

Arbitral Award Enforced in the United States Although Annulled Abroad

US court decision upholding an arbitral award annulled in Mexico, the arbitral seat, affirms US courts are willing to enforce such awards and highlights differences among court decisions around the world.

On August 27, 2013, a federal district court in the Southern District of New York confirmed a \$400 million arbitral award in favor of a Mexican subsidiary of the United States company KBR against a Mexican state oil company, although the award had been set aside at the arbitral seat in Mexico City.¹

The Court's Decision in *COMMISA*

The award was rendered in an International Chamber of Commerce arbitration arising out of a contract for the construction of natural gas platforms between Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (*COMMISA*), a subsidiary of KBR, and PEMEX-Exploracion y Produccion (*PEMEX*), a Mexican state company. The US district court for the Southern District of New York subsequently confirmed the award.

PEMEX resisted enforcement, appealing the district court's decision to the US Court of Appeals for the Second Circuit, and commencing parallel annulment proceedings in Mexico City. PEMEX sought annulment on the grounds that, among others, the arbitral tribunal had acted outside of its jurisdiction. PEMEX argued that the tribunal had overreached its jurisdiction by hearing the parties' dispute relating to PEMEX's attempted administrative rescission of the contract, although administrative rescissions were non-arbitrable according to a Mexican law that entered into force after the commencement of the arbitration proceedings.²

After three failed attempts, PEMEX succeeded in setting aside the award in Mexico. The Mexican court judgment annulling the award was based in large part on the new Mexican law precluding the arbitration of administrative rescissions. The Mexican court further held that the tribunal lacked jurisdiction over the dispute in its entirety because the rescission claims and the breach of contract claims were intertwined.³

Following the annulment, the Second Circuit remanded the matter to the New York district court for reconsideration in light of the Mexican court judgment. Thus, the district court was faced with what it called the "dilemma" of whether "to enforce the arbitration award, or to defer to the judgment nullifying the award."⁴

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),⁵ which principally governs the enforcement of international arbitral awards, requires contracting parties to recognize and enforce such awards, except as provided under the Convention.⁶

Article V of the New York Convention permits courts to refuse recognition and enforcement if, among others, the award “has been set aside or suspended by a competent authority in the country in which...that award was made.”⁷ In *COMMISA*, the parties invoked the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention),⁸ whose Article V is virtually identical to Article V of the New York Convention.⁹

In reaching its decision to enforce the award despite the Mexican court’s annulment, the New York district court focused on what it found was a retroactive application of the Mexican law rendering administrative rescissions non-arbitrable.¹⁰ Given that the law was not in force at the time the parties entered their agreement, the district court concluded that *COMMISA* had a legitimate expectation that disputes with PEMEX were subject to arbitration, which was flouted by the Mexican court’s *ex post* application of the law.¹¹ The district court also found that the Mexican court decision left *COMMISA* without any forum to litigate its claims against PEMEX because administrative rescissions were subject to a mandatory administrative proceeding whose statute of limitations had lapsed.¹² Accordingly, the district court found that the Mexican court judgment “violated basic notions of justice” and thus declined to defer to the annulment, instead again confirming the award.¹³

As a result of the district court’s decision, *COMMISA* now finds itself with an award which is no longer valid in Mexico, but is valid and enforceable in New York. Thus, as a practical matter, while *COMMISA* cannot enforce the award in Mexico, it can collect against assets that PEMEX holds in New York. Whether *COMMISA* can enforce the award in other jurisdictions depends on the approach those jurisdictions may take in enforcing foreign arbitral awards that have been set aside at the seat of arbitration, as discussed in more detail below.

Enforcement of Arbitral Awards That Have Been Set Aside at the Seat of Arbitration

The district court’s judgment in *COMMISA* joins an ever-growing body of jurisprudence from courts around the world grappling with the issue of whether a national court of a signatory state to the New York Convention should recognize and enforce a foreign arbitral award that has been set aside at the seat of arbitration. Nevertheless, currently only a handful of jurisdictions have developed clear case law indicating the approach their courts would take when faced with this issue.¹⁴

Jurisdictions Likely to Enforce Awards That Have Been Set Aside

The *COMMISA* decision deviates from recent US court decisions in which courts have tended to refuse to recognize and enforce arbitral awards which had been set aside at the arbitral seat. In an earlier decision, *Chromalloy Aeroservices v. Arab Republic of Egypt*,¹⁵ the US Court of Appeals for the D.C. Circuit enforced an arbitral award that had been set aside at the seat of arbitration, finding that launching an appeal against the award in Egypt violated the final and binding nature of the award and that failing to recognize the award would violate US pro-arbitration public policy.¹⁶ However, subsequent US court decisions have deviated from the broad ruling in *Chromalloy*, and have refused to confirm awards that had been annulled at the seat of arbitration.¹⁷

Nevertheless, this later case law had left open the possibility that a US court would decline to recognize a foreign court’s annulment provided an “adequate reason” to do so.¹⁸ In *TermoRio S.A. E.S.P. v. Electranta S.P.*, the US Court of Appeals for the DC Circuit framed the relevant inquiry as whether the foreign court’s annulment of the award “violated basic notions of justice.”¹⁹ Applying the *TermoRio* standard, the court in *COMMISA* found the case implicated issues of fundamental fairness and thus permitted the court to exercise its discretion in favor of confirming the award.²⁰ Thus, while *COMMISA* revived the *Chromalloy* principle permitting a US court to recognize an award that has been set aside at

the seat of arbitration, *COMMISA* also affirmed the *TermoRio* approach of only affording courts the narrow discretion to do so where deferring to the foreign court's judgment would be fundamentally unfair.

With the *COMMISA* decision, the US affirms its position alongside France as a prominent and traditionally arbitration-friendly jurisdiction which is inclined to enforce arbitration awards that have been set aside at the seat of arbitration. However, unlike US courts, which require a showing of a fundamental unfairness to confirm an annulled award, the French courts tend to follow a bright-line rule, where arbitral awards are recognized and enforced regardless of the annulment, without inquiring into the fairness of the foreign court's annulment proceedings.

In 2005, in the seminal case of *Société Hilmarion Ltd v Société OTV*,²¹ the French Court of Cassation confirmed an award which had been annulled at the seat of arbitration, ruling that arbitral awards were divorced from any national legal order, including that of the seat, and thus continued to exist despite the annulment.²² This principle was again reaffirmed in May 2012 by the Paris Court de Grande Instance in *Maximov v. NLMK*, which recognized an arbitral award rendered in Russia and subsequently set aside by a Russian court on the grounds that the dispute was not arbitrable. Without inquiring into the annulment proceedings themselves, the Court de Grande Instance concluded that the Russian court's annulment was not sufficient to refuse recognition of the award in France.

Dutch courts have recently taken an approach similar to that of US courts, demonstrating an inclination to inquire into the fairness of the annulment of an arbitral award at the seat of arbitration before deciding whether to recognize the award or defer to the foreign court's decision. In 2009, in *Yukos Capital S.A.R.L. v. OAO Rosneft*,²³ the Amsterdam Court of Appeal held that a Russian court's annulment of an award rendered in Russia was insufficient to make the award unenforceable in the Netherlands, noting the evidence that the annulment of the award was not the result of an impartial and independent judicial process. In September 2012, the Amsterdam Court of Appeal applied a similar approach in *Maximov v. NLMK*,²⁴ which also involved an arbitral award rendered in Russia and subsequently set aside by the Russian courts. The court held that the Russian judgment annulling the award should be respected absent specific indications that the judgment was the result of an unfair trial and ordered further hearings to determine the fairness of the annulment proceedings in Russia.

According to the 2012 ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention, recognition and enforcement of awards that have been set aside at the seat of arbitration is also likely available in Austria, Brunei, Croatia, Denmark, Hong Kong, Ireland, Lebanon, Luxembourg, Mexico, Panama, Poland, Spain, and Turkey, although the courts of these states have yet to consider the issue.²⁵

Jurisdictions Likely to Refuse to Enforce Awards That Have Been Set Aside

Courts in other contracting parties to the New York Convention take the view that an arbitral award that has been set aside at the seat of arbitration cannot be recognized and enforced. England and Germany follow this approach. Hungary, India, Italy, Japan, Korea, and Switzerland also likely follow this approach, although the courts of these states have yet to consider the issue.²⁶

Key Take-Aways

- The *COMMISA* decision confirmed the continued applicability of the *Chromalloy* decision, which permitted US courts to recognize and enforce a foreign arbitral award even when it has been set aside at the seat of arbitration.

- However, *COMMISA* also reaffirmed the approach articulated in *Baker Marine* and *TermoRio*, which permits courts the narrow discretion to confirm the award despite the annulment only where deferring to the foreign court's annulment decision would be fundamentally unfair.
- The Dutch courts follow a similar approach, deferring to the foreign court's annulment, absent specific evidence that the annulment resulted from unfair proceedings.
- French courts demonstrate the most liberal approach to enforcement of foreign arbitral awards and are likely to recognize and enforce an award that has been set aside at the seat of arbitration, without inquiring into the annulment proceedings at all.
- English and German courts, on the other hand, are likely to refuse to recognize and enforce an award that has been set aside at the seat of arbitration.
- In most other jurisdictions, courts have yet to provide guidance on how they would approach the issue.

Strategic Considerations

- The annulment proceedings in Mexico in the *COMMISA* case reaffirm the importance of carefully selecting the seat of arbitration and opting for a jurisdiction whose local law and judiciary are likely to respect the finality of an arbitral award.
- US courts are likely to confirm arbitral awards that have been set aside at the seat of arbitration, only when deferring to the foreign court's annulment decision would result in fundamental unfairness. Thus, a party seeking to set aside an arbitral award at the arbitral seat is well-advised to do so because the US courts are likely to defer to the annulment decision absent a showing of fundamental unfairness.
- A party wishing to enforce an award that has been set aside at the seat of arbitration should consider enforcing against its counterparty's assets in a jurisdiction likely to recognize the award despite the annulment, such as France, the Netherlands and the US.

COMMISA is likely to signal a broader trend in international arbitration in which claimants pursue enforcement proceedings, despite an annulment decision at the arbitral seat. Further jurisprudence on this issue is thus likely to emerge in the near term in the US and around the globe.

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Endnotes

- ¹ Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploracion y Produccion, Case 1:10-cv-00206-AKH, August 27, 2013 (hereinafter, COMMISA).
- ² COMMISA at 11.
- ³ Id. at 12-15.
- ⁴ Id. at 25.
- ⁵ 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
- ⁶ New York Convention, Art. II.
- ⁷ Id. at Art. V(1)(e).
- ⁸ 1438 U.N.T.S. 245. The Panama Convention, to which Mexico is a signatory, applies to members of the Organization of American States.
- ⁹ Because of the similarities between the Panama Convention and the New York Convention, the New York district court relied on precedent under the New York Convention in deciding the matter. COMMISA at 18.
- ¹⁰ COMMISA at 28.
- ¹¹ Id. at 26.
- ¹² Id. at 29-30.
- ¹³ Id. at 31.
- ¹⁴ ICC International Court of Arbitration Bulletin 733: ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention, v. 23/Special Supplement 2012 (hereinafter ICC Guide).
- ¹⁵ 939 F. Supp. 907 (D.D.C. 1996).
- ¹⁶ Chromalloy at 912-913.
- ¹⁷ Baker Marine (Nig.) Ltd, v. Chevron (Nig.) Ltd, 191 F2d 194 (2d Cir. 1999); Spier v. Calzaturificio Tecnica. S.pA, 71 F. Supp. 2d 279, 288 (S.D.N.Y. 1999); TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 938 (D.C. Cir. 2007).
- ¹⁸ COMMISA at 20-23 (citing Baker Marine at 197; Spier at 288; TermoRio at 938).
- ¹⁹ TermoRio at 939.
- ²⁰ COMMISA at 31.
- ²¹ Cour de cassation, 23 March 1994, YB Comm Arb, Vol XX (1995) 663.
- ²² Hilmarton at 665. See also La Direction Générale de l'Aviation Civile de l'Émirat de Dubaï v Société Internationale Bechtel Co., Paris Court of Appeal, Chamber 1C, 29 September 2005 (confirming an award rendered in Dubai and subsequently annulled by a UAE court).
- ²³ Case No. 200.005.269/01, Amsterdam Court of Appeal, April 28, 2009.
- ²⁴ Case No. 200.100.508/01, Amsterdam Court of Appeal, September 18, 2012.
- ²⁵ ICC Guide at 20.
- ²⁶ Id. at 20.