

CLIENT ALERT

Second Circuit Affirms Enforcement of \$300 Million Annulled Award

In *Corporación Mexicana De Mantenimiento Integral, S. DE R.L. De C.V. (COMMISA) v. Pemex-Exploración Y Producción (PEP)*, ___ F. 3d ___, ___ WL _____ Case No. 13-4022 (2d Cir., August 2, 2016), the United States Court of Appeals for the Second Circuit affirmed a lower court decision confirming a \$300-million arbitral award rendered in Mexico. The award was confirmed notwithstanding that it had been annulled by a Mexican court.

The *Commisa* case arose out of a dispute between PEP, the subsidiary of PEMEX, the Mexican state-owned oil company, and COMMISA, a subsidiary of the construction and military contractor, KBR, Inc. In 1997 and 2003, the parties entered into contracts for COMMISA to build oil platforms in the Gulf of Mexico. The contracts called for disputes to be settled through arbitration in Mexico City. In 2004, PEP seized the platforms and ejected COMMISA from the work sites. COMMISA commenced arbitration in December 2004. In May 2009, Mexico enacted Section 98 of the Law of Public Works and Related Services, which precluded arbitration of claims like COMMISA's. In December 2009, the arbitral tribunal issued its \$300-million award for COMMISA.

In January 2010, COMMISA sought to enforce the award in the United States District Court for the Southern District of New York. The district court confirmed the award and PEP appealed. The Second Circuit vacated the judgment and remanded for the district court to consider whether the annulment by the Mexican court made the award unenforceable. On remand, the district court again confirmed the award finding that the Mexican court's decision to vacate the award violated basic notions of justice and was contrary to U.S. public policy. PEP appealed the district court's decision.

On August 2, 2016, the Second Circuit affirmed the district court's decision to enforce the award. The Court held that a properly obtained final judgment of a foreign country is generally enforceable unless it offends the public policy of the state where enforcement is sought such that it is repugnant to fundamental notions of what is decent and just. The

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ABOUT SHOOK

Shook, Hardy & Bacon has a breadth of experience in all facets of international arbitration, from drafting and negotiating arbitration agreements to representing parties in arbitral proceedings and subsequent domestic annulment and enforcement proceedings under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. We have also acted as arbitrator or arbitral secretary in both ad hoc and institutional international arbitrations under most institutional rules, including those of the ICC, AAA, ICDR, NAI, LCIA, and UNCITRAL, and governed by a variety of procedural and substantive laws.

We are active in the International Council of Commercial Arbitration (ICCA), London Court of International Arbitration (LCIA), Miami International Arbitration Society, International Arbitration Institute and more generally in the international arbitration community through the International Bar Association and conferences held by organizations such as the ICDR and ICC.

We stay abreast of key issues affecting international arbitration, including arbitrator selection processes, challenges to and enforcement of arbitration awards under the New York Convention, the growing concern of the users of arbitration about the cost and time of arbitration, and the consideration of common ethical standards in conducting international arbitrations.



Second Circuit held that the district court did not abuse its discretion in confirming the award notwithstanding invalidation of the award in the Mexican courts because COMMISA had satisfied the heavy burden of showing the annulment of the award violated U.S. public policy. Specifically, the Second Circuit noted that COMMISA had been deprived of its property without compensation; the award was annulled based on legislation enacted after the parties had entered into their contract with a mandatory arbitration provision; and the Mexican court's ruling had left COMMISA without any forum for redress of its injury.

The *Commisa* court is the latest to consider the issue of enforcement of annulled awards. In *In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.D.C. 1996), the District Court for the District of Columbia enforced an arbitration award despite its annulment at the seat of arbitration and crafted a broad public policy basis for rejecting the nullification judgments of foreign courts. Three years later, in *Baker Marine (Nig) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999), the Second Circuit refused to enforce an arbitral award that had been set aside, but suggested that courts did have the discretion to confirm arbitration awards that had been set aside, where the facts warranted such an outcome. In *TermoRio S.A.E.S.P. and LeaseCo Group, LLC. v. Electranta S.P., Electrificadora del Atlantico S.A. E.S.P.*, 487 F.3d 928 (D.C. Cir. 2007), the Circuit Court for the District of Columbia refused to enforce an award that had been vacated at the seat of arbitration. The court, however, accepted the principle that a U.S. court may enforce an annulled arbitral award if there were evidence that the nullification proceedings or judgment are repugnant to fundamental notions of what is decent and just in the United States.

With the *Commisa* decision, the Second Circuit joins the District of Columbia Circuit's longstanding view that annulled arbitral awards are not automatically unenforceable and once again confirmed – in more definitive terms – that while the bar for enforcing an annulled award is high, U.S. courts can and should review the underlying facts of an annulled award sought to be enforced in the United States to determine whether the annulment violated fundamental principles of U.S. public policy.