Client Update
U.S. Second Circuit Affirms Decision Enforcing Annulled Arbitral Award

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The U.S. Court of Appeals for the Second Circuit has upheld a decision confirming an arbitration award which had been annulled by the courts of the country where the arbitration was seated. The decision is the first time the Second Circuit has enforced an annulled international arbitral award, and continues the line of U.S. cases that have analyzed this issue by reference to the standards for recognition of foreign court judgments.

BACKGROUND

The award in question had been issued in favor of Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. ("COMMISA"), a private U.S.-owned corporation, against Pemex-Exploración y Producción ("PEP"), a Mexican state-owned entity. The dispute arose out of contracts between COMMISA and PEP relating to the construction and installation of two offshore natural gas platforms. In 2004, when the parties' relationship broke down, COMMISA initiated international arbitration in Mexico and PEP responded by seeking administrative rescission of the contracts in the Mexican courts. In 2009, the arbitration tribunal issued an award in the amount of US$300 million in damages in favor of COMMISA, whereas the Mexican courts upheld the validity of PEP's rescission.

PEP sought annulment of the arbitral award in the Mexican courts. At the same time, COMMISA obtained an order from the U.S. District Court for the Southern District of New York confirming the award, but staying enforcement pending the outcome of the annulment proceedings. The Mexican court ultimately annulled the arbitral award, based in part on legislation that had been passed by the Mexican Congress subsequent to the parties' dispute. This new legislation provided that disputes concerning the administrative rescission of contracts fell within the exclusive jurisdiction of the Mexican Tax and Administrative Court, and reduced the statute of limitations for such claims,

with the result that COMMISA's claim would be time-barred. PEP subsequently resisted enforcement of the award in New York on the basis of the annulment, relying on Article 5(1)(e) of the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), which mirrors Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[1]

The Southern District enforced the award despite the annulment. The court noted that it had discretion to refuse enforcement on the basis of the annulment, but declined to do so because the annulment judgment "violated basic notions of justice" by applying a subsequently enacted law retroactively and leaving COMMISA without a forum in which to litigate its claims.[2] PEP appealed, challenging the Southern District's exercise of personal jurisdiction and the location of venue in that district and arguing that the Southern District abused its discretion in confirming an annulled award.

SECOND CIRCUIT'S ANALYSIS

In a decision issued on August 2, 2016, the Second Circuit rejected PEP's personal jurisdiction and venue objections and affirmed the Southern District's decision to enforce the award.[3]

The majority reasoned that PEP, in affirmatively seeking relief from the Southern District, forfeited its objections to personal jurisdiction and venue.[4] Judge Winter, in a concurring opinion, upheld personal jurisdiction and venue but on the grounds that PEP is an "agency or instrumentality" of the State of Mexico and was "doing business" in New York.[5]

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[1] Article 5(1)(e) of the Panama Convention reads: "That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made." Article V(1)(e) of the New York Convention reads: "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

[2] *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción*, 962 F. Supp. 2d 642, 659-660 (S.D.N.Y. 2013).

[3] *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, No. 13-4022 (2d Cir. 2016).

[4] *Id.* at 23.

[5] *Id.* at 1 (Winter, J., concurring).

With respect to enforcement of the award, the Second Circuit noted that the case required reconciling the competing principles of the courts' discretion to confirm an arbitral award and the comity owed to foreign judgments. The court found that the Southern District had properly exercised its discretion to enforce the award because the Mexican court judgment was unenforceable on the grounds of public policy.

The Second Circuit held that, although the plain text of Article 5 of the Panama Convention contemplates unfettered discretion, a U.S. court's discretion to enforce an annulled award is "constrained by the prudential concern of international comity."[6] Referring to Second Circuit precedent holding that a foreign court judgment is conclusive "unless . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought," the Second Circuit concluded that the exercise of discretion to enforce an annulled award is appropriate "only to vindicate fundamental notions of what is decent and just" in the United States.[7]

Emphasizing the "rare circumstances" of the case, the Second Circuit held that this "high hurdle" was surmounted because the Mexican court's application of the new law undermined PEP's contractual waiver of sovereign immunity, deprived COMMISA of its contractual rights through a retroactive change in the law, left COMMISA without a sure forum in which to bring its claims, and constituted a government taking, without compensation, of COMMISA's contractual rights and the relief it had subsequently been awarded.[8]

IMPLICATIONS FOR ENFORCEMENT OF ANNULLED AWARDS IN THE U.S.

The Second Circuit's decision could be read to equate the standard for enforcing annulled awards with the standard for disregarding foreign court judgments. The Second Circuit's conclusion that any U.S. court should act "with trepidation and reluctance" in enforcing an annulled award reflects the high standard that parties seeking enforcement of annulled awards in the U.S. must meet.[9] In doing so, the Second Circuit has continued a line of cases by U.S. courts that analyze the issue primarily from a judgment recognition framework, not an arbitration policy framework.

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[6] *Id.* at 27.

[7] *Id.* at 28.

[8] *Id.* at 30.

[9] *Id.* at 40.

To date, the D.C. Circuit and the Second Circuit are the only U.S. courts to have addressed the issue. In *Chromalloy Aeroservices v. Arab Republic of Egypt*, the D.C. district court declined to grant *res judicata* effect to an Egyptian annulment decision on the grounds that to do so would "violate . . . clear U.S. public policy" in favor of enforcing arbitral awards.[10]

Decisions in the U.S. since *Chromalloy*, however, have moved toward a narrower public-policy approach focused on the propriety of the intervening judgment annulling the award. In *Baker Marine (Nig) Ltd v. Chevron (Nig) Ltd*, the Second Circuit denied enforcement of an award annulled in Nigeria on the grounds that the Nigerian courts had acted in accordance with Nigerian law, noting in a footnote that recognition of the Nigerian court judgment "does not conflict with United States public policy."[11] In *TermoRio SA v. Electranta SP*, the D.C. Circuit affirmed the district court's decision to deny enforcement of an award annulled in Colombia, holding that there is a "narrow public-policy gloss" to Article V(1)(e) of the New York Convention and that appellants had not shown that the foreign judgment "violated any basic notions of justice to which we subscribe."[12]

New York and D.C. district courts have since followed the public policy judgment recognition approach announced in *TermoRio*. In *Thai-Lao Lignite (Thail) Co, Ltd v. Gov't of the Lao People's Democratic Republic*, the Southern District refused enforcement of an award annulled by a Malaysian court, noting that the claimants had not demonstrated that the Malaysian courts' judgments "r[o]se to the level of violating basic notions of justice such that the Court here should ignore comity considerations."[13]

More recently, in June of this year, the D.C. District Court refused enforcement of an award annulled by the *Cour Commune de Justice et d'Arbitrage* (the "CCJA"), a court created by the Organisation for the Harmonisation of Commercial Law in Africa ("OHADA") Treaty, to which 17 African States are party. In that case, the CCJA had set aside an OHADA award in favor of Getma International against the Republic of Guinea on the basis that the arbitrators had entered into a separate fee agreement with the parties, an arrangement that the CCJA held

[10] *In re Chromalloy Aeroservices*, 939 F. Supp. 907, 913 (D.D.C. 1996).

[11] *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197, fn.3 (2d Cir. 1999).

[12] *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 939 (D.C. Cir. 2007).

[13] *Thai-Lao Lignite (Thail) Co, Ltd v. Gov't of the Lao People's Democratic Republic*, 997 F. Supp. 2d 214 (S.D.N.Y. 2014) at 7.

was prohibited by mandatory provisions of the OHADA arbitration rules.[14] The district court found that, although the parties' arbitration "was not without some unusual events," those events did not rise to the standard of violating the "most basic notions of morality and justice."[15] In a marked departure from the approach taken by courts in France and elsewhere, which have considered an international arbitration award as untethered to any particular legal system, the district court endorsed the statement in *TermoRio* that "an arbitration award does not exist to be enforced . . . if it has been lawfully set aside by a competent authority in the State in which the award was made."[16]

Both the Second Circuit and D.C. Circuit will have the occasion to revisit this question when they consider the appeals in *Thai-Lao Lignite* and *Getma*, which are both currently pending. Unless either of these decisions reverse the course charted by *TermoRio* and *COMMISA*, as a practical matter, parties attempting to enforce an annulled award in the U.S. will need to demonstrate extraordinary factual circumstances sufficient to disregard the foreign annulment.

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Please do not hesitate to contact us with any questions.

[14] *In re Certain Controversies Between Getma International and the Republic of Guinea*, 2016 WL 3211808 at *1 (D.D.C. June 9, 2016).

[15] *Id.* at *7.

[16] *Id.*