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The Pemex case: the Ghost of Chromalloy Past?

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The international arbitration community sat up and took notice when a recent decision issued by Judge Alvin K. Hellerstein from the Southern District of New York in the *Pemex* [2)] case ordered that an arbitration award that had been set aside by the Mexican courts could be enforced in the United States. The case was particularly noteworthy because there is only one other reported case in the United States—*Chromalloy* [3)] from 1996—which ordered the same result, albeit for different legal reasons.

In most cases, awards that have been set aside at the seat of the arbitration are typically not enforced in other countries pursuant to Article V(1)(e) of the New York Convention. In *Chromalloy*, the award had been set aside in Egypt, and the U.S. court used Article VII and not Article V of the New York Convention to conclude that it must enforce the vacated Egyptian award because to decide otherwise would violate clear U.S. public policy in favor of enforcement of binding arbitration clauses. While *Chromalloy* was widely discussed, it was not followed here in the U.S., and several subsequent cases specifically rejected its reasoning.

Now, some 17 years after the *Chromalloy* decision we have the *Pemex* case. While the Court in *Pemex* did not rely on the Article VII [4)] analysis from *Chromalloy* (the *Pemex* matter was governed by the Panama and not the New York Convention and there is no equivalent Article VII in the Panama Convention), it did remark that *Chromalloy* remains alive. It examined two significant cases, discussed below, that stated that Courts should hesitate to defer to a judgment of nullification which conflicts with fundamental notions of fairness. And that principle is precisely what the Court in *Pemex* relied upon—the fact that the decision of the Mexican Court annulling the Pemex award was so fundamentally unfair that it should not be allowed to stand.

The factual and procedural background of the *Pemex* case is lengthy and contains many twists and turns, and readers can review the Court's 32 page decision (filed 8/27/13) for more detail. In brief, a panel of arbitrators in Mexico City issued an ICC arbitration award worth approximately $400 million USD in favor of the Petitioner, COMMISA, a subsidiary of KBR, Inc., a U.S. construction company. COMMISA obtained a judgment confirming the award in the Southern District of New York. Pemex appealed, and filed litigation proceedings in the Mexican courts to nullify the award. Pemex was successful in getting the award annulled in the Mexican Courts. In a 486 page decision by the Eleventh Collegiate Court (an appellate Court), the case was remanded to the lower court to issue a judgment in favor of Pemex. Thus the Mexican Courts considered the Pemex award a nullity.

Simply put, the Mexican Court held that arbitrators were not competent to hear and decide cases brought against the sovereign or an instrumentality of the sovereign, and that the proper recourse of an aggrieved commercial party would be in the Mexican district court for administrative matters. What made this ruling particularly noteworthy (and egregious in the eyes of the U.S. Court) is that the Mexican Court based its decision in part on a statute that was not in existence at the time the parties entered into their contract. The end result was that COMMISA was left without the apparent ability to obtain a hearing on the merits of its case.

Back in the U.S., the Second Circuit remanded the case to Judge Hellerstein to address the effect of the nullification in Mexico on the Award. Judge Hellerstein reviewed two significant Circuit Court cases in his decision—*Baker Marine* [5], and *TermoRio v. Electranta* [6], which noted that there may be circumstances where an arbitration award should be confirmed despite a nullification at the seat of arbitration. The *TermoRio* Court observed that there is a "narrow public policy gloss on Article V(1)(e) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the United States" or, stated another way, if the judgment "violated any basic notions of justice to which we subscribe" then it need not be followed. The *TermoRio* Court cited *Chromalloy*, which noted that "a decision by this Court to recognize the decision of the Egyptian Court would violate clear U.S. public policy in favor of binding arbitration clauses."

Judge Hellerstein concluded that under the standard announced in *TermoRio*, the decision vacating the award in Mexico violated "basic notions of justice" and that deference was therefore not required. The Court found it particularly compelling that when COMMISA initiated arbitration at the end of 2004 it had every reason to believe that its dispute with Pemex could be arbitrated, and that retroactive application of laws and the unfairness associated with such application was at the center of the dispute before it. Moreover, the unfairness was exacerbated by the fact that that the Mexican Court's decision left COMMISA without a remedy as, by the time the Mexican Court's opinion was issued, the governing statute of limitations, only 45 days, had run out.

Judge Hellerstein was clear in noting that in deciding to enforce the vacated award the Court was neither deciding nor reviewing Mexican law. Rather it was basing its

decision on the application to events that occurred before the law's adoption. Under these circumstances, the Court found that the decision of the Mexican Court violated basic notions of justice, and therefore it declined to give deference to its decision.

While the court in *Peme*x did not rely on the specific reasoning in *Chromalloy*, it did remark that *Chromalloy* remains alive. It seems unlikely that this case will open the floodgates in the U.S. to enforcement of awards that have been set aside abroad. The facts in this case distinguish it from many of its predecessors. Nevertheless, it would be difficult to fathom how the court could or should have reached a different result under these circumstances. And it also gives a nod to a case that many thought had been dismissed as an outlier, and reminds us that parties remain captive to the courts at the seat of arbitration when it comes to nullification of international arbitration awards. Fortunately, the language of international arbitration conventions provides parties with a solution for tough cases such as this one. Auspiciously for the integrity of the international arbitration system, as of this writing (August 2014) Pemex has lost its attempt to annul the $500 million US award in the courts of Mexico.

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References

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↑2 *Corporación Mexicana de Matenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013).

↑3 *In Re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 906 (D.C. Cir. 1996).

↑4 The governing Convention in the *Pemex* case is the Inter-American Convention on International Commercial Arbitration (1975) (the Panama Convention), but its Article 5 provisions are substantially identical to those of the New York Convention.

↑5 *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F. 3d 194 (2d Cir. 1999).

↑6 *TermoRio S.A.E.S.P. v. Electranta S.P*, 487 F. 3d 928 (D.C. Cir. 2007).

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