Enforcement Of Arbitral Awards in Latin America

Over the past 25 years, Latin America and the Caribbean have seen a continued increase in foreign investment. As a result of the increased complexities resulting from such cross-border transactions, the need for a clear and consistent dispute resolution mechanism, including the recognition and enforcement of arbitral awards, has become imperative. Most of the countries in Latin America and the Caribbean have agreed to provide such clarity and consistency by adopting The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Although each individual nation has specific procedural rules that must be carefully followed to enforce an arbitral award, the New York Convention provides a general set of standard rules and procedures for enforcing such award, including with respect to enforcing any such award in one contracting state that is issued in another contracting state. In such instance, the New York Convention rules have a strong preference toward enforcement of such award and state that such arbitral award should be enforced unless subject to certain limited defenses.

Despite such preference, however, jurisdictions in Latin America and the Caribbean from time to time, have vacated arbitral awards. For example, in Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción (Commisa), a dispute arose between Pemex-Exploración Y Producción, a subsidiary of Mexico’s state-owned oil and gas company, and its contractor, Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V (Contractor) resulting in Pemex-Exploración Y Producción (PEMEX) administratively rescinding the underlying agreement.

The underlying agreement required disputes to be settled by the International Chamber of Commerce in Mexico City. Although the ICC arbitral panel rendered an award in favor of Contractor for approximately $300 million, the Eleventh Collegiate Court of Mexico vacated the award. In rendering its decision, the Mexican court retroactively applied a Mexican law (Section 98) that was enacted after the commencement of the arbitration proceedings and which precluded arbitration of claims based on administrative rescission.

While the Mexican court was reviewing the award, Contractor filed a parallel pending action in the Second District of New York to enforce such award. On August 2, 2016, the Second District Court of Appeals of New York (the Commisa Court) affirmed a lower district court’s decision to disregard the Mexican court’s ruling to vacate the award on grounds that upholding the vacated award would be against public policy because the retroactive application of Section 98 “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 [Contractor] without an apparent ability to litigate its claims.”
In addition, the Commisa Court stated that PEMEX acted on behalf of the Mexican government when it rescinded the underlying agreement and forcibly removed Contractor from the project sites. The Mexican court then frustrated Contractor’s right to relief by applying Section 98 and precluding arbitration of Contractor’s claim.

The Commisa Court held that such application of Section 98 constituted “a taking of private property without compensation for the benefit of the government. In the United States, this would be an unconstitutional taking.” Such taking also violated “basic notions of justice” and was contrary to public policy. In balancing the concerns of public policy against concerns of international comity, the Commisa Court stated that “although the Panama Convention affords discretion in enforcing a foreign arbitral award that has been annulled in the awarding jurisdiction, and thereby advances the Convention’s pro-enforcement aim”, the exercise of that discretion is appropriate in situations similar to those that arose in the Commisa case when necessary to vindicate ‘fundamental notions of what is decent and just’ in the United States.

In conclusion, most countries in Latin America and the Caribbean offer a consistent and generally reliable model for enforcing arbitration awards as signatories to the New York Convention. As a result, arbitral awards in these jurisdictions are typically widely recognized and enforceable.

However, as demonstrated by the Commisa decision, certain “pro-enforcement” jurisdictions such as the US, have recently enforced arbitral awards when courts in other jurisdictions in Latin America and the Caribbean have vacated such awards.

Due to the recency of the Commisa decision, its legal ramifications are still undetermined and are being reviewed by the legal communities in Latin America and the Caribbean.

However, as a practical matter, parties to an agreement should use caution in selecting the location of arbitration, as certain jurisdictions are more “pro-enforcement” than others. If the reasoning behind the Commisa decision begins to flourish, parties to an agreement should be aware that an arbitral award vacated in one jurisdiction may nevertheless still be enforceable against such party’s assets in a different jurisdiction.

Endnotes

1 With the exception of Belize, Guyana, Suriname, French Guiana and a few smaller Caribbean nations, all countries in Latin America and the Caribbean have ratified New York Convention. New York Arbitration Convention, Contracting States – Status Map, available at http://www.newyorkconvention.org/countries/status+map

2 New York Convention, Art. I.

3 New York Convention, Arts. I and V


5 Id. at *5.

6 Id. at *3.

7 Id. at *10.

8 Id. at *9-10.

9 Id. at *4. This broad holding falls within the scope of the permissible defenses offered by the New York Convention and The Inter-American Convention on International Commercial Arbitration (the “Panama Convention”). Because the parties in the Commisa case invoked the Panama Convention, the Commisa Court provided its analysis under the Panama Convention but held that “there is no substantive difference” with respect to domestic enforcement of foreign arbitral awards between the New York Convention and the Panama Convention, as both agreements “evidence a “pro-enforcement bias”:” The public policy defense to enforcement is available under both the New York Convention (New York Convention. Art. VI) and the Panama Convention (Panama Convention, Art. VI).

10 Commisa, 2016 U.S. App. LEXIS 13891, at *37

11 Id.

12 Id.

13 Id.

14 Id. at 29.