

# Kluwer Arbitration Blog

## A Right Without a Remedy? The Recent US Decision to Not Enforce the Shell/Exxon Award

Travis Gonyou (Binder & Schwartz LLP) · Tuesday, March 31st, 2020 · Young ICCA

On September 4, 2019, Esso, a subsidiary of the Exxon Mobil Corporation, and Shell Nigeria, a subsidiary of the Shell Oil Company (collectively “Esso”), attempted to enforce a \$1.799 billion arbitral award in the U.S. District Court for the Southern District of New York after it had been annulled in the courts of Nigeria ([Esso Opinion](#)). In the arbitration proceedings, the tribunal had found that Nigeria’s state oil company, Nigerian National Petroleum Corporation (“NNPC”), had breached its oil production contract with Esso and awarded Esso the amount of the lost production. When Esso attempted to enforce the award in Nigeria, the Nigerian courts declined to enforce the award. Although the Nigerian courts recognized the tribunal’s finding that the NNPC had breached its oil production contract, it nevertheless found the calculation of damages to be a non-arbitrable issue, and therefore, unenforceable.

In response to the unfavorable outcome, Esso brought the dispute to the United States District Court for the Southern District of New York claiming that the Nigerian court did not grant it a fair process and did not properly recognize the arbitral tribunal’s award as required under the New York Convention. U.S. courts have long held themselves to be the guardians of due process and procedural protections. They are generally skeptical when a party’s liability is determined but there is no remedy to make the harmed party whole. Indeed, this ancient Roman legal maxim, *ubi ius, ibi remedium* (where there is a right, there is a remedy), was echoed in one of the United States’ earliest landmark cases. *Marbury v. Madison*, 5 U.S. 137 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”)

U.S. courts have also repeatedly espoused a pro-arbitration policy. Enforcement of annulled arbitration awards raises familiar topics in U.S. law, such as the opportunity to be heard, procedural fairness, and public policy considerations that arise from the application of foreign laws. Hence, proceedings have been brought before U.S. courts to enforce annulled arbitral awards, and international parties closely watch the results of such complex enforcement actions.

Despite the above, the U.S. District Court for the Southern District of New York declined to enforce the award. This decision seems to be at odds with *Pemex*, a previous U.S. Second Circuit Court of Appeals case in 2016, (discussed in detail below).

## The Precedent: The Pemex Case

In *Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración y Producción*, the Second Circuit enforced an award that a court in Mexico had annulled (**Pemex Opinion**). In annulling the award, the court in Mexico relied on a 2007 law that was passed by Mexico's legislature while the arbitration proceedings were still ongoing. The new law vested the authority for hearing claims raising issues related to public contracts exclusively in the Mexican Tax and Administrative Court. Mexico's legislature also made disputes like the one in *Pemex* non-arbitrable tax issues. Pemex had argued before the arbitral tribunal that the claims raised had turned into a non-arbitrable dispute. However, the arbitral tribunal rejected the argument and issued a final award in favor of *Corporación Mexicana de Mantenimiento Integral* ("**Commisa**") in 2009, finding there was a breach of contract. Pemex sought to set aside the award by submitting that the new law made the dispute non-arbitrable. Mexico's Eleventh Collegiate Court for the First Circuit annulled the award in 2011.

*Commisa* turned to the U.S. courts for the enforcement of the annulled award. After the Mexican court annulled the award, the Southern District of New York decided to enforce the arbitral award, and on appeal, the U.S. Second Circuit Court of Appeals found that the annulment was a procedural violation, depriving *Commisa* of predictability and fair process. Under the New York Convention, enforcement may be refused if the award was set aside by the courts of the seat. Nevertheless, the Second Circuit held it would be against public policy to deprive the parties of a forum to fairly hear the case and, as a result, the court granted enforcement.

## Abandonment or Not: What Happened in Esso?

The *Esso* case also involved a production agreement with a state oil company. Esso claimed that NNPC had extracted more oil than their contract had allowed and therefore breached the agreement. In the arbitration, Esso alleged the NNPC engaged in the overlifting, which was purely a contractual issue. The NNPC conversely argued that the differentiation in revenue was remitted to the Nigerian tax authority and their refusal to submit the tax documents prepared by Esso made it a tax issue at its core. For some time prior to the arbitration commencing, tax issues have been held to be non-arbitrable under Nigerian law, which was the law governing the agreement. The arbitral tribunal found that the matter was contractual, however, confirming its jurisdiction to hear the matter, which resulted in a \$1.799 billion award for Esso.

In proceedings both before and after the award, Nigerian trial-level courts found the underlying dispute was a tax issue and therefore non-arbitrable. The Nigerian Court of Appeals affirmed that finding. Yet, the Court of Appeals also found that the issues of liability and the related assessment of damages were contractual in nature. These issues should have been separated from the tax issue at the trial level. The Court of Appeals held not only that these were separable issues, but also if the tribunal or the trial courts had properly separated them, they would have found that liability did exist in the amount that Esso had claimed. In other words, the Court of Appeals held that there was a breach of contract, but because the damages were exclusively related to tax, an arbitral tribunal could not legally provide the remedy.

With this unfavorable outcome, Esso sought to enforce the arbitral award in the U.S. courts, emphasizing the dissonance between finding a breach of contract while denying damages due to

non-arbitrability. Yet despite this troubling position, the U.S. court declined to enforce the award and thus to provide a route to damages for Esso. So what has changed? Observers of U.S. courts might be wondering whether this is a step backward in enforcing arbitral awards, siding more with the traditional litigation systems.

The court emphasized that Esso had a right to pursue the enforcement of the annulled award. Procedurally, the court held that it had jurisdiction to hear the case and had the power to enforce an annulled arbitral award. However, the New York court felt that the Nigerian courts—the chosen forum of the seat interpreting their own law—provided an adequate opportunity to be heard. Esso did have a remedy; one available through Nigerian law and through the Nigerian tax tribunals. The Nigerian decisions adhered to existing law known to the parties during the drafting of their agreement and at the commencement of arbitration.

This predictability of process distinguished *Esso* from *Pemex*: In *Pemex*, the retroactive law interfered with the parties' chosen process. Here, the annulment was based on existing and well-known law in the chosen forum. Although the New York Convention permits enforcement of annulled awards, this did not warrant it. The court's focus was on the opportunity to be heard within the confines of the forum and legal regime that the parties themselves chose.

### **Enforcement of Annulled Awards Moving Forward**

The takeaway is that U.S. courts remain open to enforcement of annulled awards and to providing a forum to parties that have otherwise been deprived of a place to fairly enforce their award. This does not depart from the doctrine of pro-enforcement, but it adds nuance. Courts will continue to avoid the substantive issues, while focusing more so on weighing the procedure for fairness.

Questions remain such as whether procedure can affect the substance so much that it transcends a mere opportunity to be heard leading to the unfairness of the outcome being reviewed even if the process was predictable. That said, practitioners bringing annulled awards before U.S. courts should be comforted that the opportunity to enforce annulled awards remains, however, they should focus their petitions on the procedural nuances.

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