Kluwer Arbitration Blog

Comissa v. PEMEX The Sequel: Are the Floodgates Opened? The Russian Doll Effect further defined

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In August 2013, Judge Hellerstein of the US District Court for the Southern District of New York granted the enforcement of an award rendered in Mexico between Comissa (Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V.) and PEMEX (Pemex-Exploración Y Production) in favor of Comissa awarding it $300 million; an award that had been set aside by the court of the country where the award was rendered. Comissa had argued that the award had been annulled on the basis of a law that had been enacted after the award was rendered: *ex post facto* application of a law to vacate the award. (Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Production (Southern District for New York 2013), *in* Yearbook Commercial Arbitration XXXVIII (2013), at 537-541). The Court of Appeal for the Second Circuit confirmed the lower court's decision as there exists an unfettered discretion to enforce annulled awards if the annulment violates the US notions of public policy and is repugnant to the most fundamental principles of morality and justice. (Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Production, 2nd Cir., August, 2nd (13-4022).

The District Court on the 27th of August 2013: Article V(1)(e) Discretion Analyzed, Further Defined, and Exercised for the sake of resurrecting the an award.

If an award has been vacated, it ceased to exist: *ex nihilo nil fit.* Enforcement of an annulled award brings life back to an award: ghost resurrection for the sake of effectiveness of international arbitration?

The arbitration arose out of a dispute between the Mexican state-owned oil and natural gas exploration entity, PEMEX (through its subsidiary, PEP), and COMMISA, a Mexican subsidiary of the construction and military contractor, KBR, Inc. In October 1997, the parties entered into a contract for COMMISA to build and install two offshore natural gas platforms off the Gulf of Mexico. The contract called for disputes to be settled through arbitration in Mexico City. In December 2004, COMMISA filed a demand for arbitration.

The tribunal found for COMMISA, issuing an award of nearly $300 million. In January 2010, COMMISA filed a petition in the United States District Court for the Southern

District of New York to confirm the arbitral award, which the district Court did in November 2010. PEP appealed to the United States Court of Appeals for the Second Circuit. In January 2013, the Second Circuit vacated the district court's judgment and remanded for the district court to consider whether actions taken by a Mexican court in nullifying the award made the arbitration award unenforceable by the district court.

On remand, the district court ruled again to enforce the arbitral award. The district court found that the Mexican court's decision to vacate the award violated "basic notions of justice". The district court explained that Article V's "may be refused" language means that the Convention still permits enforcement of an award "annulled or suspended by a competent authority of the State in which . . . the decision has been made." The district court noted that an arbitration award may be confirmed, despite nullification in the primary state, where the nullification judgment "violate[s] . . . basic notions of justice."

Exercising its discretion, the district court looked behind the annulment judgment and held that due to the "retroactive application of laws and the unfairness associated with such application," the district court affirmed the award of the ICC tribunal.

The Court of Appeal on the 2nd of August, 2016: The award Remains Resurrected.

The most important take away from this decision is that the Court of Appeal held that the district court did not abuse its discretion in granting the enforcement of an award that had been set aside in the country of origin if the US notions of public policy are at stake:

Article V seems to contemplate the unfettered discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction. However, discretion is constrained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified. (Id. at p. 27).

The unfettered discretion over Article V(1)(e) is what will impact the future application of the New York Convention:

We hold that the Southern District properly exercised its discretion in confirming the award because giving effect to the subsequent nullification of the award in Mexico would run counter to United States public policy and would (in the operative phrasing) be "repugnant to fundamental notions of what is decent and just" in this country. (Id. at Section IV).

If the word "may" is the sole basis for discretionary power of a court and if that is the sole basis for enforcement of annulled awards, a risk surfaces that the floodgates are opened: can any given interpretation of the refusal grounds under Article V(1) (e-d) be justified with the use of that discretion? The lower court used a what I call "US Public Policy Gloss" for Article V(1)(e) and with that it added a national principle to an international treaty with 156 Contracting States. Although with the word "may" there is an expressly attributed discretion for enforcement courts, one must proceed with caution as enforcing annulled awards may lead to forum shopping and create uncertainty and counter current efforts made by the international arbitration

community to harmonize the application of the New York Convention world wide. The way the drafters designed the synergy between the courts – courts of the seat and courts of enforcement – was one of harmony, not one of one court being a primary court over the other: comity and respect of another court was key. (See Marike Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International 2016, p. 21, Section 1.07). Second guessing annulment proceedings in another Contracting State by an enforcement court of yet another Contracting State (and potentially several other Contracting States) will do harm to international comity and harmony amongst the 156 Contracting States.

In general, courts have discretion and with 'may' in Article V there is an expressly attributed discretion but it is not unlimited: one essential element of article V is the burden of proof: the drafting history states that only if a court is satisfied that enough evidence is submitted to warrant refusal, may a court proceed to do so. (See Marike Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International 2016, p. 160). This also means that enough evidence must be presented to warrant the 'discretional' choice *not* to refuse to enforce an award that had ceased to exist.

The Court invoked the fact that the New York Convention (and the Panama Convention) 'evince a pro-enforcement bias'. (Id. at p. 25). Although the US has an arbitration friendly attitude, one must not forget that the purpose of the New York Convention is not the enforcement of awards *per se*: the purpose is to contribute to the effectiveness of international arbitration; is it effective to resurrect awards? (See Marike Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International 2016, p. 13).

The future of the New York Convention: a Chrystal Ball.

The court held that it was not disagreeing with the analysis of the Mexican 11th Collegiate Court. Rather, the decision of the US District Court, as affirmed by the Second Circuit, was an exercise of discretion to assess whether the nullification of the award offends basic standards of justice in the United States. This is where the shoe pinches: was there sufficient evidence submitted in a US enforcement proceedings – normally summary proceedings – to warrant an enforcement of an award that had ceased to exist in Mexico? How was this not an analysis – using US standards – and rejection of the Mexican 11th Collegiate Court's decision? Courts are creating what I call the Russian Doll effect:

– Arbitration & award by tribunal;

– Annulment phase at the court of the country where the award was rendered and appeal;

– Review of the award and annulment decision in the country (or even countries) where enforcement is sought and appeal (and possibly several layers of appeal).

If we had a crystal ball, what we would want to see is an appeal to the Supreme Court: to have the final say in a matter that has now gone through many judicial layers in Mexico and the US. Hoping that the Supreme Court will acknowledge the rule of

thumb is that awards that are annulled should not be enforced with exceptions only allowed in unusual circumstances. Sometimes we must remember what the rules are and what the exceptions are. It is for the best for the effectiveness of the New York Convention.

This entry was posted on Thursday, August 11th, 2016 at 8:05 pm and is filed under Uncategorized
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