

Perspectives on the New York Convention under the Laws of the United States: The US Public Policy as a Gloss of Article V(1)(e)

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Under Article V(1)(e) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention"), a court presented with an action to enforce an arbitral award "may refuse" to enforce the award "only if" the opposing party can prove that an award "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."

The US doctrine is based on a so-called "public policy gloss" of Article V(1)(e), which enables US courts to disregard an annulment judgment if that judgment violates the US most basic notions of morality and justice.

Baker Marine: Taking a Step Back but Leaving Discretion on the Table

Baker Marine (Nig.) Ltd. ("Baker Marine") and Danos and Curole Marine Contractors ("Danos") (1999 WL 781594 (2d.Cir. Oct. 1, 1999) had entered into a contract to bid to provide oil barge services in Nigeria to Chevron Corp. In a dispute which subsequently arose, Baker Marine was awarded \$2.23 million against Danos and \$750,000 against Chevron. Baker Marine sought to enforce the awards before Nigerian courts, while Danos and Chevron sought to vacate the awards as well before Nigerian courts. In two separate decisions, the Nigerian Federal High Court set aside the awards because the arbitrators had "improperly awarded punitive damages, gone beyond the scope of the submissions, incorrectly admitted parole evidence, and made inconsistent awards, among other things" (Id. at 196).

In August 1997, Baker Marine sought to confirm the annulled awards in New York. The district court denied the petition to confirm (Id. at 196). On its appeal, Baker Marine maintained that the awards were set aside for reasons that would not be recognized under United States law as valid grounds for vacating an arbitration award. The Second Circuit rejected this argument, finding that the purpose of the Federal Arbitration Act is to ensure that private agreements to arbitrate are enforced according to their terms. The parties had agreed that their disputes would be arbitrated under the laws of Nigeria. Baker Marine made no contention that the Nigerian courts acted contrary to Nigerian law. The court noted:

“[I]f a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary ‘with enforcement actions from country to country until a court is found, if any, which grants the enforcement.’” (Id. at 197.)

TermoRio: The Court’s Discretion Further Defined

In the case of TermoRio S.A.E.S.P. and LeaseCo Group, LLC. v. Electranta S.P., Electrificadora del Atlantico S.A. E.S.P., (487 F.3d 928 (D.C. Cir. 2007)), the court further defined the circumstances under which a US court could ever enforce an annulled award.

Electranta, a Colombian state-owned public utility, had entered into the Agreement with TermoRio S.A. E.S.P, which provided for arbitration in Colombia. An award in excess of \$60 million was rendered in favor of TermoRio. The Colombia’s highest administrative court nullified the award on the ground that the arbitration clause found in the parties’ agreement violated Colombian law (Id. at 243.).

TermoRio filed an action to enforce the arbitral award in the United States District Court for the District of Columbia. The district court dismissed the request, and TermoRio appealed. The District of Columbia Circuit Court affirmed the district court’s order, holding that under the New York Convention, since the seat of the arbitration was in Colombia, the Colombia’s highest administrative court was competent to set aside the award under Colombian law. The purpose of the New York Convention is to encourage uniform enforcement of awards and to force national courts to “let go of matters they normally would think of as their own” (Id. at 934). Because there was nothing in the record indicating the “proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic,” the Colombian court’s decision foreclosed any foreign court’s ability to enforce the award (Id. at 935).

The court, however, also held that a state is not required to give effect to foreign judicial proceedings “grounded on policies which do violence to its own fundamental interests” (Id. at 935). States should not “routinely second-guess” the judgment of a court rendered in a primary state (Id. at 937).

The court also held that a U.S. court may enforce an otherwise annulled arbitral award if there was evidence that the nullification proceedings or judgment are “repugnant to fundamental notions of what is decent and just in the United States” (Id. at 939).

COMMISA v. PEMEX: Article V(1)(e) Discretion Analyzed, Defined, and Exercised

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, and the district Court did so 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 when 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 New York 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 found that the annulment judgment relied upon the May 2009 law that (1) made administrative rescissions non-arbitrable, (2) called for a 45-day statute of limitations on such disputes, and (3) determined that the Tax and Administrative Court had jurisdiction over disputes involving state entities. The district court found that COMMISSA had a legitimate expectation that its agreements with PEP/PEMEX were subject to arbitration since the law barring such a contract term was not in effect when the parties entered into their agreements containing mandatory arbitration provisions, and the application of the 2009 law effectively left COMMISSA without a remedy. Accordingly, due to the "retroactive application of laws and the unfairness associated with such application," the district court affirmed the award of the ICC tribunal. (For the outcome in the Pemex appeal, see Marike R. P. Paulsson, 'Commissa v. PEMEX The Sequel: Are the Floodgates Opened? The Russian Doll Effect further defined')

Where Does the Enforcement of Annulled Awards Stand in the US?

The international audience might react with applause or astonishment. The reaction entirely depends on the choice of embracing or rejecting the enforcement of awards that had been deemed unenforceable by the courts of the seat. The reaction might also be based on the fact pattern of a particular case: in the PEMEX case, some international spectators are persuaded that the Mexican judges applied the law retroactively. Even without an access to the records of the case, public persuasion can carry more weight and retroactive application of laws violates fundamental ideas of justice not just in the US. Some words of caution are important. First, the US courts have developed doctrines that are only applicable in certain circuits: the PEMEX decision is relevant only for the Second Circuit and with that for awards passing through New York. It does not represent law for the US 'as a country', and as a Contracting State in its entirety. Second, the Second Circuit relied on other case law pertaining to public policy, developed under the New York Convention in the US: when applying public policy under Article V(2)(b) of the New York Convention, only a narrow concept of public policy - fundamental norms of morality and justice - could stop the enforcement. It seems that this limited concept of public policy, which eases the enforcement of awards, is also used to allow enforcement of an award when a judgment that set such an award aside violates that narrow concept of public policy.

Finally, would this have a troublesome impact internationally? In the US, over 800 decisions were rendered under the New York Convention, which was enacted and made part of the Federal Arbitration Act. The latter is applied in the US national space. The Convention's drafters accepted sovereignty as one of the pillars: this treaty will only work if the States can invoke sovereign ideas such as public policy. It is how international law becomes acceptable to the States, and exists.