

COMMISA v. PEP - Enforcing an Award not Recognized in the Seat: Public Policy and International Comity at Cross-Roads

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The Court of Appeals for the Second Circuit, which covers the district courts of New York, Connecticut and Vermont, was recently called to decide the effect that a *vacatur* of an award in the seat of arbitration (in that case, Mexico) had in an ongoing enforcement proceeding in New York.

The Court of Appeals held that while the *vacatur* was important to the decision as to whether to enforce the award, the New York Convention did not create an obligation to refuse enforcement in such situations, but only a permission to refuse enforcement. It is the resisting party's obligation and burden to put forward its best case to have the award vacated. The Court of Appeals then went on to enforce the vacated award, a decision that appears to be only the second since *Chromalloy* was decided twenty years ago.

The Background of the Dispute

In 1997 COMMISA and PEP, a Pemex subsidiary, contracted for COMMISA to build

oil platforms in the Gulf of Mexico. When logistical and financial issues arose the parties signed a new agreement, which also in turn, did not solve the dispute. Eventually, in 2003, PEP gave notice of its intent to rescind the contract and it was then COMMISA who filed an arbitration demand with the ICC under Mexican law in Mexico. In 2006, the ICC tribunal issued a preliminary award finding jurisdiction and enjoining any attempt by PEP to collect on performance bonds.

The *Vacatur*

In 2007, a supervening law came into effect in Mexico which created a prohibition for public entities to arbitrate issues related to rescission of public contracts. PEP then filed a request for reconsideration of the preliminary award, which was rejected by the arbitral tribunal in December 2009.

Shortly afterwards, in August 2010, COMMISA filed an enforcement petition in the Southern District of New York and PEP filed an “amparo” (a type of mandamus/injunction) in the Mexican courts. In September 2011, the Mexican court, applying the supervening 2007 law, found that the arbitral award violated Mexico’s public policy and vacated it.

Meanwhile, the Southern District of New York, which had already confirmed the award in 2010, received the case back from the Court of Appeals to reconsider its decision in light of the *vacatur* in the seat. Ultimately the Southern District declined to defer to the Mexican court ruling and confirmed the award on the ground that the annulment violated basic notions of justice insofar as it applied a law retroactively and left COMMISA without a forum to adjudicate its disputes. PEP appealed the judgment to the Second Circuit relying on the *vacatur* in the Mexican court.

In a majority opinion, the Court of Appeals held that because PEP did not reinstate its personal jurisdiction objections that it had put forward in its first appeal, it had forfeited that defense.

Second, the Court of Appeals held that PEP was for all intent and purposes a foreign government with no distinct juridical status vis-à-vis the Mexican government.

Substantively, the Court of Appeals for the Second Circuit observed that the United States was a signatory of two conventions on enforcement of foreign arbitral

awards, both of which displayed a pro-enforcement bias. The Court then went on to explain that the pro-enforcement bias is reflected in the requirement that a district court must enforce an arbitral award unless a litigant satisfies one of the seven enumerated defenses. If one of the defenses is established the district court might, but it is not required to, refuse recognition of the award.

In practice, very few courts since *Chromalloy* have used their discretion and enforced an arbitral award vacated at the seat of arbitration. The judicial practice to defer to the judgment in the seat of the arbitration is based on the principle of international comity.

International comity, on the other hand, is limited by U.S. public policy. As enunciated by the D.C. Circuit, a “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 State where enforcement is sought.’” (*Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)).

Despite observing that the public policy exception standard was high and infrequently met, the Court of Appeals for the Second Circuit concluded that the lower court did not abuse its discretion in confirming the arbitral award despite the annulment in Mexico. The Court of Appeals held that under the public policy exception (1) the need to ensure legal claims find a forum, (2) the prohibition against government expropriation, (3) the vindication of contractual undertakings and waiver of sovereign immunity and finally, (4) the repugnancy of retroactive legislation that disrupts contractual expectations trumped international comity.

Although justified in both Articles V and VII of the New York Convention, the discretion exercised by courts in recognizing and enforcing awards set aside at the place of arbitration has been seldom used in the United States. This is explained in large part to the high standard that must be met in order to displace the international comity principles guiding U.S. courts.

It should be interesting to monitor if this recent decision represents a shift in American jurisprudence or if it only reflects the unusual facts that the *COMMISA v. PEP* case presented.