



International Law Report: *Dispute Resolution Update*
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Enforcement of International Arbitration Awards in U.S. Courts When They Have Been Set Aside by a Foreign Court

On November 26, 2007, the Supreme Court denied certiorari in *Termorio v. Electranta*, 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, ___ U.S. ___ (Nov. 26, 2007), letting stand the May 25, 2007 decision of the United States Court of Appeals for the District of Columbia which refused to enforce an international arbitration award that was set aside by a foreign court. That decision highlighted the difficulties of enforcing arbitration awards that have been set aside by a foreign court, but it provided insights that could help future parties avoid the same fate.

Termorio and its predecessors demonstrate the importance of researching the arbitration rules and treaties that govern the location of the arbitration, choosing arbitration rules that will be respected in that location, and including an enforcement mechanism in the contract that will prevent the losing party from appealing the arbitration award to a foreign court. An additional safeguard is to choose a neutral situs for the arbitration and have the law of that neutral forum govern the arbitration. Following these steps reduces the likelihood that an award will be set aside in the first place, and, if an award is set aside, they increase the likelihood that a U.S. court will enforce the award.

Termorio and its predecessors are discussed in more detail below.

Article V of the New York Convention

The arbitration rules in the New York Convention were implemented to ease the enforcement of international arbitration awards, and, as such, there are few exceptions which allow courts to avoid enforcement. Article V of the New York Convention gives courts discretion, at the request of the opposing party, to refuse enforcement of an arbitration award if the opposing party proves that one of the enumerated factors applies to the arbitration award. The opposing party could argue, for example, that the arbitration agreement was not valid under the law of the country

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BEST PRACTICES TO AVOID THE OUTCOME IN *TERMORIO v. ELECTRANTA*

Do your homework: Research the local laws of the jurisdiction that is the situs of the potential arbitration before entering into the arbitration agreement. Do not assume that the arbitration rules chosen will be honored in that jurisdiction. Specifically, investigate the treaty framework and vacatur standards of the arbitral forum.

If practical, choose to have the law of a neutral, third party country govern the agreement. Make this choice of law crystal clear in the arbitration agreement so there can be no dispute about it later.

Include an enforcement mechanism in your arbitration agreement that prevents either party from petitioning a foreign court to overturn the award. The parties' intent on this issue must be clear and unequivocal.

In the event an award is set aside by a foreign court, look for evidence of bad

where the award was made, or that the award contained decisions on matters beyond the scope of the submission to arbitration, or that the award was set aside by a competent authority of the country in which, or under the law of which, that award was made. See *e.g. Termorio*, 487 F.3d at 934. Because Article V is discretionary, courts, in theory, may still enforce arbitration awards despite proof that one of the enumerated factors applies to the arbitration award. In reality, courts often refuse enforcement of an award under these circumstances, particularly if the award has been set aside by a competent foreign authority with no allegations or evidence showing the process was tainted. See *e.g. Termorio*, 487 F.3d 928; *Baker Marine v. Chevron*, 191 F.3d 194 (2d Cir. 1999). To understand *Termorio* and its potential impact, it is helpful to review the significant cases leading up to this decision.

faith, foul play, or bias on the part of the foreign court. These could be "adequate reasons" for a court to ignore the decision of a foreign court.

Important Predecessors to *Termorio v. Electranta*

Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt, 939 F. Supp. 907 (D. D.C. 1996)

The *Chromalloy* case arose out of a military procurement contract between a U.S. corporation and the Air Force of Egypt. *Id.* at 908. The arbitration agreement provided that Egyptian law would govern, and that the decision of the arbitration court would be "final and binding and *cannot be made subject to any appeal or other recourse.*" *Id.* at 912. (emphasis added). After a dispute, an arbitration panel ruled in favor of Chromalloy and ordered Egypt to pay Chromalloy damages, plus interest. *Id.* at 908. Chromalloy petitioned the U.S. District Court for the District of Columbia to enforce the arbitration award. Almost simultaneously, Egypt filed a petition with an Egyptian court, which later set aside the award. *Id.*

Egypt argued that the U.S. District Court should refuse to enforce the award under Article V(1)(e) of the New York Convention because the award was set aside by an Egyptian court. In a case of first impression, the District Court, noting the discretion provided to courts by Article V, ruled in favor of Chromalloy and enforced the award, finding that deference to the Egyptian decision would violate the clear U.S. public policy in favor of final and binding arbitration. *Id.* at 913. The court was particularly persuaded by the fact that Egypt agreed in its contract with Chromalloy not to appeal the decision of the arbitral panel, finding that Egypt "repudiate[d] its solemn promise to abide by the results of the arbitration" by appealing to the Egyptian court. *Id.*

Baker Marine v. Chevron, 191 F.3d 194 (2d Cir. 1999)

The dispute in *Baker Marine* arose out of a contract to provide barge services in Nigeria; this contract included an arbitration agreement providing for arbitration under Nigerian law. *Id.* at 195. An arbitration panel ruled in favor of Baker Marine, and Baker Marine promptly sought enforcement of the award in Nigerian court. *Id.* at 196. Chevron petitioned the same Nigerian court to vacate the award. *Id.* The Court vacated the award. *Id.* Shortly thereafter, Baker Marine sought enforcement of the award in a U.S. district court. *Id.* The District Court denied Baker Marine's petition to enforce the arbitral award, concluding it would not be proper under the New York Convention and principles of comity. *Id.*

On appeal, the Second Circuit affirmed the judgment of the lower court, finding that Baker Marine had shown no adequate reason why the court should not deny enforcement by virtue of the Nigerian court's vacatur of the award. *Id.* at 197. While the Court did not elaborate on what would qualify as an "adequate reason" not to respect the Nigerian court's decision, it did distinguish the *Chromalloy* case by noting that Chevron did not violate any express promise by seeking to vacate the arbitration award to a Nigerian court. *Id.*

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004)

The *Karaha Bodas* case arose from an arbitral award made in Geneva, Switzerland, involving contracts

negotiated and allegedly breached by Perusahaan Pertambangan in Indonesia. *Id.* at 281. The arbitration agreement in these contracts provided that arbitration would take place in Geneva, and the parties later agreed that Swiss law would apply.¹ *Id.* at 288-89. The arbitral award was entered in favor of Karaha Bodas, and Karaha Bodas sought enforcement in U.S. District Court in Texas. *Id.* at 281. While those enforcement proceedings were pending, Perusahaan sought to vacate the award in a Swiss court. *Id.* The attempt to vacate the award in Swiss court failed, and the District Court granted summary judgment enforcing the award. *Id.* Perusahaan then petitioned an Indonesian court and obtained an order from that Indonesian court setting aside the award. *Id.* Perusahaan petitioned the U.S. Court of Appeals for the Fifth Circuit to reverse the District Court's decision.

The Fifth Circuit rejected Perusahaan's argument that the Indonesian court order barred enforcement of the award under the New York Convention, finding that the argument was inconsistent with the parties' agreement that Switzerland would be the neutral forum with exclusive jurisdiction over the arbitration. *Id.* at 282. The Court found that Indonesia did not have primary jurisdiction to set aside the arbitral award because Indonesia was not the situs of the arbitration and Indonesian law did not apply to the arbitration. *Id.* at 310. The Court held, therefore, that it did not have to defer to the judgment of the Indonesian court. *Id.*

Termorio v. Electranta

The dispute in *Termorio* arose out of a contract under which Termorio agreed to generate energy and Electranta, a Colombian-owned public utility, agreed to buy it. 487 F.3d at 929. The contract contained an arbitration clause which provided that any dispute would be resolved by arbitration in Colombia and governed by ICC rules. *Id.* at 931. When Electranta failed to meet its obligations under the contract, the parties submitted to arbitration in Colombia. The arbitral tribunal issued an award in excess of \$60 million in favor of Termorio. *Id.*

Shortly after the tribunal issued the award, Electranta moved to set aside the award in a Colombian court. *Id.* Colombia's Council of State (the highest administrative court) vacated the award, reasoning that the arbitration had to be conducted in accordance with Colombian law, and Colombian law "did not expressly permit the use of ICC rules in arbitration." *Id.* Termorio then sought enforcement of the award in the U.S. District Court for the District of Columbia. *Id.* In light of the Colombian court's decision vacating the arbitral award, the District Court dismissed the arbitral enforcement claim for failure to state a claim. *Id.* at 932.

On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed the judgment of the District Court, holding that because the arbitration award was lawfully nullified by the country in which the award was made, Termorio had no cause of action to seek enforcement of the award. *Id.* at 935. The Court found that Colombia had primary jurisdiction over the arbitration (as the situs of the arbitration) and that the Colombian court was a "competent authority" under Article V(1)(e). *Id.* Furthermore, the Court noted several times that there was no allegations or evidence in the record to indicate that the judgment of the Colombian court was tainted or improper. *Id.* The Court reasoned that secondary states should not second-guess the judgment of a court in a primary state when that court has lawfully acted pursuant to competent authority. *Id.* at 937. In reaching its decision, the Court relied on the reasoning of *Baker Marine* and agreed that it was not appropriate to apply domestic arbitral law to foreign awards because of the danger of conflicting judgments and encouraging the initiation of enforcement proceedings in multiple countries. *Id.*

The appellants relied heavily on *Chromalloy* to support their argument that the Court should not defer to the Colombian court's decision because the decision violated U.S. public policy. *Id.* at 937. The Court, however, found that it did not need to address *Chromalloy* because it was "plainly distinguishable . . . where an express contract provision was violated by pursuing an appeal to vacate the award." *Id.* Unlike the defendant in *Chromalloy*, Electranta "preserved its objection that the panel was not proper or authorized by law, promptly raised it in the Colombian courts, and received a definitive ruling by the highest court on this question of law." *Id.*

To the appellant's public policy argument, the court acknowledged a "public policy gloss" on Article V(1) (e) and that a foreign judgment is not entitled to deference when that judgment is against public policy "to the extent that it is repugnant to fundamental notions of what is decent and just in the state where enforcement is sought." *Id.* at 938 (citing *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)). The Court noted that this standard is high and infrequently met. *Id.* In order to find that a foreign decision violates public policy, that decision would have to clearly undermine (1) the public interest, (2) the public confidence in administration of the law, or (3) security of individual rights of personal liberty or private property. *Id.* (citing *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986)). Again, the Court found that public policy concerns did not apply to this case because appellants neither alleged nor provided any evidence to suggest that the parties' proceedings before the Colombian court or the judgment of the court violated any "basic notions of justice to which we subscribe."

Conclusion

These cases underscore the need for careful planning and attention to detail when crafting dispute resolution provisions in international contracts. It is critical to research the local arbitration laws, specifically the treaty frameworks and vacatur standards, and to ensure that the chosen arbitration rules are likely to be respected in the event that a party seeks to overturn an award in a local court. While often impractical, it is best to choose a neutral country as the situs of the arbitration, and this designation should be apparent from the face of the contract. It is also advisable to include an enforcement mechanism, similar to the one used in *Chromalloy*, that prevents either party from petitioning a foreign court to overturn an award. The parties' intent to eliminate judicial review must be clear and unequivocal. Finally, in the event an award is set aside, a U.S. court may still enforce an award if there is evidence that the foreign set-aside decision was tainted with bad faith, fraud, foul play, bias, blatant disregard for that country's own laws, or anything which violates, as *Termorio* indicates, the "basic notions of justice to which we subscribe."

The authors are grateful for the valuable contributions to this advisory made by Shannon G. Konn, an associate at McKenna Long & Aldridge LLP, and Professor Peter Rutledge at the Catholic University of America, Columbus School of Law.

¹ The Fifth Circuit noted that under the New York Convention, an agreement specifying the place of arbitration creates a presumption that the procedural law of that place applies to the arbitration. *Id.* at 290.

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