View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Fordham University School of Law

Fordham International Law Journal

Volume 40, *Issue* 3 2017 *Article* 4

The Us Approach To Recognition And Enforcement Of Awards After Set-Asides: The Impact Of The Pemex Decision

Linda Silberman* Nathan Yaffe†

*

†

Copyright ©2017 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ilj

THE US APPROACH TO RECOGNITION AND ENFORCEMENT OF AWARDS AFTER SET-ASIDES: THE IMPACT OF THE *PEMEX* DECISION

Linda Silberman & Nathan Yaffe***

I. INTRODUCTION 799
II. AN OVERVIEW OF RECOGNITION AND ENFORCEMENT OF AWARDS SET ASIDE AT THE SEAT 800
III. PEMEX: A NEW DIRECTION FOR THE UNITED STATES? 803
IV. CONCLUSION 812

I. INTRODUCTION

The decision in the *Corporación Mexicana de Mantenimiento Integral* v. *Pemex-Exploración Y Producción* case[1] [hereinafter *Pemex*] is the first US federal *appellate* decision to confirm a foreign Convention award that has been set aside at the seat. This issue of how to treat an arbitral award that has been annulled at the seat is one which most countries that are party to the New York and/or Panama Conventions also face. Thus, the Second Circuit Court of Appeals opinion and analysis in *Pemex* should be of interest not only to courts

* Martin Lipton Professor of Law, New York University School of Law. This article is based on a presentation made by Professor Silberman as part of a panel on the *Pemex* case at the 2016 Fordham Arbitration Conference. Professor Silberman thanks Benno Kimmelman, the moderator of the panel and the other participants, George Bermann, Carolyn Lamm, and Rashda Rana, for their discussion of and insights into many of the issues addressed in this article. Professor Silberman is also grateful to the Filomen D'Agostino and Max E. Greenberg Research Fund for financial support of her research in this area.

** Furman Scholar and Chief Submissions Editor for the American Journal of International Law. New York University School of Law, J.D. expected 2017.

1. Corporacion Mexicana de Mant. v. Pemex-Exploracion, 832 F.3d 92 (2d Cir. 2016) [hereinafter *Pemex II*].

in the United States, but also to courts in other countries that are parties to these Conventions.

II. AN OVERVIEW OF RECOGNITION AND ENFORCEMENT OF AWARDS SET ASIDE AT THE SEAT

Although the New York and Panama Conventions compel recognition and enforcement of arbitral awards, they also provide for certain exceptions. Article V(1)(e) of the New York Convention[2] is one of the grounds on which recognition and enforcement "may be refused" at the request of the party against whom it is invoked. The language of the New York Convention states that "the award has not yet become binding on the parties, or 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."[3] However, as underscored by the permissive language, the Conventions do not appear to impose any obligation to refuse recognition or enforcement to an annulled award. Thus, the Conventions themselves seem to leave a country free to enforce an award set aside in the country where the award was rendered.

Broadly speaking, courts faced with an award that has been set aside at the seat take one of three approaches: (1) treat the award as a nullity, with the result that there is nothing to enforce; (2) effectively ignore the set-aside, on the view that courts in each Convention country can make an independent decision about the validity of the award under its own standards; or (3) give some degree of deference to the set-aside decision, while reserving the ability to enforce the award notwithstanding the set-aside if justified under the circumstances.

A country that treats an award set aside at the seat as no award at all—because it finds nothing to recognize or enforce—views arbitration as an extension of the legal regime of the country in which

---

2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention], art. V(1)(e). Article 5(1)(e) in the Panama Convention has a similar ground. *See* Inter-American Convention on International Commercial Arbitration (Panama City, 1975) [hereinafter The Panama Convention], art. 5(1)(e).

3. The Panama Convention has similar language: "The decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made." The Panama Convention, *supra* note 2, at art. 5(1)(e).

the arbitration takes place. Thus, it is appropriate that the potential enforcing court cede to the court at the place of arbitration complete oversight and conclusive control over the award.[4] Because the parties have consciously chosen to arbitrate at that particular place, the parties can be said to expect exposure to a potential set-aside by the courts of that jurisdiction. Many countries—including Russia, Chile, Germany, and other (predominantly civil law) jurisdictions—have adopted this approach.[5]

A few countries, most notably France, take a diametrically opposed view. French arbitration law, in both its prior and present version, eliminates the Article V(1)(e) ground in the New York Convention as a basis for non-recognition.[6] The French view is that international arbitration is part of a transnational legal order and is not attached to any national legal regime. Thus, an award annulled at the seat of arbitration may still be fully enforceable in France, barring any other Convention ground justifying non-enforcement as a matter of French domestic law. Of course, the refusal to give effect to a set-aside does not mean that France necessarily enforces all awards. For example, in the *Thai-Lao Co. v. Government of Laos* case,[7] the Paris Court of Appeal refused to enforce an award set aside at the seat in Malaysia, but did so on the basis of *its own independent* review of the award under French law, invoking the ground of "excess of jurisdiction," which is a basis for non-recognition under French law.

---

4. Especially in the US literature, the seat is often referred to as the "primary jurisdiction," while any jurisdiction in which recognition and enforcement is sought is called a "secondary jurisdiction." *See generally* Alan Scott Rau, *Understanding (and Misunderstanding) "Primary Jurisdiction"*, 21 AM. REV. INT'L ARB. 47 (2010).

5. In some of these countries, there may be alternative mechanisms for enforcing the award. Under Article VII of the New York Convention, courts may nonetheless find alternative mechanisms to enforce the award. Article VII of the New York Convention permits parties to rely on laws or treaties in the enforcing court that would permit recognition or enforcement of the award on terms more favorable than what is required by the Convention. *See* New York Convention, *supra* note 2. For example, for countries party to the 1961 European Convention, Article IX(1) provides that a decision setting aside an award at the seat "shall only constitute a ground for the refusal of recognition" if the set-aside was based on the specific grounds enumerated in Articles V(1)(a)–(d), with the effect of excluding non-arbitrability or public policy under the law at the seat as reasons for refusing recognition and enforcement. *See* European Convention, art. IX(1); *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3623 (2d ed. 2014).

6. CODE DE PROCÉDURE CIVILE [C.P.C.] arts. 1525, 1520 (Fr.). An English translation of the law is available at: http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf.

7. *See* Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic, 997 F. Supp. 2d 214, 227 n. 9 (S.D.N.Y. 2014) (discussing Paris Court of Appeal decision).

Among the most undesirable consequences of the French approach of disregarding annulment at the seat is that it can lead to inconsistent awards. The reason for the inconsistency is that a second award may be issued by a tribunal at the seat of arbitration subsequent to the annulment, as was the case in both the *Hilmarton* and in *Putrabali* cases.[8]

As for the United States, courts have taken something of a middle path, appearing to follow a more discretionary approach in assessing whether to enforce an annulled award. However, it has been difficult to identify with any precision the standard that the courts in the United States have adopted. In *Baker Marine v. Chevron*, the Court of Appeals for the Second Circuit stated that it would enforce an annulled award only if there were "adequate reasons for refusing to recognize the set-aside judgments of the Nigerian court" and concluded that this was not the case on the facts before it.[9] In *TermoRio v. Electranta*, the Court of Appeals for the District Court of Columbia appeared to set a higher threshold in refusing to enforce a Colombian award set aside in Colombia.[10] The ground for the set-aside was that the arbitration clause selecting ICC Rules was a violation of Colombian law. Stating that a foreign set-aside judgment should be respected unless it was "repugnant to fundamental notions of what is decent and just in the state where enforcement is sought," the court indicated that United States courts should not go behind a foreign court's nullification of an award "absent extraordinary circumstances" and emphasized the narrowness of any "public policy" exception.[11] The D.C. Court of Appeals distinguished an earlier D.C. district court case, *Chromalloy Aeroservices* v. *Arab Republic of Egypt*,[12] which enforced an award that had been set aside

8. *Omnium de Traitement et de Valorisation v. Hilmarton*, Cour de Cassation [Cass. 1e civ.] June 10, 1997, Revue de l'Arbitrage 376 (1997) (Fr.); *PT Putrabali Adyamulia v. Rena Holding, Ltd.*, Cour de Cassation [Cass. 1e civ.] June 29, 2007, XXXII Yearbook Commercial Arbitration 299, 302 (2007).

9. Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 197 (2d Cir. 1999).

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

11. *Id.* at 937-38. It is worth noting that the relationship between the "adequate reason" test and the "extraordinary circumstances" test is not entirely clear. *TermoRio* states that *Baker Marine* is "consistent with" the extraordinary circumstances approach. *Id.* at 938. However, on its face the language in *Baker Marine* would seem to suggest a lower threshold for enforcing an award that has been set aside at the seat.

12. Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996).

at the seat, as one in which the defendant Egypt had breached its agreement not to file an appeal to nullify the award.

III. PEMEX: A NEW DIRECTION FOR THE UNITED STATES?

In *Pemex*, the district court enforced an arbitral award in favor of COMMISA—a Mexican subsidiary of KBR, a US corporation—against the Mexican-state owned petroleum company Pemex, even though the award had been set aside by a court at the Mexican seat.[13] The underlying dispute arose when contractual disagreements led to Pemex seizing oil platforms that COMMISA had been working on, and then administratively rescinding the contracts Pemex had with COMMISA. COMMISA brought an ICC arbitration in December of 2004. Pemex participated in the arbitration but challenged the tribunal's jurisdiction, arguing that the rescission constituted an "act of authority" and was therefore not arbitrable. The tribunal rejected the argument. In 2009—prior to the rendering of the award[14]—Section 98 of the Law of Public Works and Related Services came into effect, which provided that rescissions of government contracts "may not be subject to arbitration proceedings."[15] Exclusive jurisdiction was vested in the administrative courts of Mexico, and any judicial adjudication of public contract disputes was changed from 10 years to 45 days. The tribunal issued its award, finding Pemex liable and awarding COMMISA approximately US$300 million in damages. One arbitrator dissented on the ground that Section 98 of the Mexican law barred the action.[16]

Shortly thereafter, COMMISA sought to confirm the award under the Panama Convention in the New York federal district court. Pemex moved to dismiss for lack of personal jurisdiction and also moved to set aside the award in Mexico and to stay the New York proceedings. The federal district court denied the stay and confirmed

---

13. Corporacion Mexicana de Mantenimiento Integral, S.De R.L. De C.V. v. Pemex Exploracion Y Produccion, 962 F.Supp. 2d 642 (S.D.N.Y. 2013) [hereinafter *Pemex I*].

14. The award was rendered on December 19, 2009; the legislation came into effect on May 28, 2009. *See Pemex I*, *supra* note 13, at 648. There is usually an interval of several months between the close of the hearings and the issuance of the award, so it is not clear whether or to what extent the new law was addressed during the course of the hearings.

15. *See* Law of Public Works and Related Services, § 98 (Mex.) (effective May 28, 2009).

16. *Pemex I*, *supra* note 13, at 648. The dissenting arbitrator also argued that *res judicata* barred the action in light of a related *amparo* proceeding, but the *res judicata* issue was not taken up by the US court. *Id*.

the award in August 2010. While the case was on appeal to the Second Circuit, the Mexican court (the Eleventh Collegiate Court) annulled the award on the ground that arbitration of the dispute was non-arbitrable and against Mexican public policy. The Mexican court relied not only on the new law (Section 98), but also on a 1994 judgment of the Mexican Supreme Court that discussed administrative rescission of contracts, but without any reference to arbitration or arbitrability. On the basis of the set-aside, the Second Circuit Court of Appeals remanded the case in order that the district court could reconsider its decision in light of the Mexican set-aside.

On remand, the district court again confirmed the award, "declin[ing] to defer to the Eleventh Collegiate Court's ruling."[17] Its judgment was based on the conclusion that the Mexican court set-aside judgment violated basic notions of justice by applying a retroactive prohibition on arbitrability and leaving the plaintiff with no remedy.[18] Key to the district court's ruling was a determination that the Eleventh Collegiate Court—despite that Court's statements directly to the contrary—did not actually reach the result it did based solely on the 1994 judgment, but that it had instead relied on Section 98.[19] Particularly troubling to the court was the fact that Section 98 established a 45-day time limitations period for filing claims regarding administrative rescission in the designated court, which meant that the period in which COMMISA could file a claim had already elapsed by the time the Eleventh Collegiate Court judgment came down.[20]

Pemex appealed, and the Court of Appeals for the Second Circuit affirmed the district court in an opinion that conceivably adopts a new framework for recognition of an arbitral award in the aftermath of a set-aside. [21] Rather than starting with the earlier standard espoused in *Baker Marine*—that enforcement of a set-aside award is inappropriate absent an "adequate reason"—or the potentially stricter "extraordinary circumstances" formulation from *TermoRio*, the Court of Appeals for the Second Circuit framed its

17. *Id.* at 644.

18. *Id.* at 657.

19. *Id.* at 659 ("Based on the Eleventh Collegiate Court's extensive discussion of Section 98, it was this law, not the 1994 Mexican Supreme Court decision, that was critical to its decision.").

20. *Id.* at 652. The limitations period ran from the date of the rescission, in 2004.

21. *Pemex II*, *supra* note 1.

discussion around the concept of comity, with specific reference to the law on recognition of judgments. It began by describing the district court decision to enforce the award despite the set-aside as a "denial of comity" to the Mexican judgment—a formulation that the district court had never itself used.[22] Nonetheless, it affirmed the district court's confirmation of the award. Citing a series of cases from the judgment recognition context, the Court of Appeals stated that foreign judgments are "generally conclusive"—as a matter of comity—except where recognition and enforcement "would offend the public policy of the state in which enforcement is sought."[23] The Court of Appeals drew particularly heavily from *Ackermann v. Levine*, a case decided under New York's version of the Uniform Foreign Country Money-Judgments Recognition Act.[24] Indeed, in the single paragraph devoted to the content of the public policy standard itself, the court simply distilled a key passage from *Ackermann* as follows:

> The public policy exception does not swallow the rule: the standard is high, and infrequently met; a judgment that tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy. The exception accommodates uneasily two competing (and equally important) principles: [i] the goals of comity and res judicata that underlie the doctrine of recognition and enforcement of foreign judgments and [ii] fairness to litigants.[25]

Notwithstanding that it relied primarily on cases from the judgment recognition context, the Court of Appeals stated that *TermoRio* and *Baker Marine* "endorsed this approach."[26] That statement may be somewhat of a reach. *Baker Marine* never cited to any judgment recognition cases, although it did say that there were

---

22. *Pemex II*, *supra* note 1, at 100.

23. *Id.* at 105–06 (citing Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997); Ackermann v. Levine, 788 F.2d 830, 837 (2d Cir. 1986); and Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971)).

24. Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986). Notably, the practice commentaries to the UFCMJRA as incorporated into the CPLR state, "Article 53 only incorporates a *portion* of New York's comity case law into statute: specifically, that involving money judgments." N.Y.C.P.L.R. § 5301 (McKinney 2017), *C5301:1. Recognition of Foreign Country Money Judgments, Generally* (Richard C. Reilly, ed.) (emphasis in original).

25. *Pemex II*, *supra* note 1, at 106, (quoting *Ackermann*, *supra* note 24, at 841-42).

26. *Id.*

"no adequate reasons for refusing to recognize the judgments of the Nigeria court," and it mentioned "public policy" only in passing in a footnote. *TermoRio*, which did engage in a more fulsome discussion of public policy, disclaimed that US courts have "unfettered discretion to impose [their] own considerations of public policy."[27]

Moreover, the Second Circuit's application of public policy to the facts of the case is not particularly illuminating. The Court of Appeals cited four considerations in support of its conclusion that the set-aside judgment by the Mexican court contravened US public policy: (1) that it violates a contractual waiver of sovereign immunity; (2) that it amounts to retroactive application of the law which disrupted contractual undertakings; (3) that it deprives COMMISA of a forum; and (4) that it amounts to government expropriation without compensation.[28] Each of these factors merits further inquiry. The concern about violating the contractual immunity waiver and the reference to expropriation without compensation in particular raise questions. The first suggests that courts at the seat may not review whether an arbitral tribunal properly exercised jurisdiction over the dispute, which is surely not the case. The concern about expropriation looked to the US Constitution's "Takings" doctrine and to NAFTA's provision on expropriation, but there is no discussion of how these sources, as applied to the enforcement of the award in this case, would violate U.S. public policy.

The second and third grounds are stronger, but they too raise questions. First, it is an open issue as to whether an enforcing court should review a foreign set-aside judgment for *substantive* as well as *procedural* defects. And even assuming substantive concerns are an appropriate subject of inquiry, retroactive legislation is not always prohibited or against public policy—even in the United States—although it is certainly "disfavored."[29] Second, comity might suggest

---

27. *TermoRio*, *supra* note 10, at 251–52.

28. *Pemex II*, *supra* note 1, at 107–11.

29. Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic."). Yet it is important to note that the presumption against retroactive legislation is a rule of statutory interpretation: Congress may be able to pass a retroactive law—subject to certain constitutional questions about retroactive legislation—but it must indicate clearly that the law is to have retroactive effect. In the *Pemex* dispute, Section 98 "did not address whether it applied to administrative rescissions that were issued prior to its enactment." *Pemex I*, *supra* note 13, at 648. Of course, even if Section 98's silence regarding retroactive application means a US court would apply the *Landgraf* presumption—and even if

that an enforcing court should not be second-guessing a foreign court on the determination of its own law. Although *TermoRio* stated that a "narrow public policy gloss on Article V(1)(e)" could provide for enforcement of set-aside awards, nonetheless it noted various limits to US courts' invocation of public policy; it specifically disclaimed that "a court in the United States has unfettered discretion to impose its own considerations of public policy" especially where that involves "reviewing . . . the foreign court's construction of the law of the [seat]."[30] In the district court decision in *Pemex*, Judge Hellerstein also signaled his awareness of the need for caution in engaging in substantive review of foreign judgments when he wrote: "In declining to defer to the Eleventh Collegiate Court, I am neither deciding, nor reviewing, Mexican law. I base my decision not on the substantive merit of a particular Mexican law, but on its application to events that occurred before that law's adoption."[31] Nonetheless, it is clear that that the district court did make its own determination about the actual ground for the Mexican court's set-aside decision that contradicted the ground on which the Mexican court purported to base its decision.[32] Whatever the merits of the district court's conclusion, its disagreement with the foreign court's reasoning does raise sensitive issues of international comity. In a somewhat different context, the Second Circuit recently invoked comity and refused to looking behind the law of a foreign state to inquire into motive or reasoning.[33] In *Pemex*, however, the Second Circuit appeared to agree with the district court's determination that the Mexican court had not genuinely relied on the 1994 Mexican judgment and had instead

---

that presumption reflects public policy—it is another matter altogether to say that a foreign judgment setting aside an award violates US public policy for failing to apply that same statutory presumption.

30. *TermoRio*, *supra* note 10, at 251–52.

31. *Pemex I*, *supra* note 13, at 661.

32. *See supra* notes 17–20 and accompanying text.

33. In *In re* Vitamin C Antitrust Litigation, 837 F.3d 175 (2d Cir. 2016), the defendants (Chinese corporations) formed a cartel to fix the price of vitamin C exported to the United States in violation of US antitrust law. Rather than deny the allegations, defendants argued that Chinese law required them to coordinate export prices. Despite evidence that the defendants had *specifically asked* the Chinese government to fix their prices, perhaps in a move to avoid liability in the United States, the Second Circuit credited the defense and dismissed the case on the ground of international comity. The case is noteworthy because it marked the first time a ministry of the Chinese government appeared in a US proceeding as *amicus curiae*. *See id.* at 180, n.5.

based its decision on § 98,[34] stating "we do not think that the Southern District second-guessed the Eleventh Collegiate Court, which appears only to have been implementing the law of Mexico."[35] Finally, the concern about lack of access to any other forum for resolution of the dispute may be the most compelling reason the Court offered to justify ignoring the set-aside. Pemex's response was that COMMISA had been told early on to bring an action in the Mexican courts to challenge the rescission, and thus the lack of remedy was the result of its own strategic choice.

An even more troubling aspect of the Second Circuit's decision in *Pemex* is its use of an "abuse of discretion" standard for review of the district court judgment. The court stated that the "unfettered discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction" was "constrained" only by "international comity."[36] Despite the fact that neither appellate court in *TermoRio* or *Baker Marine* used an abuse of discretion standard, the Court of Appeals in *Pemex* devoted no analysis to this point. The district court in *Pemex* properly viewed *TermoRio* and *Baker Marine* as holding that a court has only "narrow discretion" to confirm an award that has been set aside by a competent court.[37] But that discretion is the

34. *See Pemex II*, *supra* note 1, at 109 ("One of PEP's own witnesses, in the evidentiary hearing before the Southern District, testified that the 1994 decision was a 'weak premise' for the Eleventh Collegiate Court to rely upon. . . . It is therefore unsurprising that the opinion of the Eleventh Collegiate Court relies heavily on Section 98 and very little on the Mexican Supreme Court decision.").

35. *Id.* at 111. The claim that the district court did not second guess the Eleventh Collegiate Court is not entirely convincing. The district court said, "it was [§ 98], not the 1994 Mexican Supreme Court decision, that was critical to [the Eleventh Collegiate Court's] decision." *Pemex I*, *supra* note 13, at 659. However, the Eleventh Collegiate Court purportedly relied at least in part on case law that predated Section 98. Thus, the Second Circuit's conclusion that the US enforcement decision did not contradict the Mexican set-aside decision on what was effectively a point of Mexican law is not illuminating. Perhaps it would have been preferable for the Court of Appeals to directly confront the question of when the deference typically owed to a court at the seat when interpreting its own law is outweighed by other considerations.

36. *Id.* at 106. Interestingly, as authority for the proposition that "we review a district court's decision to extend or deny comity to a foreign proceeding for abuse of discretion," *Pemex* cited Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999), a case that involved dismissing a US debt collection suit in favor of a Brazilian bankruptcy proceeding, in which the US defendant's assets were being liquidated, on the grounds of international comity.

37. *Pemex I*, *supra* note 13, at 657. (The district court referenced Article 5 of the Panama Convention, as implemented by the FAA [Chapter 3] and stated: "The statutory phrase, 'may,' gives me discretion but, it appears from [*TermoRio* and *Baker Marine*], a narrow discretion.").

discretion provided by the "may refuse" language of the New York and Panama Conventions and refers to the discretion that a country has in determining how to deal with a set-aside. It does not and should not address the allocation of decision-making between the district and appellate court. Similarly, "abuse of discretion" is not the applicable standard of review of a lower court's ruling in the context of judgment recognition, which is generally said to be "de novo."[38] Use of "de novo" review is necessary to develop consistent standards in an area that requires predictability and uniformity.

Nonetheless, the adoption by the Court of Appeals in *Pemex* of a "judgments framework" as the means to evaluate a set-aside is desirable and provides criteria and guidance for such assessments.[39] A similar standard for treating set-asides has been articulated in the 2012 Draft of the American Law Institute's Restatement of the Law Third on International Commercial Arbitration: Section 4-16(b) of the Draft provides that a court in the United States may confirm, recognize, or enforce an award that has been set aside by a competent authority "if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances."[40]

A few courts elsewhere appear to have engaged in a similar analysis. In the *Yukos Capital Sarl v. Rosneft* case,[41] the Amsterdam Court of Appeal enforced an award that was set aside by the Russian

38. DeJoria v. Maghreb Petroleum Expl., S.A., 804 F.3d 373, 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2486, 195 L. Ed. 2d 822 (2016) ("Whether the judgment debtor established that one of these non-recognition provisions applies is a question of law reviewed de novo."). *DeJoria*, in which recognition was sought under Texas's Uniform Foreign Country Money–Judgment Recognition Act, noted that it used *de novo* review because that was the standard under state law. Although not entirely analogous, the Second Circuit has employed *de novo* review when a lower court grants summary judgment on a judgment recognition question. SerVaas Inc. v. Republic of Iraq, 540 F. App'x 38, 40 (2d Cir. 2013). The same standard of review should be applied in the award recognition context.

39. *See generally* Linda Silberman & Maxi Scherer, *Forum Shopping and Post-Award Judgments*, *in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 313–45 (Franco Ferrari, ed., 2013). *See also* William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. OF INT. L. 805 (1999); Linda J. Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 32–36 (2009).

40. American Law Institute, Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft No. 2 § 4-16 (Apr. 16, 2012).

41. *Yukos Capital Sarl v. OAO Rosneft, Amsterdam Court of Appeal*, Apr. 28, 2009 (Neth.), XXXIV Y.B. COMM. ARB. 703 (2009).

courts, concluding that the Russian set-aside was a foreign judgment rendered by a judicial body that lacked impartiality and independence and thus should not be recognized. The Dutch *Yukos* case was probably an "easy" case for a "judgments approach" because the need for impartial tribunals and fairness of proceedings is a universal ground for non-recognition of a judgment. "Public policy" is also a ground for non-recognition of foreign judgments, but that is a more amorphous standard, and was recognized as such by the Court of Appeals in *Pemex*, which cautioned that invocations of public policy must be limited and therefore require a high hurdle. Although it may be questioned whether the "public policy" exception should be limited to "process" defects in the set-aside court, as in *Yukos*, or can also include substantive matters such as retroactivity, substantive standards of "decency and justice" are often invoked in traditional judgment-recognition cases. Thus, such standards, along with acceptable practices in international arbitration, can and should properly inform public policy in this context.

One need not go as far as the late Professor Hans Smit, who proposed that all annulments be presumptively disregarded in cases where the set-aside had taken place in the "home court" of one of the parties, and at its request,[42] but concerns about local bias and parochialism at the situs cannot be entirely disregarded where a state-owned entity is involved and that state was the only realistic place of arbitration. The late Andreas Lowenfeld, Professor Silberman's colleague at NYU, thought set-asides should not be respected if they were "fishy." In our view, "fishy" is not a legal standard that one that can define or legitimately invoke, and although the "judgments approach" has its limitations, it is a substantial improvement over "fishy" or mere "discretion."

Further word on the propriety of a "judgments approach" will have to await another case. Although Pemex filed a petition for certiorari in the Supreme Court challenging both the standard applied by the Second Circuit and what it characterized as the US court's inappropriate inquiry into the Mexican set-aside decision, the case ultimately settled.[43] It is worth keeping an eye on another set-

---

42. See Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. OF INT'L ARB. 297, 304 (2007).

43. *KBR Resolves Decade Long Despite in Mexico*, OFFSHORE ENERGY TODAY (10 April 2017), *available at* http://www.offshoreenergytoday.com/kbr-resolves-decade-long-dispute-in-mexico-collects-435-million/. The petition for certiorari also raised two additional

aside/recognition case pending in the Second Circuit. In *Thai-Lao Lignite v. the Government of Laos*, a district court in New York refused to enforce an award in favor of a Thai company against the Government of Laos after it had been set aside by a court seated in Malaysia.[44] *Thai-Lao* has a peculiar twist because the district court had previously confirmed the award—a decision that was affirmed by the Court of Appeals for the Second Circuit.[45] After the confirmation action in the United States, the Government of Laos successfully challenged the award in Malaysia. The ground for the set-aside in Malaysia was that the arbitral tribunal exceeded its jurisdiction by extending the agreement to reach non-parties and claims related to other contracts. The Government of Laos filed to have the case re-opened in light of the set-aside,[46] and by the time the district court issued its decision, the district decision in *Pemex* had just been rendered. In distinguishing *Thai-Lao* from *Pemex*, the district judge pointed out that the set-aside judgment in *Thai-Lao* was in a neutral country and did not involve any entity of the State of the seat. It is also the case that the ground for set-aside in Malaysia was the equivalent of a New York Convention defense whereas the ground in Mexico was arguably a "local" arbitrability issue favorable to the state entity. Finally, unlike in *Pemex*, the Malaysian High Court

---

points. First, Pemex challenged the augmentation of the award at the enforcement stage by the district court and the Second Circuit by ordering Pemex to pay COMMISA US$

106 million over what the arbitrators awarded, as compensation for performance bonds Pemex collected after the award issued. Second, Pemex argued that the district court had no personal jurisdiction over it and thus could not entertain an action to confirm the award. The Court of Appeals did not expressly address the question of whether §1605(a)(6) the Foreign Sovereign Immunities Act ("FSIA"), which provides an exception for immunity where "the agreement or award is (or may be) governed by a treaty or international agreement in force for the United States which calls for the recognition and enforcement of arbitral awards," also provides a constitutional basis for jurisdiction. The panel majority held that when Pemex sought remand for reconsideration in light of the set aside, it forfeited its personal jurisdiction defense, despite timely raising, fully briefing and arguing the point. *Pemex II*, *supra* note 1, at 101. One judge dissented on the "forfeiture" point. In any event, the full panel agreed that Pemex, although formally a foreign corporation, was to be treated as the foreign sovereign itself and thus was not entitled to Due Process protection. *Pemex II*, *supra* note 1, at 102–03.

44. *See* Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic, 997 F. Supp. 2d 214, 227 (S.D.N.Y. 2014).

45. Thai–Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic, 2011 WL 3516154, (S.D.N.Y. Aug. 3, 2011) (Wood, J.), *aff'd*, 492 F. App'x 150 (2d. Cir. 2012), *cert. denied*, 133 S. Ct. 1473 (Feb. 21, 2013).

46. *See* Fed. R. Civ. P. 60(b)(5).

decision did not leave the losing party without a remedy, as it merely ordered re-arbitration before a different panel of arbitrators.[47]

IV. CONCLUSION

The *Pemex* case may have signaled a new approach for the United States to the recognition of awards that have been set aside at the seat. The move toward a judgments approach is a welcome development in providing a framework by which to evaluate the set-aside of a foreign Convention award. However, the *Pemex* opinion is not entirely satisfactory. To the extent a court will engage in review of both substantive and procedural defects in the foreign set-aside judgment, comity would seem to require some deference to the foreign judgment when the foreign court is interpreting its own law. It is unclear whether the Second Circuit provided that deference in the instant case. Also, the invocation of an "abuse of discretion" standard to review the district court's ruling to disregard the foreign set-aside seems wrong and threatens to undermine uniformity and consistency at the recognition stage and potentially erodes the supervisory authority of courts at the seat. The need for some inquiry into the basis of the foreign set-aside does seem appropriate, but further development of the issues we have raised will nonetheless be necessary to make that approach effective and acceptable.

---

47. *See Thai-Lao*, *supra* note 44, at 227.