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III. U.S.A.

1. **United States Court of Appeals for the District of Columbia Circuit, Decision of 25 May 2007, No. 06-7058, Termorio S.A. E.S.P. v. Electranta S.P., 487 F.2d 928 (D.C. Cir. 2007), 2007 U.S. App. LEXIS 122012188 [Abstract].**

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*Enforcement of award annulled in the State where it was rendered? (No)*

*Exécution d'une sentence annulée dans le pays d'origine? (Non)*

*Vollstreckung eines im Ursprungsland aufgehobenen Schiedsspruchs? (Nein)*

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An ICC arbitration award in favour of a private Colombian company against a state-owned Colombian company was set aside by a Colombian court applying Colombian law, on the ground that arbitration in Colombia could not take place under ICC Rules (or any other arbitration rules than those used in domestic Colombian arbitrations). Enforcement of the nullified award was sought in the U.S. District Court in Washington under the New York Convention. The Court refused enforcement, respecting the decision of the Colombian court. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's order, finding no basis in U.S. or international public policy to enforce a foreign award that had been set aside by a court at the seat of the arbitration in a lawful application of the laws of that nation.

Is international or United States public policy violated when a foreign State enters into a commercial contract providing for commercial arbitration under ICC Rules, participates in and eventually loses the arbitration, and then obtains nullification of the Award by an administrative court of the State on the ground that State law did not permit arbitration under ICC Rules?

The U.S. Court of Appeals for the District of Columbia held that the Award annulment was not a violation of public policy sufficiently grave or

fundamental as to justify enforcing the nullified award under the New York Convention.

Article V(1) of the Convention sets forth the exclusive grounds on which recognition and enforcement 'may be refused' by the Courts of a Convention State other than the State where the Award was made.

Subsection (e) thereof permits refusal of recognition/enforcement where an 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.'

According to the U.S. Court, refusal of recognition is essentially mandatory: 'Pursuant to this provision of the Convention, a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary Contracting State.' (At \*20).

Prior US case law was not adequate to address the question presented to the Court. In the famous *Chromalloy* case (*Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996), 1996 U.S. Dist. LEXIS 13736, a federal district court granted enforcement of an award in favor of a US national against the Egyptian air force, where the Egyptian party had obtained annulment in an Egyptian court in violation of an express contractual covenant that it would not apply for such relief.

Thus, the annulment was the product of an express violation of an international legal obligation voluntarily undertaken. By contrast, here the Colombian State party made no such undertaking and, moreover, timely raised and preserved its objection to the jurisdiction of the Arbitral Tribunal constituted under ICC Rules.

Also relevant, but not dispositive, was the decision of the US Second Circuit Court of Appeals in the *Baker Marine* case (*Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999), 1999 U.S. App. LEXIS 18776) But that decision, in which the Court refused enforcement of an award set aside in Nigeria, held only that a 'public policy' ground for enforcement of a vacated award does not exist merely because the grounds for the annulment would not be recognized under US law. In *TermoRio*, unlike *Baker Marine*, there appears to have been a closer question of whether Colombia violated its own international legal obligation and domestic law by setting aside the award.

The Court in *TermoRio* defined US public policy interests strictly in terms of the fundamental procedural fairness of the foreign judicial proceedings, thus equating the test for enforcement of a nullified award to the standard for refusing recognition of any foreign judgment. It was therefore dispositive that ‘Appellants [had] neither alleged nor provided any evidence to suggest that the ... proceedings... violated any basic notions of justice to which we subscribe.’ 487 F.3d at \_\_\_, 2007 U.S. App. LEXIS 12201 at \*30.

But the Court gave seemingly short shrift to the argument that Colombia, having adopted the New York Convention into the body of its own domestic an international law, violated its own law and its international obligations by enforcing other domestic law that not only compromised the command of the Convention to enforce agreements to arbitrate according to their terms, but did so to excuse the State from a substantial commercial obligation.

One might surmise that a different outcome would be possible if only one fact were changed: that the Award winner had foreign rather than Colombian nationality. But there is only the faintest hint of this possibility in the Court's decision. *Id.*, 487 F.3d at \_\_\_, 2007 U.S. App. LEXIS 12201 at \*32 (‘The District Court correctly observed that ‘[t]his matter is a peculiarly Colombian affair,’ concerning, as it does, ‘a dispute involving Colombian parties over a contract to perform services in Colombia which led to a Colombian arbitration decision and Colombian litigation.’’).

As a consequence, American law as to when a nullified foreign award may be enforced despite the annulment remains underdeveloped, and several more episodes in the *Chromalloy* saga evidently remain to be written before the ‘public policy exception’ to non-enforcement of nullified awards becomes satisfactorily defined.

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