Does The Enforcement Of Annulled Foreign Arbitral Awards In The United States Come Down To Normative Judgments?

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Several recent circuit-level decisions have shown that U.S. courts are willing to review a foreign court's annulment of an arbitration award to determine whether the annulment conflicts with U.S. public policy. This exercise inherently involves normative judgments and leads to the question of whether U.S. courts may be "out of their depth" in making such determinations.

When an arbitral tribunal issues an award abroad, issuance of the award is often followed by a race to the courthouse – the prevailing party seeks enforcement of the award, whereas the losing party seeks annulment. Frequently, this race takes place in the state where the award was made (primary jurisdiction) as well as in the courts of other states (secondary jurisdictions). The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention") is intended to streamline the enforcement process by mandating enforcement of a foreign arbitral award unless one of several enumerated circumstances is present, in which case, enforcement is discretionary.

Notwithstanding the Convention's "pro-enforcement bias," the issue of whether to enforce a foreign arbitral award becomes more complex when the award is

annulled by a court in the primary jurisdiction. When this happens, U.S. courts are "constrained by the prudential concern of international comity"[1] and accordingly, will not second guess the primary jurisdiction's annulment of the award unless the annulment offends the "most basic notions of morality and justice."[2] As the words "morality" and "justice" suggest, however, U.S. courts are asked to make normative judgments as to the primary jurisdiction's annulment. Two recent circuit-level decisions, Corporación Mexicana v. Pemex (Pemex) and Getma v. Republic of Guinea (Getma) out of the Second and D.C. Circuits, respectively, demonstrate how the public policy exception inevitably requires American courts to assess a foreign judiciary's fitness and impartiality to adjudicate its own enforcement proceeding, thereby making a normative judgment as to whether a foreign award is worthy of enforcement in the United States.

PEMEX and GETMA

Pemex involved a contract between Corporación Mexicana (Commisa), a Mexican subsidiary of a U.S. construction corporation, and a subsidiary of Pemex, a state-owned enterprise of the Mexican government. After a dispute arose, Pemex administratively rescinded the contract and the case was submitted to arbitration. As the arbitration proceedings were ongoing, the Mexican Congress amended the statute of limitations for actions arising under public contracts from ten years to 45 days. In addition, the Congress passed a statute prohibiting any dispute related to the administrative rescission of a contract from being submitted to arbitration. Shortly thereafter, the arbitral tribunal found Pemex in breach of contract and awarded Commisa $300 million in damages.

Commisa requested confirmation of the award in the Southern District of New York. At the same time, Pemex successfully challenged the award in a Mexican court. Because the Mexican court, as the primary jurisdiction, annulled the award, the Second Circuit was not required to enforce it under Article V(1)(e) of the New York Convention. The Second Circuit held that the Mexican court's annulment of the award was "repugnant to fundamental notions of what is decent and just" in the United States, and accordingly enforced the award. The Second Circuit reasoned that the annulment violated certain fundamental legal norms: "the vindication of contractual undertakings," "the repugnancy of retroactive legislation," "the need to ensure legal claims find a forum," and "the prohibition against government expropriation without compensation."

In Getma, the Republic of Guinea terminated a long-term concession agreement with Getma International, a French company. Guinea terminated the contract shortly after it elected a new president two years after the parties entered into their agreement. The parties submitted their dispute to arbitration subject to the rules of the Common Court of Justice and Arbitration ("CCJA"). The CCJA fixed the arbitrators' fees at €61,000, however, after over a year of proceedings, the arbitrators requested €450,000. The CCJA denied the arbitrators' request for higher fees and warned that any private arrangement with the parties for increased fees could jeopardize the validity of the award. The tribunal awarded Getma €39 million and Getma paid its share of the tribunal's asking price.

Not surprisingly, the CCJA annulled the award. Getma then sought to enforce the invalidated award in the United States. The D.C. Circuit held that Getma was unable to carry its burden of showing that the CCJA's decision to annul the award was "repugnant to fundamental notions of what is decent and just" in the United States. Although the D.C. Circuit viewed the annulment as "harsh," the circumstances did not warrant direct contravention of the primary jurisdiction's judgment. Consequently, the award was not enforced.

NORMATIVE POLICING

Under Pemex and Getma, the extension of comity appears to depend on the primary jurisdiction's compliance with fundamental American legal norms. However, the wisdom of this approach is questionable. The Supreme Court has cautioned that extraterritorial application of U.S. laws could lead to "clashes between our laws and those of other nations" as well as a concomitant state of "international discord."

Pemex criticized the elements of unfairness that permeated the Mexican annulment proceedings, including: (i) statutory changes that retroactively eviscerated legal avenues of relief; (ii) Pemex's status as an instrumentality of the Mexican government; and (iii) the court's questionable reliance on a 1994 Mexican Supreme Court decision to justify its annulment order. Hinting at what it may have seen as collusion, the Second Circuit stated that the fact that Pemex's subsidiary "is part of the government that promulgated the law [that withdrew arbitrability of Commisa's claim] does not help at all." This view was later reaffirmed in Thai-Lao Lignite v. Lao People's Democratic Republic, where the Second Circuit described the circumstances of Thai-Lao as "far less suspect and therefore more worthy of

presumptive recognition, than the circumstances surrounding the proceedings in Pemex."[3]

Getma, on the other hand, takes a more restrained approach. Unlike Pemex, Getma did not involve the appearance of collusion between local legislative and judicial bodies to deny the claimant a legal remedy. Moreover, the dispute in Getma was "quintessentially foreign" in nature and therefore, may have provided less of an incentive for an American court to intervene. The D.C. Circuit found that the annulment was not fundamentally unfair because Getma was on notice that it was jeopardizing the validity of its award by agreeing to increased arbitrators' fees. Nevertheless, the D.C. Circuit reviewed the CCJA's annulment order for allegedly "tainted" proceedings because a member of the CCJA's panel had discussed the case with the Guinean Minister of Justice before issuing the annulment order. Ultimately, Getma did not involve the same level of sovereign overreach by the Republic of Guinea that would have justified disregarding considerations of comity. The question remains, however, whether U.S. courts are properly equipped to review such issues at all, especially in cases where U.S. interests are not implicated.

The public policy exception inherently places U.S. courts in the position of acting as de-facto umpires to a foreign court's annulment order. However, it is difficult to delineate the outer bounds of permissible conduct by a foreign sovereign when assessing the enforceability of an annulled arbitral award. For instance, why was the claimant's annulled arbitral award in Getma less deserving of enforcement than the invalidated award in Pemex? The only way to answer this question is to review the local court's annulment order and to determine whether it complied with "basic notions of morality and justice." Although Pemex based its holding on the violation of certain laudable principles, it is questionable whether U.S. courts are equipped to admonish foreign judicial or legislative bodies for their perceived violation of such principles.

Judging another sovereign's handling of an investment in its own territory as "suspect" and reviewing a foreign court's compliance with American standards of "morality" or "decency" may be perceived as normative policing by U.S. courts. One year before Pemex was decided, Judge José Cabranes of the Second Circuit wrote that "[t]he application of U.S. laws extraterritorially directly contradicts the principles of self-governance and self-determination." After Pemex, U.S. courts may be wise to heed this cautionary sentiment and avoid further extensions of the

public policy exception when asked to enforce annulled foreign arbitral awards.

[1] Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex–Exploración Y Producción, 832 F.3d 92, 106 (2d Cir. 2016).

[2] Getma International v. Republic of Guinea, 862 F.3d 45, 49 (D.C. Cir. 2017) (internal citation omitted).

[3] Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic, 864 F.3d 172, 187 (2d Cir. 2017).