those in the common law system: it potentially operates to preclude a party from adopting inconsistent positions, particularly if the opposing party has relied upon such positions and would suffer prejudice if they were to change. Doctrinally, it is sometimes associated with the maxim *venire contra factum proprium* ("no one may set himself in contradiction to his own previous conduct") as well as the general principles of good faith and *pacta*

[80] Kaiser Bauxite Company v. Jamaica, ICSID Case No. ARB/74/3, Decision on Jurisdiction and Competence, 22 (July 6, 1975); Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, Art. 45(1), 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[81] *Bauxite*, Decision on Jurisdiction, 24.

[82] ICSID Arbitration Rules, Art. 44.

sunt servanda."[83] As described, estoppel requires that the affected party show that it relied on the prior position of the other party to its detriment.[84]

The heirs could advance the argument that enforcement is proper because Malaysia chose to not participate in the arbitration, despite having challenged the proceedings in different forums, and because of such willful inactions Malaysia cannot argue on enforcement that it did not have an opportunity to present its case. In making this argument, the heirs will have to show that they relied on Malaysia's inaction to their detriment.

Although it would be reasonable to argue that Malaysia is precluded from asserting that it did not have an opportunity to present its case, the heirs will likely not be able to show reliance or detriment; the heirs did not change their position and suffered no detriment.

The heirs continued with the arbitral proceedings despite Malaysia's failure to participate and continued to push forward despite anti-suit injunctions and orders to suspend the proceedings. This was the heirs' plan from the beginning; they wanted this arbitration to proceed uninterrupted. Thus, it does not seem like the heirs changed their position in reliance of Malaysia's inaction. In addition, the heirs suffered no detriment. In fact, Malaysia may argue that the heirs received a benefit: the Award for US$14 billion, the second largest award in recorded history.

In turn, if Malaysia argues that recognition and enforcement would be improper because it did not have an opportunity to present its case, the enforcement court may reject the argument on the basis of waiver. Malaysia waived its right to be heard.

The general, international standards of due process "requires that each party have a fair opportunity to present its case to the tribunal and to rebut its opponent's case at a meaningful time and in a meaningful manner.[85] However, such right may be waived.

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[83] Timothy G. Nelson, *Blowing Hot and Cold: State Commitments to Arbitrate Investment Disputes*, 9 WORLD ARB. & MED. REV. 181, 182 (2015).

[84] *Id.* 192-93 (citing Pan American Energy LLC & BP Argentina Exploration Co. v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (July 27, 2006).).

[85] RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (2011) § 4-13, cmt. c.

Waiver is a widely recognized principle of law in possibly all jurisdictions and legal traditions. In the US, waiver "occurs when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished."[86] The waiver may be accomplished by express actions or language, but it also may be implied from the party's course of conduct inconsistent with an intent to enforce the right.[87]

Here, by voluntarily and intentionally failing to participate in the arbitration—because it disagreed with it, or because it was challenging it in other forums—Malaysia may have unintentionally waived its right to assert in the enforcement proceedings that it did not have an opportunity to present its case. The only element of the waiver defense which is unclear under the facts is whether Malaysia's actions induced the heirs to believe that Malaysia had relinquished this due process right. It is possible for the heirs to make such argument. Malaysia's actions represented a complete abandonment of the arbitration process in which it had initially attempted to participate in. This, coupled with its multiple court challenges to the Arbitrator's appointment and his conduct of the process, may indicate to the reasonable observer a desire to give up all rights and remedies related to the process.

As a result, Malaysia will not be able to resist recognition and enforcement based on its inability to present its case. Hence, neither of these arguments seems to lead to a satisfactory result for either of the parties.

IV. CONCLUSION

The Award against Malaysia is one of the largest awards ever issued against a state, surpassed only by the Yukos Award. It arises out of a 150-year-old contract with very ambiguous terms. It was issued in the context of a highly disputed *ad hoc* arbitration, in which neither the alleged arbitration clause, nor the conduct of the proceedings was accepted by the parties or the courts of the seat, Spain. The Arbitrator took actions which may be considered unreasonable, extreme, or even defiant, such as

[86] *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 938 (9th Cir. 2017); *see also United States v. Olano*, 507 U.S. 725, 733 (1993).

[87] ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 273-74 (2004).

relocating the seat of arbitration, to ultimately issue a polarizing Award. Any enforcement effort, in any jurisdiction will likely be met with substantial resistance.

The heirs will need to overcome several obstacles if they seek to enforce their Award in the US. The fact that the 1878 Agreement does not expressly refer to arbitration may offer Malaysia a chance to assert immunity from suit under the FSIA. That same issue—the lack of any reference to arbitration—may also give Malaysia an opportunity to challenge the Award under Article V of the New York Convention for lack of arbitration agreement. Separately, Malaysia may challenge the Award for lack of proper notice—also under Article V of the New York Convention. Indeed, this challenge may prove successful given prior rulings from the Superior Court in Madrid.

Nonetheless, the heirs have a non-frivolous case that the Award should be enforced in the US. The 1878 Agreement contains some reference to dispute resolution, interpreted as a reference to arbitration by both the Arbitrator and the Superior Court of Madrid. As for notice, there is no question that Malaysia was aware of the arbitration early in the proceedings. A US court may reasonably conclude that Malaysia should have raised its challenges in the arbitration itself.

Either way, the story of this dispute highlights the importance of the New York Convention and the protections it provides to both parties. For the heirs, the Convention offers a mechanism to enforce a money judgement that may be rightfully due to them. On the other hand, it gives Malaysia a chance to challenge an arbitration that some would say went completely rogue.

Ultimately, based on the analysis above, we believe that there are sufficient arguments and procedural peculiarities in the process that a US court would be justified in denying recognition and enforcement of the Final Award.

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