Client Update
U.S. Courts Confirm Judgment Recognition Approach to Annulled Awards

Three recent judgments refusing to enforce annulled arbitral awards continue U.S. courts' focus on the associated foreign court judgments. Both the D.C. and Second Circuit courts granted comity to foreign courts' annulment decisions, while the New York state appellate court denied comity to a foreign court's recognition of an annulled award. The New York state court even went one step further and enjoined a party from taking steps to enforce the annulled award abroad. This appears to be the first time that a New York court has restrained enforcement of an arbitral award abroad.

FEDERAL CIRCUIT COURTS CONFIRM JUDGMENT RECOGNITION APPROACH

On July 7, 2017, the Court of Appeals for the D.C. Circuit affirmed the district court's refusal to enforce an award that had been annulled by the Common Court of Justice and Arbitration ("CCJA") of the Organization for the Harmonization of Business Law in Africa ("OHADA"), holding that the CCJA's decision did not violate "basic notions of morality and justice."[1]

This is the latest in a series of decisions arising out of the controversial *Getma* award. The award in question had been issued in favor of Getma International, a French cargo company, against the Republic of Guinea in 2014 in a dispute concerning a concession agreement for the operation of a port. The CCJA annulled the award on the basis that the arbitrators had "breached [their] duty by deliberately ignoring the mandatory provisions" of the OHADA arbitration rules concerning the tribunal's fees, despite the parties' agreement to a different fee arrangement.

As we reported last year (see here), the district court had denied enforcement because, although the case "was not without some unusual events," those events did not rise to the standard of violating the "most basic notions of morality and justice." Continuing the "narrow public-policy gloss" approach in *TermoRio*, the D.C. Circuit affirmed the decision. It rejected Getma's primary argument that the annulment was tainted, among other things, by the participation of a

[1] *Getma Int'l v. Republic of Guinea*, No. 16-7087, 2017 WL 2883755, at *4 (D.C. Cir. July 7, 2017) (citing *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007).

Guinean judge in the CCJA's judgment. The court held that it would enforce an annulled award only if the annulment is "repugnant to fundamental notions of what is decent and just" in the United States, which was not met in this case.

Two weeks later, on July 20, 2017, in *Thai-Lao Lignite v. Lao*, the Court of Appeals for the Second Circuit affirmed the Southern District's refusal to enforce an award that had been annulled by a Malaysian court.[2] The dispute had a complex procedural history. The 2009 award had been issued by a Malaysian tribunal in favor of the claimants in an arbitration arising out of a terminated agreement with Laos to mine lignite coal and develop a power plant to convert the coal into electricity. The award was initially confirmed by the Southern District in 2011 (a decision affirmed by the Second Circuit), before being set aside by a Malaysian court in 2012. The Southern District then vacated its enforcement judgment, finding that the New York Convention required it to give effect to the later Malaysian decision, which did not "rise to the level of violating basic notions of justice such that the Court here should ignore comity considerations."

Adopting the same judgment recognition framework reflected in *COMMISA v. Pemex*,[3] on which we reported last year (see here), the Second Circuit held that its discretion to enforce an annulled award is "constrained by the prudential concern of international comity." The court concluded that "basic notions of justice" are not offended by recognizing the Malaysian judgment.

NEW YORK APPELLATE COURT ENJOINS FOREIGN ENFORCEMENT PROCEEDINGS

A recent New York appellate court decision adopted the same judgment recognition approach to a converse problem. In *Citigroup v. Fiorilla*, the award creditor, John Fiorilla, obtained enforcement in France of an award that the New York state courts had previously annulled. Mr. Fiorilla then unsuccessfully sought to vacate the original annulment in New York courts. The first instance court not only refused to enforce the award but also enjoined Fiorilla from enforcing the award in France.

The Appellate Division affirmed.[4] The court reasoned by reference to the standard for issuing anti-suit injunctions for violation of a forum selection clause. It did not address arbitration policy or the ability of national courts, under Article V of the New York Convention, to exercise

[2] *Thai-Lao Lignite (Thailand) Co. v. Lao*, No. 14-597, 2017 WL 3081817 (2d Cir. July 20, 2017).

[3] *Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016).

[4] *Citigroup Global Markets, Inc. v. Fiorilla*, 54 N.Y.S.3d 586 (1st Dep't 2017).

discretion in deciding whether to enforce an award that has been annulled at its seat.[5] Without even mentioning the New York Convention, the court noted simply that the "respondent commenced the French proceedings in bad faith" and that therefore the lower court "properly declined to apply the doctrine of comity to the French court's recognition of the vacated award."

This is the first U.S. case in which a court has enjoined award enforcement proceedings abroad. If followed, the court's summary analysis could have wide-ranging consequences for parties to arbitrations seated in New York. Many foreign courts have held that the use of the discretionary "may" in Article V of the New York Convention allows an enforcing court to decide whether to enforce an award despite an annulment. Enjoining foreign enforcement proceedings would essentially close that gap between the annulling court and the enforcing court. The particular facts of this case, however – including that the enforcing party appears not to have informed the French court of the annulment – may limit its application to other cases.

THE OUTLOOK AHEAD

Although each of these cases turn on peculiar facts, they illustrate U.S. courts' resort to judgment recognition rules instead of arbitration-specific reasoning grounded in the New York Convention. Since the *COMMISA* case was settled before Supreme Court review, the judgment recognition framework looks set to stay.

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Please do not hesitate to contact us with any questions.

[5] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958. Article V(1)(e) of the Convention states that "[r]ecognition and enforcement of the award *may* be refused" (emphasis added) if, *inter alia*, the award has been "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

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