New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 73
FRIDAY, OCTOBER 14, 2016

International Arbitration

Expert Analysis

Confirmation of Awards Vacated at the Arbitral Seat

By **John Fellas**

This article discusses the recent decision of *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 2016 WL 4087215 (2d Cir., Aug..2, 2016), in which the U.S. Court of Appeals for the Second Circuit affirmed a judgment of the U.S. District Court for the Southern District of New York confirming an arbitration award rendered in Mexico, even though that award had been vacated by a Mexican court. In doing so, the Second Circuit articulated a cogent analytical framework for courts addressing the question of whether to confirm awards that have been vacated at the arbitral seat.

Confirmation and Vacatur

Before getting to the specifics of the Second Circuit's decision, it is necessary to set the scene by outlining three important differences between the confirmation of an arbitration award and its vacatur. This article discusses those differences by focusing upon awards that fall under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention). There is no substantive difference between the two from the standpoint of the enforcement of arbitral awards and, for the sake of simplicity, the term "Convention" refers to both.[1]

> The Second Circuit articulated a cogent analytical framework for courts addressing the question of whether to confirm awards that have been vacated at the arbitral seat.

One difference between confirmation and vacatur is straightforward, and relates to the effect of each. When a court confirms an arbitration award, it "makes what is already a final arbitration award a judgment of the court." *Florasynth v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). In New York, for example, once an award is confirmed, the prevailing party can use all the post-judgment remedies available to execute upon that award that would be available to a party that had secured a court judgment on the merits. *Prudential Blake Realty Inc. v. Schenectady Indus. Development Agency*, 255 A.D.2d 622 (3d Dept. 1998). By contrast, when a court vacates an arbitration award, it holds, in essence, that that award

JOHN FELLAS *is a partner at Hughes Hubbard & Reed in New York City.*

has "no further force and effect." Cf. *United States v. Williams*, 904 F.2d 7 (7th Cir. 1990).

A second difference relates to which courts have authority to confirm or vacate an award. Simplifying things slightly, any court in a Convention country can entertain an application to confirm an award rendered in another Convention country. By contrast, only the court at the seat of the arbitration (which in most cases is the place of arbitration designated in the arbitration clause) can vacate an award. In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004), the U.S. Court of Appeals for the Fifth Circuit expressed this difference by distinguishing between the court of primary jurisdiction (with authority to vacate an award) and courts of secondary jurisdiction (with authority only to confirm an award).

A third difference relates to the standards used by the courts to decide whether to confirm or vacate an award. While Article V of the New York Convention contains uniform standards governing the confirmation of awards in all New York Convention countries, it contains no standards governing their vacatur. Those latter standards are a matter for the domestic law at the arbitral seat. Thus, when it comes to the confirmation of awards by U.S. courts, section 207 of the Federal Arbitration Act (FAA) explicitly incorporates the standards of Article V of the New York Convention, which, for example, provide that confirmation of an award may be refused if "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration" (Article V(1)(c)). (Section 302 of the FAA incorporates the confirmation standards in Article V of the Panama Convention.) By contrast, Section 10 of the FAA contains the unique standards used by U.S. courts for the vacatur of international awards rendered in the U.S. For example, in the U.S., an award may be vacated, where, for example, "there was evident partiality" by the arbitrators. (9 USC §10(b)).

With this background, we turn to the question raised in *Pemex*: If the court at the arbitral seat vacates an award, can that award be nonetheless be confirmed by the courts in another Convention country and, if so, in what circumstances?

Pemex Case

Pemex arose out of a 1997 contract (superseded by a 2003 contract) between Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. (COMMISA) and Pemex-Exploracíon Y Produccíon (Pemex) (a state-owned company) to build oil platforms in the Gulf of Mexico. The contract had a clause requiring that disputes be resolved by arbitration in Mexico City.

A dispute arose following which Pemex rescinded the contract and seized the oil platforms, which were 94 percent complete. COMMISA responded by commencing arbitration proceedings in Mexico City. In 2009, the arbitration tribunal issued an approximately $300 million award in COMMISA's favor. COMMISA then successfully petitioned to confirm that award in the Southern District of New York. Pemex appealed the Souther District's decision to the Second Circuit and, at the same time, moved to vacate the award in Mexico.

While the appeal was pending, the Mexico court vacated the award on the ground that Pemex could not be required to arbitrate. And relying on that vacatur, Pemex persuaded the Second Circuit to vacate the Southern District judgment and remand the case so that the Southern District could consider the effect of the Mexican court's decision.

After hearing expert evidence on Mexican law, the Southern District confirmed the award notwithstanding its vacatur in Mexico. It did so on the ground that the Mexican vacatur was based on the

retroactive application of Mexican law. Specifically, the court found that the vacatur was based on a change to Mexican law made in 2007, after the underlying contract was executed, the effect of which was to (i) grant exclusive jurisdiction for disputes related to public contracts (as in *Pemex*) in the Tax and Administrative Court and so override any arbitration agreement; and (ii) establish a 45-day limitation period for suits in that court.

The Southern District found that the vacatur judgment "violated basic notions of justice in that it applied a law that was not in existence at the time the parties' contract was formed and left COMMISA without an apparent ability to litigate its claim." Pemex, again, appealed to the Second Circuit.

Approaches

The central question in *Pemex* was whether a district court can confirm an award that has been vacated at the seat, and, if so, in what circumstances. This is not the first time this question has reached the U.S. courts. And the prior decisions have been mixed. One court has confirmed a vacated award. *In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.D.C. 1996) (confirming award notwithstanding vacatur at Egyptian seat). Other courts have declined to do so. *Baker Marine (Nig.) v. Chevron (Nig.)*, 191 F.3d 194 (2d Cir. 1999) (declining to confirm award because of vacatur at Nigerian seat); *TermioRio S.A., Esp. v. Electranta*, 487 F.3d 928 (D.C. Cir. 2007) (declining to confirm award because of vacatur at Colombian seat).

The central question in 'Pemex' was whether a district court can confirm an award that has been vacated at the seat, and, if so, in what circumstances. This is not the first time this question has reached the U.S. courts. And the prior decisions have been mixed.

While, as noted above, a vacated award has "no further force or effect," that is categorically true only at the place of vacatur. For example, an award that has been vacated at the arbitral seat in, say, Mexico, has no further force and effect in Mexico, and so cannot subsequently be confirmed by the courts there. However, it is an independent and further question whether vacatur at the arbitral seat in Mexico entails that that award is of no further force and effect in another country, say the U.S. That depends on what weight the U.S. courts give to the vacatur of an award at the seat.

In *Pemex*, the Second Circuit began its analysis by focusing on the text of the Convention, noting that Article V states only that a petition to confirm an award "may" be refused when an award has been vacated at the seat. The Second Circuit stated that "the plain text of the [Convention] seems to contemplate the unfettered discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction." The court went on to provide guidance as to how that discretion should be exercised by framing the issue as one of a clash between two competing obligations of district courts: on the one hand, the obligation of a court to confirm an arbitration award pursuant to the Convention and, on the other, its obligation, based on international comity, to respect the judgment of a foreign court.

Thus, the central question for the Second Circuit in deciding whether to confirm an award that had been vacated by a judgment of the court at the seat is this: Should a U.S. court enforce the judgment of a court at the seat vacating an arbitral award? If it does, the effect is to treat the arbitral award as extinguished. If, by contrast, it declines to do so, the award remains effective and, barring other defenses to enforcement, should be confirmed.

U.S. courts have traditionally enforced foreign judgments based on the doctrine of comity, which "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation…" *Hilton v. Guyot*, 159 US 113 (1895). However, as the Second Circuit noted in *Pemex*, quoting *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986), the doctrine of comity is not without limits; "a final judgment obtained through sound procedures in a foreign country is generally conclusive… unless…enforcement of the judgment would offend the public policy of the state in which enforcement is sought." And a judgment offends public policy when it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."

The Second Circuit noted that this standard "is high and infrequently met." In *Pemex*, the Second Circuit found that this standard was nonetheless met, as a result of, among other things, "the repugnancy of retroactive legislation that disrupts contractual expectations [and] the need to ensure legal claims find a forum."

Courts in other countries have taken different approaches to the question raised in *Pemex*, with Germany,[2] at one end of the spectrum, giving almost decisive weight to vacatur at the place of arbitration, and France,[3] at the other end, attaching little weight to it. In this author's opinion, the Second Circuit's approach in *Pemex*, which echoes its approach in *Baker Marine* and the D.C. Circuit's approach in *TermioRio*, is a sound, middle ground.

On the one hand, if U.S. courts were to routinely ignore foreign judgments vacating awards, there is a risk that foreign courts would disregard U.S. court judgments doing the same. On the other, one of the main reasons parties choose international arbitration is neutrality; they want to arbitrate the merits of a dispute in a neutral forum, rather than take the risk that a national court may favor the local party. It is important, therefore, that there be some standard for reviewing foreign judgments vacating awards to ensure that any bias that was avoided through arbitration at the merits stage does not creep in at the vacatur stage through a parochial approach by a national court at the arbitral seat.

It is submitted that the Second Circuit has struck a reasonable balance between these competing considerations. It sets a standard that would generally require U.S. courts to respect the vacatur judgments of the foreign courts at the arbitral seat. But, it gives U.S. courts the authority to disregard those judgments in those rare cases where it is clear that the court at the seat engaged in "hometown justice."

1. More than 150 countries are party to the New York Convention. The Panama Convention includes virtually all the countries in the Americas. All the Panama Convention countries are also party to the New York Convention. The Panama Convention takes precedence over the New York Convention when the majority of the parties to the arbitration agreement are from Panama Convention countries. 9 USC §305(1). Because *Pemex* involved parties from Mexico, it fell under the Panama Convention.

2. See, e.g., German Supreme Court, 23 April 2013—III ZB 59/12, XXXIX YBCA 394 (2014).

3. See, e.g., Cour de Cassation, 29 June 2007, *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, Rev. de l'Arb. 515 (2007).