Kluwer Arbitration Blog

Recognizing Annulled Awards in the U.S. Court of Appeals for the Tenth Circuit: Compañía de Inversiones Mercantiles SA v. Grupo Cementos de Chihuahua SAB de CV

Gary B. Born, Russell B. Childree, Claudio D. Salas (Wilmer Cutler Pickering Hale and Dorr LLP) ·
Sunday, April 16th, 2023

In an important decision upholding the finality of awards and party autonomy in international commercial arbitration, a divided three-member panel of the U.S. Court of Appeals for the Tenth Circuit recently held in *Compañía de Inversiones Mercantiles SA v. Grupo Cementos de Chihuahua SAB de CV* (58 F.4th 429 (10th Cir. 2023)) that recognition of an arbitral award need not be vacated because of the post-recognition annulment at the arbitral seat. Instead, recognition of the award may be upheld if enforcement of the annulment decision would violate U.S. public policy.

The facts before the Tenth Circuit presented a novel issue. In summary, an award by a tribunal seated in Bolivia was initially annulled by a lower Bolivian court, but, due to the particular characteristics of the Bolivian court system, two different "chambers" of Bolivia's highest court issued contradictory decisions in 2016 and 2020, which respectively vacated, but later effectively reinstated, the lower court's annulment decision. Meanwhile, a U.S. district court had recognized the Bolivian award ***after*** the first appellate court decision (reinstating the award) but ***before*** the second appellate decision (upholding annulment of the award). The award-debtor then returned to the district court with this second annulment decision in hand and moved the U.S. court to vacate its previous recognition of the award. When the district court denied the motion, the award-debtor appealed and the Tenth Circuit was faced with an issue of first impression: should the Court recognize a later-annulled award that had previously been recognized by a lower court.

In a wide-ranging decision (accompanied by a lengthy dissent), the Tenth Circuit addressed this issue by reference to U.S. jurisprudence on the recognition of annulled awards, the text and structure of the New York Convention, and the proper role of U.S. courts in recognizing and enforcing international arbitral awards. This post describes the background of the dispute, the path of the award in the Bolivian and U.S. courts, and the appellate decision issued this January by the Tenth Circuit.

Background

The underlying dispute arose between the two principal shareholders of Bolivia's largest cement

company over one shareholder’s sale of its ownership interest to a third party.

The two shareholders, Grupo Cementos de Chihuahua (“GCC”) and Compañia de Inversiones Mercantiles, S.A. (“CIMSA”), had entered into a shareholders agreement to govern the rights and obligations with respect to their ownership interests. GCC decided to sell its shares to a third party rather than to CIMSA, and CIMSA contested GCC’s sale to the third party as a breach of CISMA’s right of first refusal. Under the shareholders agreement, the dispute was subject to arbitration under Bolivian law administered by the Inter-American Commercial Arbitration Commission (“IACAC”). The parties also agreed in the arbitration clause to “waive all actions for annulment, object or appeal against that award.” (Id. at 437)

The arbitral tribunal bifurcated proceedings into a merits and damages phase, ultimately ruling in CISMA’s favor on the merits and later awarding $36 million in damages (the “Damages Award”). However, rather than being the end of the dispute, the issuance of the Damages Award began a protracted battle over its recognition and enforcement.

The Circuitous Procedural History Behind the Tenth Circuit’s Decision

The procedural history of the parties’ dueling attempts to enforce and annul the award is important to understanding the Tenth Circuit’s recent decision.

GCC applied to a lower Bolivian court in September 2015 to annul the Damages Award and the lower court ruled in GCC’s favor almost immediately (the “Annulment Decision”). After several rounds of appeals, however, Bolivia’s highest court, the Plurinational Constitution Tribunal (the “PCT”), vacated the lower court’s Annulment Decision in December 2016.

CIMSA then returned to the lower court and applied for a new decision confirming the Damages Award, however, GCC responded by filing two collateral appeals that effectively stalled CIMSA’s request for a new decision from the lower court. At this point, the Annulment Decision itself had been vacated and GCC had pending appeals in Bolivian courts.

Meanwhile, in the United States, CISMA had applied in September 2015 for recognition of the Damages Award from the U.S. District Court for the District of Colorado. After CIMSA struggled to effect service for several years due to what it alleged were evasive tactics by GCC, the District Court eventually ruled in CISMA’s favor and recognized the Damages Award in March 2019. The Tenth Circuit affirmed.

Two months after the District of Colorado recognized the Damages Award, GCC initiated a new appeal in Bolivia’s courts. This appeal also wound its way through the Bolivian court system before ultimately being heard by the PCT, albeit by a different “chamber.” The PCT ruled in GCC’s favor in October 2020 (the “2020 PCT Decision”) by invalidating the previous decision made by its sister-chamber to vacate the Annulment Decision. After the 2020 PCT Decision, the lower Bolivian court reinstated its original Annulment Decision.

This circuitous procedural history resulted in the original Annulment Decision of the Damages Award being reinstated, but only after the District Court in the District of Colorado had already recognized the Damages Award.

Unsurprisingly, GCC then returned to the District Court with the 2020 PCT Decision in hand. GCC moved the Court to vacate its previous judgment recognizing the Damages Award under Federal Rule of Civil Procedure 60(b)(5), which provides in relevant part that the court may "relieve" a party from a final judgment that "is based on an earlier judgment that has been reversed or vacated."

The District Court denied GCC's motion. GCC appealed to the Tenth Circuit, which issued the decision discussed in the remainder of this post.

The Tenth Circuit's Decision

A divided three-member panel affirmed the District Court's ruling. The Court set out in detail the bases for its holding that the District Court (a) correctly concluded that U.S. courts may uphold recognition of a later-annulled award when giving effect to the annulment decision would violate U.S. public policy; and (b) did not abuse its discretion in denying GCC's Rule 60(b)(5) motion to vacate on the basis that enforcement of the Annulment Decision would violate U.S. public policy.

The Legal Standard Applicable to GCC's Motion to Vacate

Adopting the approach taken by the Second and D.C. Circuits, the Tenth Circuit held that when presented with an award that has been annulled in the arbitral seat, courts must "perform a weighing analysis, generally according comity to the foreign annulment order unless doing so violates United State public policy." (*Id.* at 449) The dissent's suggestion that there was a "presumption" of comity was expressly rejected by the Court, although it is unclear exactly how the Court's standard differed from the dissent's "presumption." (*Id.* at 463)

The crux of GCC's appeal centered on the nature of the public policy exception. GCC argued that a court may rely on the public policy exception to recognize an annulled award only if the substance of an annulment order – not the effect of enforcement of that order – offends U.S. public policy. The Court rejected this argument, announcing that a court may decline to enforce an annulment order "if the order itself is repugnant *or* if enforcing that order would offend public policy." (*Id.* at 451 (emphasis in original) That meant the District Court could uphold its previous recognition of the Damages Award on the basis that the enforcement of 2020 PCT Decision would violate U.S. public policy and outweighed concerns of comity, even if the substance of the 2020 PCT Decision itself did not.

The Court relied principally on its interpretation of the New York Convention, which it found was consistent with existing Second Circuit caselaw, to reach this result.

The Court reasoned that Article V(1)(e) of the Convention provides that a recognition court "may" refuse to recognize an award if the award-creditor establishes proof that the award has "been set aside or suspended" in the jurisdiction where the award was made. Article V(2)(b) provides that a court may *sua sponte* refuse recognition if recognition "would be contrary to the public policy of that country." Without explaining its rationale, the Court embraced the argument that, when read together, Article V(b)(2) gives Article V(1)(e) a "public policy gloss" whereby courts assertedly can only use their discretion to enforce an annulled award if non-enforcement would violate public policy. The Court therefore reasoned that "because the Convention explicitly permits a secondary jurisdiction to refuse to enforce an arbitral award on public policy grounds, a court may also refuse

to enforce the annulment of an arbitral award on public policy grounds." (*Id.* at 453) The Court said that Second Circuit similarly interpreted the New York Convention "to permit a district court to consider whether enforcement of an annulment order violates public policy." (*Id.* at 451)

The Court then emphasized that GCC's argument that the public policy exception could not apply to enforcement of the 2020 PCT Decision was contradicted by the fact that GCC's motion for vacatur was itself effectively a request for enforcement of that very same decision.

Finally, the Court addressed the implications of FRCP 60(b)(5) on the applicable legal standard. Because the District Court had previously recognized the Damages Award before the PCT reinstated the Annulment Decision, the majority agreed that additional considerations come into play: the award-debtor must provide "highly convincing" evidence that it is entitled to vacate that recognition and must show "why its conduct, as a matter of equity, should allow vacatur." (*Id.* at 457)

Application of the Legal Standard

The Tenth Circuit concluded that the District Court did not abuse its discretion by deciding that "giving effect" to the 2020 PCT Order would offend U.S. public policy in three ways.

First, U.S. public policy protects the finality of the judgments of its courts. The Court of Appeals found that the District Court appropriately emphasized that GCC was seeking to undo recognition granted after Bolivia's highest constitutional court had rejected GCC's attempt to annul the Damages Award, and that GCC's ultimately successful appeal was not even raised until after the District Court had already recognized the Damages Award. Finding otherwise would encourage "an endless barrage of challenges." (*Id.* at 458) The Court also noted that the parties' agreement that the award would be final and unappealable reinforced "the import of finality." (*Id.*)

Second, and relatedly, the Tenth Circuit agreed with the District Court that, because the underlying arbitration agreement waived any right to challenge the award, declining to give effect to a foreign court's annulment would "uphold[] the parties' contractual expectations in the arbitration context, including the finality of awards," which is "favor[ed]" by U.S. public policy. (*Id.* at 460) In other words, the parties agreed in advance not to challenge the awards, and the U.S. public policy favoring finality supports the district court from preventing GCC from backing out of that agreement when the award did not go its way. The Court did not dispute GCC's contention that the waiver clause did not "insulate such judgments from judicial review," but nevertheless held, in an important ruling, that on judicial review the clause implicated the U.S. public policy in favor of finality and therefore militated in favor of enforcement (*Id.* at 461 fn. 32)

Third, by reference to the well-established caselaw stating that there is a federal policy in favor of arbitration that applies with particular force in the field of international commerce, the majority found that a "corollary" to this policy is a "strong interest in enforcing the resulting award." (*Id.* at 461)

The Court concluded that these three public policy concerns were sufficient to conclude that the lower court did not abuse its discretion in deciding that U.S. public policy overcame concerns of comity, and that denial of GCC's motion was justified on this basis alone.

Lastly, the Court held that the inequity of GCC's litigation conduct "reinforced" denial of relief. (*Id.* at 465) The Court agreed with the lower court's reasoning that GCC "slept on its rights" (*id.*)

by waiting until its initial efforts to defend against recognition were unsuccessful before initiating a new challenge in Bolivia, and otherwise attempted to frustrate enforcement of the arbitral award.

Analysis and Implications

The Tenth Circuit's decision further solidifies an emerging consensus in U.S. courts that Article V of the New York Convention permits recognition of an award that is annulled at the arbitral seat if non-recognition would violate U.S. public policy. The decision also supports the finality of awards and party autonomy in international arbitration, reasoning that these considerations constitute U.S. public policy sufficient to warrant recognition of an award annulled in the arbitral seat.

By upholding the District Court's recognition of an award after the highest court at the seat effectively upheld its validity (even though the highest court's decision was itself later invalidated), the Tenth Circuit's decision deters recalcitrant award-debtors who might otherwise seek to lodge repeated appeals at the seat to annul an award. This concern is particularly acute in jurisdictions, like Bolivia, where the justice system may be susceptible to pressure from corruption or changes in regime at the political level. While commercial parties would be well advised to avoid selecting a seat in such jurisdictions in the first place, the Tenth Circuit's decision mitigates the risk of doing so.

This decision also provides an important reminder to award-debtors seeking to challenge an award: do not "sleep on" your rights. The Tenth Circuit emphasized that the District Court "appropriately considered GCC's actions leading to its vacatur motion" and that in "every case" where a U.S. court of appeal affirmed a district court's decision not to confirm an arbitral award due to a foreign court's annulment, the "movant had sought annulment in the primary jurisdiction ***before*** confirmation of the arbitral award in the United States." (*Id.* at 460, emphasis in original)

The dissent in *Compañía de Inversiones Mercantiles SA v. Grupo Cementos de Chihuahua SAB de CV* would have denied recognition. Citing Professor Born's *International Commercial Arbitration*, the dissent correctly acknowledged that the public policy defense functions as an "escape device" to protect the fundamental policies of national legal regimes. (*Id.* (dissent) at 487 (quoting G. Born, *International Commercial Arbitration*, 3d ed. (2021) at 26.05[C][9][a]) Nonetheless, the dissent's assertion that "enforcement of an annulled award [is] a legal impossibility" (*id.* at 485) is, as explained in detail elsewhere, wrong in fundamental respects.[1] The text and structure of the New York Convention compel the opposite conclusion from that suggested by the dissent. If an award could not carry any legal force after annulment, then it would make no sense for Article V(1)(e) to permit, but not require, non-recognition of an award that is "set aside or suspended by a competent authority of the country, in which, or under the law of which, that award was made." It would similarly make no sense for Article VII to expressly contemplate the possibility of recognition of annulled awards under national law or other treaties if an annulled award can no longer carry any legal force. Nothing in the text or structure of the New York Convention prevents a Contracting State from recognizing an award that has been annulled in the arbitral seat.

The Tenth Circuit's decision leaves unresolved the extent and nature of the U.S. public policy that will justify non-recognition of a foreign annulment decision. The Court expressly rejected the dissent's suggestion that there was a "presumption" in favor of recognizing foreign annulment

decisions. It did not, however, explain either what the (other) status of such decisions was or what kind of showing of U.S. public policy would be required to deny recognition of a foreign annulment decision. Would, for example, any one of the three U.S. public policies identified by the Court of Appeals have been sufficient to deny recognition of the Bolivian annulment decision, or was non-recognition only permitted where all such grounds existed?

Finally, while the Tenth Circuit declined to find that the arbitration agreement's clause waiving the right to appeal absolutely precluded judicial review of the award, the Court nonetheless determined that the inclusion of such a clause "supports the parties' expectation that arbitral awards would be final" and therefore militated in favor of upholding the District Court's recognition of the award. (58 F.4th at 461) This analysis, paralleling that in the D.C. District Court's classic decision in *Chromalloy Aeroservices v. Egypt* (939 F.Supp. 907 (D.D.C. 1996)), suggests that courts within the Tenth Circuit will likely consider such clauses highly persuasive, even if not necessarily dispositive, in establishing that important U.S. public policy interests are implicated where a party seeks recognition of an annulled award with clauses waiving the right to seek to set aside an award in the underlying arbitration agreement.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*

References

?1 *See generally* G. Born, *International Commercial Arbitration*, 3d ed. (2021) at 26.05[C][8][b][i] ("This proposition has been entirely, and properly, discredited by French, U.S. and other decisions…Neither does an arbitral award vanish nor the arbitral proceedings rewind, because the award is 'annulled' or 'set aside'; on the contrary, as these terms suggest, a national court makes a legal decision that purports to deny the award any legal effect. This decision is not, insofar as other states are concerned, the end of analysis, but rather the beginning of analysis."). *See also* G. Born, *International Arbitration: Law and Practice* 3d ed. (2021) at 16.05[D].

This entry was posted on Sunday, April 16th, 2023 at 8:16 am and is filed under Bolivia, New York Convention, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Public Policy, United States Courts, USA
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.