

Amlon Dilemma: Another Hilmarton Nightmare in International Commercial Arbitration

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Received 13 January 2014; accepted 24 March 2014

Published online 18 April 2014

Abstract

The Amlon case reflects an unfair phenomenon that the winning party gets a successful award but the enforcement of the award is refused by all relevant countries, and there are no other recourse means or remedies available for the winning party. We may call this embarrassing situation of the winning party in international commercial arbitration as Amlon Dilemma. To work out this dilemma, the New York Convention and national arbitration laws should take some measures, such as adopting the principle of waiver in the proceedings of refusing enforcement, coordinating the proceedings of setting aside in the country of the arbitral forum and the proceedings of refusing enforcement in other countries, and endowing the decision of refusing enforcement made by the court of a country outside the arbitral forum with the effect of invalidating the award in that country.

Key words: International commercial arbitration; Amlon dilemma; Resolutions

Shi, X. M. (2014). Amlon Dilemma: Another Hilmarton Nightmare in International Commercial Arbitration. *Canadian Social Science*, 10(3), 29-36. Available from: <http://www.cscanada.net/index.php/css/article/view/4516>
DOI: <http://dx.doi.org/10.3968/4516>

INTRODUCTION

In international commercial arbitration, there is a famous case, the outcome of which is called Hilmarton Nightmare. It reflects the phenomenon that the award

has been set aside in the country of the arbitral forum but is still enforced in other countries. The Hilmarton case has generated controversial debate in the circle of international arbitration. To the contrary of the Hilmarton Nightmare, the author discovers in his practice another kind of phenomenon which is unfair and unendurable for the winning party of the arbitral proceedings. That is, the enforcement of the award is refused by the courts of all possible countries where the losing party has assets for enforcement because there exist one or more grounds for refusal as enumerated in Article V(1) of the New York Convention, whereas the winning party of the arbitral proceedings eventually could neither submit the dispute for re-arbitration nor commence litigations in any national court because the original award has not been set aside and still remains valid. The author calls this unfair phenomenon as the Amlon Dilemma, following the name of the winning party of the case. The Amlon Dilemma frustrates the objectives of the parties to international arbitration and should be wiped out. This article purports to analyze this dilemma and propose some possible resolutions.

1. THE FACTS OF THE AMLON CASE

1.1 The Contract and the Dispute Between the Parties

On 7th November 2005, Amlon Metals Ltd (an English company, hereafter referred to as “the Claimant”), concluded a contract to sell one lot of copper concentrate ore to Yunnan Nickel and Cobalt Co., Ltd (a Chinese company, hereafter referred to as “the first respondent”) and Kunming Railway Bureau Import and Export Corporation (the agent of the first respondent, hereafter referred to as “the second respondent”). Amongst other clauses, Article 19 of the Contract provides that all disputes arising under the Contract shall be determined under the Rules of the London Court of International Arbitration by two arbitrators and an umpire to be

appointed pursuant to the English Arbitration Act 1996. Article 20 stipulates that all disputes shall be exclusively determined by Hong Kong International Arbitration Centre (HKIAC) in Hong Kong in accordance with English laws.

From 9th April to 3rd May 2006, six shipments of the contracted goods arrived successively at Hekou, China. Three shipments were classified into HS26203000 (mixture mainly containing copper, which is forbidden to be imported under Chinese Laws) and ordered to be returned to the seller by Hekou Customs. The two respondents applied to Kunming Customs for re-inspection and re-classification. Upon the respondents' application, commitment not to use the goods before the Customs making the final decision, depositing a sum of security, and approved by Hekou Customs, all the goods were transported to and stored in the first respondent's warehouse under the supervision of the Customs. In such a situation, the respondents refused to pay the claimant the already-agreed outstanding balance for the three shipments in a total sum of about USD445,000, and a dispute arose between the parties.

1.2 The Arbitral Proceedings and the Award

On 7th November 2006, the claimant's solicitor wrote to the respondents, demanding to submit the dispute for arbitration to HKIAC. This letter proposes to appoint Mr. Russell Coleman SC as the sole arbitrator to arbitrate the dispute in accordance with procedural rules which the arbitrator may consider fit, and presumes that the respondents have accepted the proposal if they do not respond otherwise within 14 days. On 12th December 2006, the first respondent, on behalf of itself and the second respondent, wrote to the claimant's solicitor, pleading that the dispute cannot be arbitrated since the Customs has not made the final decision, without mentioning the proposal made by the claimant's solicitor.

On 2nd May 2007, HKIAC appointed Mr. Russell Coleman SC as the sole arbitrator, upon the claimant's application made on 16th March 2007. After the composition of the tribunal, the arbitrator issued two orders for directions, which determined, among other procedural matters, that the (1993) Domestic Arbitration Rules of the Hong Kong International Arbitration Centre with some necessary amendments shall apply to the arbitration. Meanwhile, the arbitrator sent several faxes to the respondents, urging them to participate in the arbitral proceedings. Both respondents did not respond to these faxes and did not appear in the arbitral proceedings.

Just during this course, the first respondent violated its commitment to the Customs and used all the copper ore in production. On 12th June 2007, Hekou Customs issued an administrative punishment decree, increasing the import tax from 13% to 21% (RMB 572,309 higher than normal), and fining the two respondents in a total sum of RMB424,000. So on 6th August 2007, the first respondent

wrote to the claimant's solicitor, pleading once again that the dispute could not be arbitrated because the loss which they suffered surpassed that payable to the claimant.

On 10th March 2008, the arbitrator issued his final award, declaring that the claimant succeeds and the two respondents are jointly and severally liable to the claimant for the principal and the interest already accrued and to be accrued till the payment, as well as all arbitration cost, including the claimant's cost and the arbitrator's fees.

1.3 The Post-Arbitration Proceedings

After the award was served, the first respondent cancelled its registration and dissolved immediately to escape the debt. The second respondent refused to perform the award voluntarily. Learning that it has no assets outside the Mainland China, the author advised the second respondent not to apply for setting aside the award in Hong Kong, but just to wait for the claimant to apply for enforcement in the Mainland.

On 1st September 2008, the claimant applied to Kunming Middle People's Court for recognition and enforcement of the award. Acting as the second respondent's solicitor, the author pleaded to the Court that the recognition and enforcement must be refused on the grounds that the composition of the arbitral tribunal and the procedural rules applied by the arbitrator are not in conformity with the parties' agreement, as well as the enforcement of the award would violate China's social public interest¹ because the award undisguisedly denied the decision on classification of the goods and the administrative punishment decree issued by the Chinese Customs. After reporting to and being confirmed by the Supreme People's Court,² Kunming Middle People's Court made its final decision on 5th November 2009, ruling not to enforce the award, but only on the ground that the composition of the arbitral tribunal is not in conformity with the parties' agreement.³

On 29th July 2010, the claimant's solicitor wrote to the respondents, demanding to submit the dispute for re-arbitration in HKIAC and requesting the respondents to appoint an arbitrator. Being authorized by and on behalf of

¹ Social public interest is the synonym of public policy or public order often used in Chinese laws.

² According to the Notice on Several Issues Regarding the Handling by the People's Courts of Certain Issues Pertaining to Foreign-Related Arbitration and Foreign Arbitration issued by the Supreme People's Court on and effective from 28th Aug. 1995, if the Middle People's Court contemplates that a foreign arbitral award sought for recognition and enforcement is not in compliance with the provisions of international conventions acceded to by China, it must, before deciding to refuse the recognition and enforcement, report its findings to the Higher People's Court in the same jurisdiction for review. If the Higher People's Court also agrees with the findings that recognition and enforcement should be refused, it should report its findings to the Supreme People's Court. Only after the Supreme People's Court confirms the findings, can the Middle People's Court rule to refuse the recognition and enforcement of the award.

³ See (2008) Kun Non-Enforcement No. 48-1, 5th Nov. 2009.

the second respondent, the author wrote to the claimant's solicitor and HKIAC, holding that the dispute cannot be re-arbitrated and HKIAC cannot re-exercise jurisdiction on the same dispute because the award has not been set aside. Till now, there is no information from either the claimant or HKIAC.

2. THE DILEMMA OF THE WINNING PARTY IN THE AMLON CASE

According to the Contract, the final price payable to the seller was to be determined on the content of copper, with the lowest of the four LME official quotations for copper grade A as the reference price. The content of copper shall be assayed independently by the seller's representative and the buyer's representative. If the difference between the two assaying results is within 0.50 units, the exact mean value shall be taken as the agreed content of copper for determining the final price. In case of greater difference, an umpire assaying shall be made. As to the quality, the Contract only requires that the copper ore should be free from impurities deleterious to normal smelting process. All these provisions of the Contract make clear that the content of copper is the main or only concern of the buyers. Before the dispute arose, both parties had reached agreement on the content of copper and the final price payable to the seller. The facts that the respondents applied to the Customs for re-inspection and re-classification and that the first respondent violated its commitment to the Customs and used the goods in production showed that the respondents themselves were satisfied with the goods delivered and didn't want to return the goods to the seller. It can be concluded that the claimant did not breach the Contract, the respondents' loss suffered from higher import tax and fine was caused completely by their own violation against the decision and order of the Customs. Therefore, I believe undoubtedly that the claimant should win the case and the arbitral award is correct in substance. However, Amlon, the winning party of the arbitral proceedings, encounters a dilemma which cannot be resolved under the present legal systems of international commercial arbitration.

2.1 The Award Cannot Be Enforced Anywhere

On one hand, the recognition and enforcement of the award should be refused, because the composition of the arbitral tribunal and the procedural rules applied in the arbitral proceedings are inconsistent with the parties' agreement.

Article 19 of the Contract stipulates clearly that the arbitral tribunal shall consist of two arbitrators and an umpire to be appointed under the provisions of the English Arbitration Act 1996, and the arbitral proceedings shall be conducted in accordance with the Rules of the London Court of International Arbitration. According to the English Arbitration Act 1996, in case each of two parties to an arbitration agreement is to appoint an arbitrator, only

when one party ("the party in default") refuses to do so or fails to do so within the time specified, may the other party, having duly appointed his arbitrator, give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.⁴ But unfortunately, when commencing the arbitral proceedings, the claimant and its solicitor didn't request the respondents to appoint an arbitrator, but immediately proposed to appoint a sole arbitrator to arbitrate the dispute in accordance with whatever procedural rules which the arbitrator may consider fit. This proposal can only amount to an offer to amend the relevant provisions of the original Contract. What is even worse is that the claimant and its solicitor mistakenly presumed that the respondents had accepted its proposal if they didn't object to it within 14 days. However, the respondents' silence could never constitute an acceptance and the original Contract could never be modified by the claimant's unilateral proposal. Therefore, even the arbitrator himself had to acknowledge in the arbitral award that, though no specific objection was raised by the respondents, the appointment was not expressly agreed to by the respondents. Since the relevant provisions of the original Contract regarding to the composition of the arbitral tribunal and the procedural rules to be applied have not been changed by the claimant's unilateral proposal, both HKIAC's appointing a sole arbitrator and the arbitrator's decision to apply the (1993) Domestic Arbitration Rules of HKIAC are not consistent with the parties' agreement.

According to the Arrangement between the Mainland and Hong Kong SAR Concerning the Mutual Recognition and Enforcement of Arbitration Awards, if the respondent⁵ submits evidence proving that the composition of the arbitral tribunal or the procedure is not consistent with the parties' agreement, or, in the absence of such an agreement, is not in accordance with the laws of the arbitration seat, the relevant people's court may rule not to enforce the award.⁶ Though this Arrangement provides that the court may (not "should") rule not to enforce the award if any of the grounds enumerated in Article 7 thereof is established, the Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards issued by the Supreme People's Court requires the court to reject the application for enforcement if any of the grounds enumerated in Article V of the New York Convention has been proved to exist.⁷ In practice, the Chinese courts

⁴ See Section 17(1) of the English Arbitration Act 1996.

⁵ It refers to the party against whom the enforcement is sought.

⁶ See Article 7 of the Arrangement between the Mainland and Hong Kong SAR Concerning the Mutual Recognition and Enforcement of Arbitration Awards. The grounds to refuse the recognition and enforcement of arbitral awards enumerated in this Arrangement are the same as those in the New York Convention.

⁷ See Article 4 of the Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement

generally have no discretion in determining whether or not to enforce a foreign award. Therefore, the ruling of Kunming Middle People's Court not to enforce the award is undoubtedly correct.

What can Amlon do after the enforcement of the award is refused by the court of the Mainland? Theoretically, the principle of *res judicata* does not apply in the recognition and enforcement context between countries, refusal of recognition or enforcement in one country does not generally bar the winning party from seeking recognition or enforcement in another country (Herbert, Patricia, Dirk & Nicola, 2010, p.215). Therefore, Amlon may seek recognition and enforcement in other countries and areas where the respondents may have assets for enforcement. But the problem is that the respondents only have assets in Mainland China, and Amlon can not, in fact, seek enforcement in other countries or areas.

Even if the respondents have assets in other countries and Amlon applies to courts of other countries for recognition and enforcement, the recognition and enforcement may probably be denied by other countries, in the context that most countries have acceded to the New York Convention and the grounds to refuse the recognition and enforcement of foreign awards are uniform.⁸ Of course, as some commentators point out, this "much depends upon the reason for which enforcement was refused. If, for example, enforcement was refused for local public policy considerations, it may be possible to find another country in which the same considerations do not apply. However, if enforcement was refused because of failure by the arbitral tribunal to give the losing party an opportunity to present its case, it may not be possible to enforce the award elsewhere, since other courts may take the same view" (Nigel, Constantine, Alan, & Martin, 2009, p.632). In broader words, if the enforcement of an award is refused by one country on the grounds as enumerated in Article V(2) of the New York Convention, the award might be enforced by other countries because the perceptions on public policy and the legal provision on arbitrability vary from country to country.⁹ If the enforcement of an award is refused by one country on one or more grounds as enumerated in Article V (1) of the New York Convention, it might be refused by all other countries. It is not difficult to imagine such a scenario as in the Amlon case that the winning party has obtained a successful award, but the award cannot be enforced anywhere.

of Foreign Arbitral Awards issued by the Supreme People's Court on 10th April 1987.

⁸ Up to now, 149 countries have acceded to the New York Convention. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. 2013-10-18.

⁹ If it is such a case, the Amlon Dilemma will not occur. Therefore, refusing enforcement on the grounds of Article V (2) of the New York Convention will be excluded in the forthcoming parts of this article.

2.2 The Winning Party Has no Other Recourse Means or Remedies

On the other hand, Amlon has no other recourse means or remedies to take back what it is entitled to under the Contract, just because the arbitral award has not been set aside and remains valid.

The New York Convention, the Model Law,¹⁰ and almost all national arbitration laws¹¹ keep silent on the legal consequence of refusal of the recognition and enforcement of an award. Little academic authority addresses this issue. But it is commonly accepted that, if the recognition and enforcement of an award is denied in a national court outside the place of arbitration, the award remains in existence as a binding award (Gary, 2009, p.2673). Since the award still remains valid and binding on both parties, a logic consequence is that the issues decided in the award with regard to the facts upon which a party based its claim may not be reopened before the same, or any other arbitral tribunal, or any national court, unless and until the award is successfully challenged before a competent court (Jean-Louis, Gerald, & Jean, 2009, p.187).¹² So in the Amlon case, when Amlon sought to submit the dispute to HKIAC for re-arbitration, the respondent and its solicitor firmly insisted that the dispute cannot be re-arbitrated and objected to HKIAC's re-assuming jurisdiction. Because of the respondent's objection, Amlon finally had to abandon its attempt for re-arbitration.

An award set aside in the seat ceases to exist (Emmanuel, 2010, p.135). If the award has been set aside completely on the basis that the arbitration agreement was null and void, resort to litigation might be considered, if there could be no problems of time limits. If the award has been set aside for procedural defects, the arbitration agreement will usually (but not always) still be effective, the dispute can be submitted to arbitration, providing the claim is not time-barred (Nigel, Constantine, Alan, & Martin, 2009, p.619). Therefore, a possible option for Amlon and other winning parties under the same situation might be to apply to the court of the arbitration seat to

¹⁰ Up to now, legislation based on the UNCITRAL Model Law has been enacted in nearly 90 countries and territories worldwide, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. 2013-10-18.

¹¹ See e.g., the English Arbitration Act 1996, the Swedish Arbitration Act 1999, the Danish Arbitration Act 2005, German Arbitration Law 1998, the Law on International Commercial Arbitration of Greece 1999, the Arbitration Ordinance of Hong Kong 1997, the Indian Arbitration and Conciliation Act 1996, the Code of Civil Procedure of Germany, Swiss Private International Law Act 1987, the Australian International Arbitration Act 1974, Law of the Russian Federation on International Commercial Arbitration 1993, the Japanese Arbitration Law 2003. All these national laws do not contain provisions on the legal consequence of refusal of enforcement.

¹² But there are also some scholars vaguely holding that the winning party will probably have no option but to recommence arbitral proceedings in case the recognition and enforcement of the award is refused, assuming that the right to do so has not been lost by lapse of time (Nigel, Constantine, Alan, & Martin, 2009, P.632).

set aside the award. However, in practice, the winning party will not actively set a motion to set aside the award, because the award is in its favor and it is satisfied with the award. Only after the recognition and enforcement of the award is refused in one or all relevant countries, may the winning party desire to apply to set aside the award. But it cannot do so, because the time limit for setting aside the award must have already lapsed.¹³

To summarize, the Amlon Dilemma in international commercial arbitration is that the winning party should win the case in substance and does get a successful award, but the award cannot be enforced anywhere because there exists one or more circumstances as enumerated in Article V (1) of the New York Convention, and the winning party has no other recourse means or remedies because the award has not been set aside by the court of the arbitral forum and still remains valid.

3. RESOLUTIONS TO THE AMLON DILEMMA

The most significant advantages of international arbitration are neutrality of the arbitral forum and the enforceability of international arbitration award (Christopher, & Richard, 2005, p.19). Judges in most countries will in fact be more sympathetic to their countrymen than to foreigners (William, & Noah, 2000, p.539). By choosing neutral arbitrators and conducting the proceedings in a neutral place, it is more likely to achieve a fair and just award in international arbitration. The New York Convention and favorable arbitration legislation in many countries provide a “pro-enforcement” regime, with expedited recognition procedures and only limited grounds for denying recognition to an arbitral award (Gary, 2009, p.78). This makes it much easier to enforce an arbitral award than to enforce a court judgment in other countries outside the forum. However, if, as in the Amlon case, an arbitral award is correct and fair in substance but can not be recognized and enforced anywhere because of jurisdictional or procedural defects, whereas the winning party has no other recourse means or remedies, these advantages of international arbitration would be frustrated. This is unfair to the winning party. Both international conventions and national legislations should take measures to work out this dilemma.

3.1 To Apply the Principle of Waiver to the Proceedings of Refusing Enforcement

International commercial arbitration is the creature of the autonomy of the will of the parties. It is elementary that jurisdictional objections may be waived. If a party does

not challenge the existence or validity of the putative agreement to arbitrate relatively early in the arbitral proceedings, then subsequent objections, including in annulment proceedings, will be precluded (Gary, 2009, p.2573). In international commercial arbitration, there is in general no pre-established procedural code, applicable generally in arbitral proceedings, but instead a procedure resulting from the parties’ agreements. So the parties are required to raise their objections to any non-compliance with the arbitration procedure or agreement promptly. Otherwise, they may not invoke such non-compliance as a ground for setting aside the award or as a reason for refusing its recognition and enforcement (UNCITRAL secretariat, 2012, p.19).

Though the principle of waiver is theoretically accepted, there are no specific references in the provisions of most national arbitration laws dealing with waiver of the right to challenge an award, only several national laws containing provisions concerning waiver of the right to challenge either in the context of not contesting the invalidity of arbitration agreement or challenging arbitrators,¹⁴ and few arbitration laws containing specific rules on waiver of the right to challenge an award.¹⁵ Even in these national laws, it seems that the principle of waiver is applied only to the proceedings of setting aside, but not to the proceedings of refusing enforcement.¹⁶

In order to promote the enforcement of arbitral awards, the New York Convention permits a national court to refuse the recognition and enforcement of an award only if one of the grounds enumerated in Article V is established. The English version of the Convention employs a permissive rather than mandatory language: enforcement “may be “refused. So some scholars hold that, even if the party against whom the award is invoked proves the existence of one of the grounds for refusal of enforcement, the court still has a certain discretion to overrule the defense and to grant the enforcement of the award in the case where the respondent can be deemed to be estopped from invoking the ground for refusal (Albert, 1981, p.256).¹⁷ In simple words, the principle of waiver may be applied to the proceedings of refusing enforcement. But the different translations in other official languages of Article V of the Convention have generated controversy about whether courts have discretion

¹³ Most national laws require the challenge to be launched within weeks rather than months after the time limits have started to run. Periods for bringing a claim to set aside an award may be as short as 28 days, often three months and occasionally as long as six months (Julian, Loukas, & Stefan, 2003, p.672).

¹⁴ See, e.g., Article 16(2) of UNCITRAL Model Law, Section 73(1) of the English Arbitration Act, Article 1027 of CCP of Netherlands.

¹⁵ See, e.g., Article 4 of UNCITRAL Model Law, Section 73(1) of the English Arbitration Act, Article 1704(4) of Judicial Code of Belgium.

¹⁶ For example, Section 73(1) (loss of right to object) is contained in Part I of the English Arbitration Act 1996, but the rules concerning enforcement of foreign awards are contained in Part III of the Act, so it seems that the principle of waiver does not apply to the proceedings of refusing enforcement of foreign awards.

¹⁷ Gary B. Born also holds that the objection under Article VI(a), (b), (d) can be waived if the party fails to raise them during the arbitration (Gary, 2009, p.2761, p.2777, p.2796).

to enforce or recognize foreign awards. Some other commentators hold that Article V seeks to standardize and harmonize the grounds for refusal of recognition and enforcement, granting discretionary authority to the judges deciding recognition and enforcement issues would contradict the purpose of the Convention, the better view is that courts must deny recognition if one of the defenses enumerated in Article V has been established (Herbert, Patricia, Dirk, & Nicola, 2010, p.208). So in the practice in many jurisdiction, such as in Mainland China, the courts must refuse and always do refuse foreign arbitral awards if one of the grounds of Article V of the Convention is established, no matter the respondent has raised its objections or not in the arbitral proceedings.¹⁸

The principle of waiver demands the parties of arbitral proceedings to raise promptly their objections to the arbitral tribunal's jurisdiction and the irregularities of the arbitral procedures, and prevents any party from attacking the arbitral award when finding the award is against it. If this principle is adopted by all national arbitration laws, and if it is clearly incorporated into the New York Convention and uniformly interpreted by all national courts, the probability that an award will be set aside or the enforcement will be refused would be considerably reduced. Especially, the losing party would not wait and attack the award at the last minute, that is at the enforcing stage, as in the Amlon case, and the occurrence of the Amlon Dilemma would decrease correspondingly. Of course, even if the party has raised its objections during the arbitral proceedings, the arbitral tribunal may make wrong decisions and deny the objection. In such cases, there may still exist the grounds to refuse the enforcement of the award, the enforcement of the award may still be refused anywhere. So adopting the principle of waiver cannot eliminate completely the occurrence of the Amlon Dilemma.

3.2 To Coordinate the Proceedings of Refusing Enforcement and the Proceedings of Setting Aside

After an award is rendered, if there is no internal appeal mechanism available, the distressed party generally has two choices, either challenging the award in the courts of the arbitration seat (applying for setting aside the award in most jurisdictions), or seeking to resist the enforcement when the successful party initiates enforcement proceedings before a court in another country outside the arbitration seat (Julian, Loukas, & Stefan, 2003, p.663). Under the present legal systems of international arbitration, though the grounds to set aside an award are the same as or similar to the grounds to

refuse the enforcement of an award,¹⁹ the two proceedings are generally independent from each other. This produces the result that the two separate state courts have authority to decide issues which are frequently the same and may decide them in a completely different and possibly conflicting way (Mauro, 2003, p.924).

The New York Convention only provides that recognition and enforcement of the award may be (but not "shall be") refused if it has been set aside by a competent authority of the country in which or under the law of which the award was made. Therefore, in practice, on one hand, even if an award has been set aside by the court in the arbitration seat, it may still be recognized and enforced in other countries,²⁰ causing such a result as the Hilmarton Nightmare (Hamid, 1997, pp.20-25). The Convention doesn't demand that member countries should recognize and enforce the award if the losing party didn't apply for setting aside it or the application was denied.²¹ So on the other hand, even if the losing party has not applied for setting aside the award or failed in the proceedings of setting aside in the arbitration seat, it still has chances to resist the enforcement of the award when the winning party seeks enforcement in other jurisdictions, the court in other jurisdictions may still refuse the enforcement of the award, thus causing the occurrence of the Amlon Dilemma.

To solve the Hilmarton Nightmare, scholars have raised various resolutions. Some scholars propose to distinguish

¹⁹ For example, the UNCITRAL Model Law suggests adopting the same rules. The grounds to set aside an award listed in many national arbitration laws are the same as those in Article V of the New York Convention.

²⁰ For example, the Chromalloy case decided by the U.S. courts, the Hilmarton Case decided by the French Courts. For comments on the practice of the U.S. courts and the French courts, please see Christopher Koch, The Enforcement of Awards Annulled in Their Place of Origin: The French and U.S. Experience, *Journal of International Arbitration*, 26(2),2009, 267-292. As some commentators point out, though most jurisdictions around the world are likely to refuse enforcement of an award that has been set aside in another country, this is not the universal position. Courts in certain countries have been receptive in the past to enforcing awards set aside elsewhere based on local annulment standards, and this trend may grow as international arbitration around the world becomes more transnational in character and less deferential towards the place of arbitration (Michael, & John, 2010, p.357).

²¹ The author finds provisions on the relationship between these two proceedings only in the Philippines Alternative Dispute Resolution Act of 2004. Section 44 of this Act provides that a foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court. In practice, different courts hold different attitudes in this regard. Some courts have considered whether a party resisting recognition of an award challenged the procedural conduct of an arbitration in an annulment action in the arbitral seat. A few courts have suggested that a party will not be required to seek judicial review in the arbitral seat where doing so would be futile. Some courts have held that an award debtor is bound by decisions rendered in annulment proceedings rejecting its procedural objections. Other national courts have held that they are not bound in recognition proceedings by the findings of courts in the arbitral seat made in annulment proceedings (Gary, 2009, pp.2762-2763).

¹⁸ See Article 4 of the Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards issued by the Supreme People's Court on 10th Apr. 1987.

between grounds for refusal, those of a local nature should be disregarded and only those of an international nature should be kept (Jan, 1998, p.14). Some scholars suggest that, if an award is rendered in accordance with the procedural laws of the arbitration seat, it must be treated as a domestic award and does not exist anymore and shall not be enforced in other jurisdictions once it is set aside by the court of the arbitration seat; where the situation is international, no interest of the state in which the award was issued and set aside justifies that enforcement of such annulled award be refused outside its borders (Pierre, 1999, pp.38-43). Some scholars propose to establish an internal arbitral appellate system for the parties to choose and national judicial remedies to be waived (William, & Noah, 2000, pp.551-564). Some scholars even envisage providing for an International Arbitral Court of Appeal to review the awards, to replace all national setting aside and enforcement proceedings (Mauro, 2003, pp.980-984). These proposals are creative and helpful to achieve the consistency of judicial review by different national courts and to eliminate the Hilmarton Nightmare, but they are either impractical, such as distinguishing the nature of the grounds for refusal, or unrealistic, such as abolishing judicial review by national court or establishing a supra-national appellate court (Hamid, 2002, pp.141-165).

To resolve the Amlon Dilemma, it is advisable to coordinate the proceedings of setting aside in the court of the arbitration seat and the proceedings of refusing enforcement in other states. In a logic order, the proceedings of setting aside in the arbitration seat take place before and so should be prior to the proceedings of enforcement in other states. Therefore, if the losing party is not satisfied with the award, it should first apply to the court in the arbitration seat for setting aside the award. If it failed to do so, it would be barred from raising any objections in the forthcoming proceedings of enforcement in other countries. Only if it has applied for setting aside the award but the application was wrongly denied by the court of the arbitral forum, can it resist the enforcement of the award in the enforcement proceedings on the same ground as raised in the proceedings of setting aside. This would force the losing party to challenge the award before the court of the arbitration seat immediately after the award is rendered if it is not satisfied with the award, rather than to wait and attack the award at the last stage when the winning party seeks enforcement in other jurisdictions. If such provisions be incorporated into the New York Convention or all national laws, the possibility of the Amlon Dilemma could be considerably reduced, although could not be completely eliminated.

3.3 To Clarify the Legal Consequence of Refusal of Enforcement

The above two suggestions can only diminish, but not eliminate, the probability of the occurrence of Amelon Dilemma. A better solution which can completely

prevent the occurrence of Amlon Dilemma is to grant the decision of refusal of enforcement made by the court in a jurisdiction outside the arbitral forum with the legal consequence of invalidating the award in that jurisdiction.

As stated above, theoretically, if the recognition and enforcement of an award is refused by the court in a country outside the arbitral forum, the award still remains valid and the winning party can seek recognition and enforcement in another country.²² Maybe it is because of this assumption, the New York Convention, the Model Law and most national laws only provide for the circumstances under which the enforcement of an award may be refused, but do not expressly provide for the legal consequence of refusal of enforcement, especially the legal consequence in the country when the enforcement is refused. This theory and practice is not enough. It ignores the situation that the recognition and enforcement of an award may be refused by the courts of all countries where the losing party has enforceable assets and the award eventually turns out to be unenforceable. This is the main reason that causes the Amlon Dilemma.

The Chinese legislation and practice is preferable. In both the Chinese Civil Procedure Law and the Chinese Arbitration Law, there are provisions concerning non-enforcement by the people's court of domestic or foreign-related arbitral awards rendered in Mainland China, which is similar to but different from refusing the enforcement of foreign arbitral awards (Shi, 2013). According to these provisions, if a domestic or foreign-related arbitral award is decided by a Chinese people's court not to be enforced, the parties of the award may submit the dispute for re-arbitration if a new arbitration agreement can be reached or otherwise file a lawsuit before the competent people's court.²³ Under this regime, where the enforcement of an award is refused, the parties can seek remedies through re-arbitration or litigation. Similarly, According to the New Code of Civil Procedure, if the award were to be refused recognition or enforcement on the grounds that the arbitrator had ruled "in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired", it would be possible to submit the same dispute to the French courts, provided that the courts have international jurisdiction to hear the case (Emmanuel, & John, 1999, p.780).

Although the regime of non-enforcement in Chinese laws is criticized by some Chinese scholars (e.g., An, C., 1995, pp.372-373), similar legal consequence of refusal of enforcement can be introduced into the New York Convention to avoid the Amlon Dilemma. The Convention should provide that if the recognition and enforcement of an award is refused by the court of a

²² See *infra* para. 3 of part II (ii).

²³ See Articles 273-275 of the Civil Procedure Law of the People's Republic of China, as amended on August 31, 2012, and Articles 63 and 71 of the Arbitration Law of the People's Republic of China.

country outside the arbitral forum, the parties, especially the willing party of the arbitral proceedings, shall have the right to take actions over the original disputes in the court of that country.²⁴ If so, when the award is not set aside in the country of the arbitral forum but its enforcement is refused by one or all relevant countries, the winning party could have a chance to commence legal proceedings to get a judgment in its favor in the courts in those countries. By this way, the occurrence of the Amlon Dilemma could be completely avoided.

CONCLUSION

Under the present legal systems of international commercial arbitration, the judicial review in the proceedings of refusing enforcement is separate from the judicial review in the proceedings of setting aside. Lack of coordination between these two proceedings could result in not only the Hilmarton Nightmare where an award which has been set aside in the country of the arbitral forum is still recognized and enforced in other countries, but also the Amlon Dilemma where an award which has not been set aside in the country of the arbitral forum is denied enforcement in all other relevant countries without any recourse means or remedies available for the winning party of the arbitral proceedings. The Amlon Dilemma frustrates the objectives of the parties to an international arbitration for a neutral forum and an enforceable award. To work out this dilemma, it is advisable for the New York Convention and national arbitration laws to adopt the principle of waiver both in the setting aside proceedings and the enforcement proceedings, place the proceedings of setting aside in a position prior to the proceedings of refusing enforcement, and endow the decision of refusal of enforcement made by the court in a country outside the arbitral forum with the legal consequence of invalidating the award in that country.

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²⁴ Because the original award is still valid in the country of the arbitral forum and other countries, re-arbitration based upon a new arbitration agreement may not be suitable.