THE PEMEX CASE: THE GHOST OF CHROMALLOY PAST?

By Lorraine M. Brennan, Esq.

The international arbitration community sat up and took notice when a recent decision issued by Judge Alvin K. Hellerstein from the Southern District of New York in the *Pemex*[1] case ordered that an arbitration award that had been set aside by the Mexican courts could be enforced in the United States. The case was particularly noteworthy because there is only one other reported case in the United States—*Chromalloy*[2] from 1996—which ordered the same result, albeit for different legal reasons.

In most cases, awards that have been set aside at the seat of the arbitration are typically not enforced in other countries pursuant to Article V(1)(e) of the New York Convention. In *Chromalloy*, the award had been set aside in Egypt, and the court used Article VII and not Article V of the New York Convention to conclude that it must enforce the vacated Egyptian award because to decide otherwise would violate clear U.S. public policy in favor of enforcement of binding arbitration clauses. While *Chromalloy* was widely discussed, it was not followed here in the U.S., and several subsequent cases specifically rejected its reasoning.

In *Pemex*, a panel of arbitrators in Mexico City issued an ICC arbitration award worth approximately $400 million US (including interest) in favor of the petitioner, COMMISA. A subsequent judgment by the Southern District of New York confirmed the award. PEP, the respondent, appealed, and was successful in getting the award annulled in the Mexican court. In ruling, the Mexican court held that the district court for administrative matters and not arbitrators should decide cases such as *Pemex*, applying a law enacted after PEP and COMMISA entered into their contract. The decision also came after the statute of limitations for COMMISA to file in the district court for administrative matters had run out.

Back in the United States, the Second Circuit remanded the case to Judge Hellerstein to address the effect of the nullification in Mexico on the award. Judge Hellerstein reviewed two significant circuit court cases in his decision, *Baker Marine*[3] and *TermoRio v. Electranta*[4], which noted that there may be circumstances where an arbitration award should be confirmed despite a nullification at the seat of arbitration. Based on these cases, Judge Hellerstein concluded that the decision vacating the award in Mexico violated "basic notions of justice" and that deference to the Mexican courts was therefore not required. Judge Hellerstein found it particularly compelling that when COMMISA initiated arbitration at the end of 2004, it had every reason to believe that its dispute with PEP could be arbitrated. Moreover, the unfairness was exacerbated by the fact that that Mexican court's decision left COMMISA without a remedy, as by the time the Mexican court's opinion was issued, the governing statute of limitations, only 45 days, had run out. While the court in *Pemex* did not rely on the specific reasoning in *Chromalloy*, it did remark that *Chromalloy* remains alive.

It is unlikely that this case will open the floodgates in the U.S. to enforcement of awards that have been set aside abroad. The facts in this case distinguish it from many of its predecessors. Nevertheless, it would be difficult to fathom how the court could or should have reached a different result under these circumstances. And it also gives a nod to a case that many thought had been dismissed as an outlier, and reminds us that parties remain captive to the courts at the seat of arbitration when it comes to nullification of international arbitration awards. Fortunately, the language of international arbitration conventions provides parties with a solution for tough cases such as this one. ■

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[1] *Corporación Mexicana de Matenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013).*

[2] *In Re Chromalloy Aeroservices and the Arab Republic of Egypt, 939 F. Supp. 906 (D.C. Cir. 1996).*

[3] *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F. 3d 194 (2d Cir. 1999).*

[4] *TermoRio S.A.E.S.P. v. Electranta S.P., 487 F. 3d 928 (D.C. Cir. 2007).*