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Was the Bar Set Too High to Sustain RICO Jurisdiction? More on the *Conproca vs. Pemex* Case.

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In a recent decision, the United States Court of Appeals for the Second Circuit considered Pemex's allegations insufficient to sustain RICO jurisdiction in the *Conproca vs. Pemex* case. This prompts out a number of interrogations:

Was the bar set too high for Pemex to sustain RICO Jurisdiction?

Was the underlying reason of the Court's decision to uphold the award?

Is this an example of the US courts' pro-arbitration policy?

Does this kind of decisions encourage the parties to look for enforcement of awards before the US courts?

Does it trigger forum shopping for the enforcement of awards?

Pemex is a Mexican public entity dealing with the oil and gas industry. Conproca is a Mexican corporation owned by SK Engineering & Construction (Korean) and Siemens (German). Pemex and Conproca executed public works contracts to modernize and expand a refinery in Nuevo León, Mexico.

Under the relevant contracts, Pemex should pay Conproca for work orders required by unexpected events. In fact, Conproca submitted to Pemex several claims for cost overruns related to the unexpected problems at the project. For the payment of such claims, Pemex entered into several additional agreements with Conproca extending construction deadlines and approving claims for cost overruns and expenses.

Disputes arose in connection with the project and Conproca commenced arbitration by filing a claim with the ICC. The arbitral tribunal issued an award on liability, ruling in favor of Conproca on a majority of its claims and rejected the majority of Pemex's counterclaims; later on, the arbitral tribunal issued its award on quantum.

Conproca filed before the United States District Court for the Southern District of New York (Stanton, J.) a petition to confirm the award on liability, prior to the issuance award on quantum in the arbitration, to avoid possible forfeiture of its right to seek confirmation. Once the award on quantum was issued, Conproca amended petition to confirm.

Pemex then filed an appeal before the United States Court of Appeals for the Second Circuit. Pemex amongst others that Conproca had violated the RICO Act for bribing Pemex officials to approve overrun and expense payments in the course of an oil refinery rehabilitation project.

Pemex brought three main claims: (i) violations of RICO; (ii) conspiracy to violate RICO; and (iii) common-law fraud. In support of its claims, Pemex alleged a variety of conduct related to seven specific invoices Conproca submitted to Pemex, including bribes allegedly paid to unidentified individuals at Pemex and business consultants; the entry by Pemex into a contract with Conproca in violation of Mexican law; and the failure of Pemex's Technical Committee and counsel to follow Pemex's own internal procedures. Pemex also assented that ongoing proceedings might unearth information regarding cost overruns and bribes that may provide a basis for them to plead additional domestic contacts.

Conproca considered the District Court's dismissal of Pemex's extraterritorial RICO claims was clearly correct and sustained that Pemex's insurmountable problem is that it sought to apply U.S. statutes to a dispute primarily involving foreign actors and foreign acts. Conproca based its arguments on the following: (i) RICO does not apply extraterritorially; (ii) Pemex's amended complaint provides for an extraterritorial scheme; (iii) the use by Pemex of a United States bank account does not make a its extraterritorial scheme domestic; and (iv) Pemex failed its attempt to escape *Morrison* and *Norex*. Moreover, Conproca alleged that Pemex's Amended Complaint failed adequately to allege RICO elements: (i) predicate acts of wire or honest services fraud; (ii) a continuous and related pattern of predicate acts; (iii) RICO conspiracy; (iv) a plausible, non-speculative chain of direct causation, as Pemex did not adequately plead a direct causal connection between its injury and acts of racketeering.

Therefore the Court of Appeals had to decide whether the District Court correctly dismissed Pemex's RICO claims because they allege an impermissibly extraterritorial foreign conspiracy against a foreign victim conducted by foreign defendants participating in foreign enterprises.

By ruling dated July 16, 2014, the Court of Appeals dismissed Pemex's complaint by considering its allegations insufficient to sustain RICO jurisdiction, under the following basis:

– In a recent decision in *European Community v. RJR Nabisco, Inc.*, (F.3d. -, 2014 WL 1613878 (2d Cir. April 23, 2014)), the Court of Appeals held that: “the extraterritorial application of RICO [is] coextensive with the extraterritorial application of the relevant predicate statutes.” It also held that wire fraud cannot serve as such an extraterritorial predicate. Here, because Pemex relied exclusively on the wire fraud statute in pleading predicate acts, the Court of Appeals considered that it had failed to state a claim sufficient to support extraterritorial application of RICO Act.

– To the extent Pemex relied on several allegations of domestic activity to support its RICO claim, these, too, were considered insufficient by the Court of Appeals: “[S]imply alleging that some domestic conduct occurred cannot support a claim of domestic application.” (*Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32–33 (2d Cir. 2010))

– The scheme alleged by Pemex possesses three minimal contacts with the United States: (i) the financing was obtained there; (ii) the invoices were sent to the bank for payment; and (iii) the bank issued payment. Absent from the pleadings are any allegations that the scheme was directed *from* or *to* the United States. The activities involved in the alleged scheme—falsifying the invoices, the bribes, the approval of the false invoices—took place outside of the United States.

– In the supplemental briefing Pemex asserted that ongoing proceedings might unearth information regarding cost overruns and bribes that may provide a basis for them to plead additional domestic contacts. However, Pemex did not adduct any information that would demonstrably alter the substance of its complaint. See *In re Am. Exp. Co. S'holder Litig.* (39 F.3d 395, 402 (2d Cir. 1994), holding that “leave to amend may be denied if the amendment would be futile”); see also *Pac. Inv. Mgmt. Co. LLC v. Mayer Brown LLP* (603 F.3d 144, 160 (2d Cir. 2010), “Plaintiffs do not disclose to us those recently discovered facts and there is therefore no basis for suggesting, much less concluding, that plaintiffs could amend their claims . . . in a way that would make them viable.”).

Hence, the US Court of Appeals for the Second Circuit dismissed Pemex’s complaint alleging that Conproca had violated the RICO Act, supposedly by bribing Pemex officials to approve overrun and expense payments in the course of an oil refinery rehabilitation project.


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