

PROTECTING AGAINST PROTECTIONISM: *COMMISA v. PEMEX*

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TABLE OF CONTENTS

I.	INTRODUCTION	227
II.	BACKGROUND.....	230
	A. <i>Selecting Arbitration</i>	230
	B. <i>Legal Principles: The Panama Convention, the New York Convention, and the Federal Arbitration Act</i>	232
	C. <i>History of COMMISA v. PEP</i>	235
III.	APPROACHES U.S. COURTS HAVE TAKEN IN DECIDING WHETHER TO ENFORCE ANNULLED AWARDS	238
	A. <i>Broad Enforcement Authority</i>	238
	B. <i>No Enforcement Authority</i>	239
	C. <i>Limited Enforcement Authority</i>	241
IV.	INTERNATIONAL APPROACHES TO ENFORCEMENT.....	242
	A. <i>Ability to Annul Arbitral Awards</i>	242
	1. <i>France: Broad Enforcement Authority</i>	243
	2. <i>The Netherlands: Narrow Enforcement Authority</i>	245
	3. <i>No Enforcement Authority</i>	246
	B. <i>The Paulsson—van den Berg Debate</i>	246
V.	ANALYZING THE PROTECTIONIST RATIONALE IN ENFORCING ANNULLED AWARDS.....	248
	A. <i>Protectionism in COMMISA v. PEP</i>	248
	B. <i>Protectionism in Arbitration: Annulling Awards and Limiting Arbitration</i>	251
	C. <i>Protecting Arbitration and Judicial Values</i>	253

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<i>D. Enforcing Annulled Awards: Upholding Pre-Contractual Expectations and the Purposes of International Arbitration</i>	255
<i>E. Upholding the Parties' Informed Expectations</i>	257
<i>F. Protecting International Comity</i>	258
<i>G. Possible Enforcement Scenarios in the United States</i>	259
VI. CONCLUSION	260

I. INTRODUCTION

Suppose that an American company enters into a contract with a subsidiary of a foreign country. The deal falls apart after the contract is nearly complete. According to the investment contract, all contractual disputes must be resolved through arbitration in the foreign country. The American company initiates arbitration, but then the foreign government adopts a series of substantive and procedural measures intended to harm the American company's interests. Though the international arbitration panel proceeds to find in favor of the American company, the foreign country's courts later annul the favorable award. Under such circumstances, can the American company nonetheless enforce the favorable award in the United States or in another foreign country? Does this answer accord with international arbitration practice?

Such a scenario recently confronted the Second Circuit Court of Appeals in *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. (COMMISA) v. Pemex-Exploración y Producción (PEP)*.¹ There, the Second Circuit upheld the Southern District of New York's enforcement of an arbitration award annulled in Mexico, the forum state.² This brought at least a temporary end to the thirteen-year dispute between COMMISA and PEP.³ The Second Circuit concluded that the district court's holding was in line with the Panama and New York Conventions, despite the rarity of such a ruling.⁴ The court declined to defer to the Mexican court in the interest of international comity,⁵ holding that the Mexican court's decision to annul the award went against the U.S. policy of allowing recourse for contractual violations, and procedural technicalities made it nearly impossible for COMMISA to bring suit against PEP in any other forum.⁶ The court reasoned that the enforcement

¹ See *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016) [hereinafter *COMMISA v. PEP*].

² *Id.*

³ As of April 2017, this dispute has officially ended. In January 2017, PEP filed a petition for writ of certiorari with the Supreme Court. While this petition was being considered, the parties settled, with PEP paying KBR, COMMISA's parent company, \$435 million. See Chuck Stanley, *Mexican Oil Co. Settles \$435M Dispute With KBR*, LAW360 (Apr. 10, 2017), <https://www.law360.com/articles/911580/mexican-oil-co-settles-435m-dispute-with-kbr>.

⁴ *COMMISA*, 832 F.3d at 111.

⁵ International Comity is "[t]he principle that one sovereign nation voluntarily adopts or enforces the laws of another sovereign nation out of deference, mutuality, [or] respect." *Comity of Nations*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/comity_of_nations (last visited Sept. 10, 2017).

⁶ *COMMISA*, 832 F.3d at 108–10.

of this annulled award was justified to “vindicate ‘fundamental notions of what is decent and just’ in the United States.”⁷

While the Panama and New York Conventions do grant courts considerable discretion in the enforcement of arbitration awards, this ruling marked the first time that a court enforced an annulled arbitration award *explicitly* on the basis of U.S. judicial and public policy.⁸ This decision changed the judicial landscape of enforcing arbitral awards in the United States and furthered a discussion around the enforceability of awards annulled in their arbitral forum. This Note provides a way to categorize different approaches to interpreting decisions regarding the enforcement of annulled awards and argues that U.S. courts implement U.S. judicial values to determine whether to enforce annulled awards.

Part II of the Note will give a brief overview of the Second Circuit’s decision in *COMMISA v. PEP* before explaining the reasons parties select arbitration to adjudicate disputes and the overall purposes and benefits of selecting arbitration, rather than judicial litigation to resolve disputes. It will then discuss the prevalence of arbitration clauses in certain contracts, particularly in procurement contracts. This section then explains the importance of the Second Circuit’s decision, particularly as it relates to understanding the reasons why parties select arbitration to resolve their disputes, and the usual deference to international comity when courts are faced with a decision to enforce awards arbitrated in a different forum. Part II will conclude by discussing the reason why *COMMISA v. PEP* was a landmark decision, and how this case differed from the only other decision in which a U.S. court upheld a lower court’s enforcement of an award annulled in the arbitral forum.

Part III will discuss the ability of states to enforce, or decline to enforce, arbitral decisions awarded or annulled in a different forum state under the New York and Panama Conventions. This section will also address the Federal Arbitration Act, which affords U.S. courts the ability to implement provisions of these Conventions. It will then discuss the history of *COMMISA v. PEP* and the application of these Conventions by the Southern District of New York and the Second Circuit to enforce an annulled award.

⁷ See *id.* at 107 (stating 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 here is appropriate only to vindicate ‘fundamental notions of what is decent and just’ in the United States.” (quoting *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986))).

⁸ See generally *In re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996). *Chromalloy* marked the first time that the United States enforced an annulled award, but there, the court’s decision was based on a policy in favor of binding arbitration, rather than the policy concerns outlined in *COMMISA v. PEP*.

This part will include an analysis of the United States' Court of Appeals for the District of Columbia's decision in *In re Chromalloy Aeroservices and the Arab Republic of Egypt* to understand the first time that an annulled award was enforced in a U.S. court—twenty years before *COMMISA v. PEP* was decided. An overview of *Chromalloy* will provide an explanation of one of the three approaches that U.S. courts have taken in deciding whether to enforce annulled awards. After a discussion of the “broad enforcement authority” approach in *Chromalloy*, the “no enforcement authority” approach from *Baker Marine*⁹ and *Spier*¹⁰ will be analyzed before finally analyzing the “limited enforcement authority” approach under *TermoRio*.¹¹ Each of these enforcement approaches, or rather lack of enforcement in many cases, has revolved around an interpretation of the authority courts have under the New York or Panama Conventions, as well as a discussion of applicable U.S. judicial policy.

Part IV will then discuss how other states have interpreted the enforcement authority granted under the New York Convention. Based on the same three categories outlined above, this section will focus on “broad enforcement authority” in France, a “limited enforcement authority” followed by Dutch courts, and the “no enforcement authority” reasoning of British and German courts. This part will also provide a commentary on the debate between Jan Paulsson and Albert Jan van den Berg regarding the scope of the New York Convention and whether states may enforce awards that have been annulled in the seat of arbitration.

Finally, this Note will discuss states' underlying protectionist reasons for enforcing annulled awards. This Note will argue that courts that choose to enforce or not to enforce annulled awards do so to protect their judicial values. This was the circumstance in *COMMISA v. PEP*, where the Second Circuit's decision and interpretation of the New York and Panama Conventions was a way to protect American judicial values in response to the Mexican government's protectionist measures. This section will analyze the Second Circuit's deference to judicial principles of equity, *res judicata*, and the importance of providing parties with a forum in which to have their disputes heard. Finally, this part will examine contractual principles governing expectations at the time of contracting and risk allocation. While it would seem that the Second Circuit's decision to enforce the annulled award was a way to protect an American company against an unfair retroactive application of a law that benefitted a subsidiary of a foreign government, by analyzing other states' rationales for enforcing annulled

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

¹⁰ *Spier v. Calzaturificio Tecnica S.p.A.*, 663 F. Supp. 871 (S.D.N.Y. 1987).

¹¹ *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 930 (D.C. Cir. 2007).

awards, it appears that this was actually a way to protect judicial values rather than to protect a particular company. Ultimately, Western judicial systems, particularly the U.S. judicial system, take pride in upholding core judicial values of fairness and party autonomy.

II. BACKGROUND

The invocation of what commentators have called the “judgment recognition framework,” rather than an “arbitration policy framework,” has raised debate over the inquiry to be applied to determine whether to enforce annulled arbitration awards.¹² A judgment recognition framework analyzes whether the judgment rendered in the forum state is valid. An arbitration policy framework analyzes whether the arbitral decision frustrated the purposes of arbitration. Arbitration is intended to be a method of “expeditious resolution of disputes” that avoids “protracted and expensive litigation.”¹³ Yet, the controversy surrounding the *COMMISA* decision led to a protracted and incredibly expensive dispute that will inevitably impact future commercial arbitral disputes.

A. *Selecting Arbitration*

Arbitration clauses are particularly prevalent in commercial and procurement contracts because they afford parties the ability to control key factors should a dispute arise in the course of a contract.¹⁴ Moreover, arbitration allows parties the opportunity to select arbitrators with knowledge of different legal systems in cross-border disputes to ensure decisions are reached in a fair manner.¹⁵ Ultimately, “businesses perceive international arbitration as providing a neutral, speedy and expert [adjudicated] dispute resolution process, largely subject to the parties’ control, in a single, centralized forum, with internationally-enforceable dispute resolution

¹² Donald Donovan et al., *Client Update: U.S. Second Circuit Affirms Decision Enforcing Annulled Arbitral Award*, DEBEVOISE & PLIMPTON (Aug. 12, 2016), http://www.debevoise.com/~media/files/insights/publications/2016/08/20160812_us%20second_circuit_affirms_decision_enforcing_annulled_arbitral_award.pdf.

¹³ See *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2d Cir. 1998).

¹⁴ The arbitral process affords parties the opportunity to contractually design the dispute resolution process, including the length of testimony, the location of decision making, the applicable laws, and the parties who will adjudicate the hearing. Furthermore, the process is much more flexible, confidential, and permanent than traditional adjudication through national courts. See Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, AM. B. ASS’N (Mar. 2012), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

¹⁵ *Id.*

agreements and decisions.”¹⁶ Arbitration allows for commercial investments and international development to be protected when foreign parties contract for various services.

Traditionally, U.S. courts have adopted a judgment recognition framework, rather than an arbitration policy framework.¹⁷ American courts have often relied on the principle of international comity to give deference to awards made in foreign jurisdictions by foreign sovereigns.¹⁸ This deferential treatment provides a way for American courts to avoid interference with foreign relations by overturning a decision made by foreign sovereigns. Yet, as will be later discussed, the New York and Panama Conventions provide courts with the ability to negate a foreign decision under certain circumstances.¹⁹ Largely as a result of international comity, U.S. courts have generally declined to enforce awards annulled in the seat of arbitration. The controversial outcome in *COMMISA v. PEP* is only the second time that courts have decided to enforce an annulled award.

In *Chromalloy Aeroservices v. Arab Republic of Egypt*, the D.C. District Court enforced an arbitral award previously annulled at the seat of arbitration in Egypt.²⁰ In *Chromalloy*, the court looked to Article VII of the New York Convention in deciding to enforce the award as to not violate U.S. public policy.²¹ The court analyzed the text of Article VII, particularly its emphasis on parties’ rights in the enforcing jurisdiction.²² Ultimately, the court held that the United States’ policy of final and binding arbitration of commercial

¹⁶ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 73 (2d ed. 2014) (citing Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT’L ARB. 163 (2011)).

¹⁷ Donovan et al., *supra* note 12.

¹⁸ See Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS., 19, 19–38 (Summer 2008), <http://scholarship.law.duke.edu/lcp/vol71/iss3/2> (citing Justice Rehnquist’s opinion in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972)). In this case, Justice Rehnquist acknowledged numerous doctrines that are “judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal government.”

¹⁹ See Inter-American Convention on International Commercial Arbitration art. (5), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 [hereinafter Panama Convention]; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. (6), June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

²⁰ *In re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907, 908 (D.D.C. 1996).

²¹ *Id.* at 914. See New York Convention art. (7), June 10, 1958, 21 U.N.T.S. 2517 (“The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”).

²² *In re Chromalloy*, 939 F. Supp. at 913–14.

disputes is “unmistakable, and supported by treaty, by statute, and by case law.”²³ The court declined to extend the previously relied upon principle of international comity to the arbitral tribunal, stating that “[n]o nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum.”²⁴ After the court’s decision in *Chromalloy*, it appeared as though the U.S. arbitral landscape would change, and, perhaps, the United States would enforce annulled awards regardless of the principle of comity.²⁵ Yet, until the U.S. judicial system was faced with *COMMISA v. PEP*, the courts consistently declined to differ from decisions rendered by foreign sovereigns.

B. Legal Principles: The Panama Convention, the New York Convention, and the Federal Arbitration Act

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention) were “intended to unify nations and forego regional standards for handling arbitration disputes by adopting a standardized arbitration framework, thereby doing away with national peculiarities concerning enforcement requirements and procedures.”²⁶ Regardless of which convention applies in an arbitral proceeding, the outcome in the United States is the same.²⁷

The Panama and New York Conventions give the member states substantial discretion in enforcing awards, yet they “evinced a ‘pro-

²³ *Id.* at 913 (“The Federal Arbitration Act ‘and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act,’ demonstrate that there is an ‘emphatic federal policy in favor of arbitral dispute resolution’ . . .”).

²⁴ *Id.* (citing *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984)). See *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (emphasizing the protection of the “rights of its own citizens” in reaching this decision).

²⁵ See *Client Alert Commentary, Second Circuit Affirmed Enforcement of ICC Arbitral Award Annulled Abroad*, LATHAM & WATKINS (Aug. 6, 2016), <https://www.lw.com/thoughtLeadership/second-circuit-affirmed-enforcement-of-ICC-arbitral-award-annulled-abroad>.

²⁶ Danielle Dean & Chelsea Masters, “*In the Canal Zone*”: *The Panama Convention and Its Relevance in the United States Today*, ARB. BRIEF 2, no. 1, 90–102 (2012) (citing Nigel Blackaby et al., *Overview of Regional Developments*, in *INTERNATIONAL ARBITRATION IN LATIN AMERICA* 3 (Nigel Blackaby et al. eds., 2002)).

²⁷ Even if the outcome would appear to be different under the two Conventions, courts have interpreted the Panama Convention as an extension of the New York Convention, “particularly when analyzing disputes to compel arbitration, determine jurisdiction, and disputes over enforcement of an arbitral award.” Dean & Masters, *supra* note 26. Regardless, the Panama Convention applies when a majority of the party States “have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States. . . .” 9 U.S.C. § 305 (1994).

enforcement bias.’ ”²⁸ Moreover, Article V of the New York Convention states that a state “may”²⁹ refuse to recognize annulled awards “suspended by a competent authority of the country in which, or under the law of which, that award was made.”³⁰

Article V provides that:

1. A court can refuse to enforce an award at the request of a party, if the party gives proof that:
 - a. The parties were incapacitated, or the agreement is invalid under the law where the award was made;
 - b. The party was not given proper notice of the proceedings or notice to appoint an arbitrator;
 - c. The award is outside the scope of the arbitration;
 - d. The composition of the arbitral proceedings did not accord with the parties’ agreement; or
 - e. The award is not binding on the parties, or has been set aside or suspended in the arbitral forum.
2. Recognition can also be refused if:
 - a. The subject matter of the award cannot be decided under the laws of that country; or
 - b. The recognition or enforcement would be contrary to public policy in the country where enforcement is sought.³¹

²⁸ See *COMMISA v. PEP*, 832 F.3d 92, 105 (2d Cir. 2016) (citing *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997)). Accord *CHRISTIAN BÜHRING-UHLE ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 59 (2d ed. 2006) (discussing the New York Convention’s minimum standard for the enforcement of awards).

²⁹ Mike McClure, *Enforcement of Arbitral Awards That Have Been Set Aside at the Seat: The Consistently Inconsistent Approach Across Europe*, KLUWER ARBITRATION BLOG (June 26, 2012), <http://kluwerarbitrationblog.com/2012/06/26/enforcement-of-arbitral-awards-that-have-been-set-aside-at-the-seat-the-consistently-inconsistent-approach-across-europe/> (“On a plain reading of the language of the New York Convention, the word ‘may’ denotes an option and, therefore, there should in theory be no bar to a state recognising [sic] and enforcing an arbitral award if it has been set aside at the seat of the arbitration.”).

³⁰ New York Convention art. 5, June 10, 1958, 21 U.S.T. 2517.

³¹ *Id.* The text states:

- (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or,

In *COMMISA v. PEP*, the Southern District of New York also relied on Article VI of the Convention, which states that:

[i]f an application for the setting aside . . . of the award has been made to a competent authority referred to in Article (V)(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.³²

The Federal Arbitration Act (FAA) incorporates the Panama and New York Conventions into U.S. law and allows the U.S. courts to enforce international arbitral awards.³³ The FAA allows awards to be vacated:

-
- failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) 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.
- (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

³² New York Convention art. (6), Dec. 29, 1970, 21 U.S.T. 2517.

³³ See 9 U.S.C. § 301 (1990) (stating that the "Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter"). Accord BORN, *supra* note 16, at 709.

1. [W]here the award was procured by corruption, fraud, or undue means;
 2. [W]here there was evident partiality or corruption in the arbitrators, or either of them;
 3. [W]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 4. [W]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.³⁴

“[T]he ultimate test of any arbitration proceeding is its ability to render an award which, if necessary, will be recognized and enforced in relevant national courts.”³⁵

C. *History of COMMISA v. PEP*

In 1997, COMMISA, a Mexican subsidiary of the American contracting conglomerate KBR, Inc., entered into a contract with PEP, an oil and gas subsidiary of PEMEX, the “state oil and gas company,” to build oil platforms in the Gulf of Mexico.³⁶ The original contract contained an arbitration clause requiring disputes related to the contract to be arbitrated in Mexico City in accordance with International Chamber of Commerce (ICC) regulations.³⁷ The contract also contained an “administrative rescission” provision giving PEP the unilateral right to rescind the contract if COMMISA breached or abandoned the work, as well as a requirement that COMMISA post performance bonds.³⁸

³⁴ 9 U.S.C. § 10 (2002) (originally codified 1947).

³⁵ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 704 (2d ed. 2001).

³⁶ *COMMISA v. PEP*, 832 F.3d 92, 97–98 (2d Cir. 2016).

³⁷ *Id.* at 98.

³⁸ *Id.*

In May 2003, the dispute between COMMISA and PEP began when COMMISA disagreed with PEP's decision to fully complete the platforms before moving them into the Gulf.³⁹ Unable to reach an agreement, the parties decided to enter into a new contract, which contained the same arbitration and administrative rescission provisions as the original contract.⁴⁰ In March 2004, the dispute came to a head when PEP administratively rescinded the contract, forcing COMMISA employees from the worksite.⁴¹ In December 2004, COMMISA filed a demand for arbitration with the International Chamber of Commerce, per the terms of the contract.⁴² At the same time, COMMISA filed an "*amparo* action"⁴³ with the Mexican district court, to challenge the constitutionality, appropriateness, and timeliness of PEP's invocation of administrative rescission.⁴⁴ The Mexican district court found for PEP in the *amparo* action, but arbitration had already begun in May 2005, before the court reached a decision.⁴⁵ In December 2007, two developments in Mexican law led to COMMISA's claim against PEP being barred in Mexico: the forum for public contracts was changed to the Tax and Administrative Courts, which no longer allowed arbitration of such contracts, and the statute of limitations on such claims was decreased from ten years to forty-five days.⁴⁶ Another significant change in Mexican law occurred in May 2009, when Section 98 of the Law of Public Works and Related Services was enacted. Section 98 stated that disputes arising out of administrative rescission and early termination of a contract were no longer subject to arbitration.⁴⁷

In December 2009, the arbitral tribunal issued its finding in favor of COMMISA.⁴⁸ The tribunal found that PEP had in fact breached the contracts with COMMISA and awarded COMMISA approximately \$300 million in damages.⁴⁹ COMMISA sought to have the award confirmed in the Southern District of New York in August 2010.⁵⁰ PEP appealed.⁵¹ Simultaneously, PEP filed an *amparo* action that eventually made its way

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ An *amparo* action is filed to remedy a lost constitutional guarantee.

⁴⁴ *COMMISA*, 832 F.3d at 98.

⁴⁵ *Id.* at 98–99. The arbitral panel would not reach a decision until December 2009.

⁴⁶ *Id.* at 99.

⁴⁷ *Id.* (stating that "administrative rescission, early termination of the contracts and such cases as the Regulation of this Law may determine may not be subject to arbitration proceedings").

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

into the Eleventh Collegiate Court of Mexico, which held that PEP's administrative rescission could not be arbitrated and consequently annulled the award set forth by the arbitral tribunal as a result of Section 98.⁵² PEP then sought to have the annulment considered in the appeal from the district court's confirmation.⁵³ After considering whether Section 98 could be applied retroactively, as well as the recourse COMMISA would have available if the court followed the decision of the Eleventh Collegiate Court, the Southern District of New York "decline[d] to defer to the Eleventh Collegiate Court's ruling," because the annulment "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 COMMISA without an apparent ability to litigate its claims."⁵⁴

PEP appealed the award to the Second Circuit Court of Appeals, which upheld the lower court's finding.⁵⁵ The Court interpreted the Panama Convention to mean that "a district court *must* enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses; if one of the defenses is established, the district court *may* choose to refuse recognition of the award."⁵⁶ In considering the public policy issues surrounding the award, the Court stated that "[a] judgment is unenforceable as 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.'" ⁵⁷ This public policy exception seems to "accommodate" "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.'" ⁵⁸ The court made four considerations before affirming a landmark decision to enforce an annulled award.⁵⁹ The court considered: "(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation."⁶⁰

The court ultimately affirmed the award because the result of Mexico's changing laws violated the "domestic principles of claim preclusion" and

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 100.

⁵⁵ *Id.* at 97.

⁵⁶ *Id.* at 106.

⁵⁷ *Id.* (quoting *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986)).

⁵⁸ *Id.* (quoting *Ackermann*, 788 F.2d at 841).

⁵⁹ *Id.* at 107.

⁶⁰ *Id.*

“[a]bsent confirmation of the award, COMMISA would lose the opportunity to bring its claims because of the change in Mexican law subjecting COMMISA’s claims to the forty-five-day statute of limitations in the Tax and Administrative Court.”⁶¹ Furthermore, COMMISA’s claims would be barred by *res judicata*, and PEP, “acting on behalf of the Mexican government,” would unjustly benefit at COMMISA’s expense.⁶²

III. APPROACHES U.S. COURTS HAVE TAKEN IN DECIDING WHETHER TO ENFORCE ANNULLED AWARDS

A court’s ability to enforce or not enforce an award can provide a way for courts to protect their judicial values regardless of a decision rendered in a different jurisdiction. The Second Circuit’s decision in *COMMISA v. PEP* employs one of the three approaches taken by U.S. courts in deciding whether to enforce annulled awards. In *Chromalloy*, the D.C. District Court recognized the broad authority to enforce awards under the New York Convention.⁶³ Conversely, in *Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd.*⁶⁴ and *Spier v. Calzaturificio Tecnica S.p.A.*, Second Circuit courts held that they had no authority to enforce awards annulled in foreign courts.⁶⁵ Finally, in *TermoRio S.A. E.S.P. v. Electranta S.P. et al.*, the D.C. Circuit recognized that there was limited authority to enforce such awards when presented with evidence of “tainted” or unauthentic foreign proceedings—this situation finally transpired in *COMMISA v. PEP*.⁶⁶

A. Broad Enforcement Authority

In *Chromalloy*, the D.C. District Court disregarded the principle of international comity and enforced the annulled award—the first time a U.S. court made such a decision.⁶⁷ Here the court faced an investor-state dispute over a military procurement contract.⁶⁸ Finding Egypt liable for cancellation of the contract, the arbitral panel ordered Egypt to pay certain sums to the corporation.⁶⁹ After this award was decided, Egypt sought to have it

⁶¹ *Id.* at 110.

⁶² *Id.*

⁶³ See *In re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907, 909–10 (D.D.C. 1996).

⁶⁴ *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999).

⁶⁵ *Spier v. Calzaturificio Tecnica S.p.A.*, 663 F. Supp. 871 (S.D.N.Y. 1987).

⁶⁶ *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 930 (D.C. Cir. 2007).

⁶⁷ See *In re Chromalloy*, 939 F. Supp. at 908.

⁶⁸ *Id.*

⁶⁹ *Id.*

nullified by an Egyptian court.⁷⁰ The Egyptian court suspended and then nullified the award.⁷¹ The U.S. court found the arbitral award to be valid and affirmed it, despite Egypt's objections based on the "requirement" of international comity.⁷²

The court first analyzed the requirements to enforce a foreign judgment in light of the "U.S. public policy in favor of final and binding arbitration of commercial disputes. . . ."⁷³ Looking to the FAA⁷⁴ and the New York Convention, the court concluded that "[a] decision by [the] Court to recognize the decision of the Egyptian court would violate [the] clear U.S. public policy."⁷⁵ The court also analyzed the role of international comity and the reach of that principle before finding that the U.S. was not required to give *res judicata* effect to the Egyptian court's decision.⁷⁶ *Chromalloy* presented U.S. courts with the first opportunity to discern the enforceability of annulled awards.⁷⁷ This decision allowed U.S. courts to weigh U.S. policy and law more favorably than the law of the country of origin in assessing the validity of an award.⁷⁸ After *Chromalloy*, it was assumed that the U.S. would provide a forum for the enforcement of annulled awards, but despite numerous opportunities to do so, it took nearly two decades for a U.S. court to be presented with a similar enough question to warrant the same outcome.

B. No Enforcement Authority

Surprisingly, despite the pro-enforcement air created by the D.C. District Court's decision in *Chromalloy*, "[this case] did not usher in an era of enforcement of [set aside international] arbitral awards. . . ."⁷⁹ Following *Chromalloy*, the courts largely declined to enforce annulled awards. In *Baker Marine*, a breach of contract between Baker Marine, Danos, and Chevron involved an oil supply in Nigeria and led to arbitration per the terms

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 913.

⁷³ *Id.*

⁷⁴ See 9 U.S.C. § 10 (2002) (originally codified in 1947) for circumstances in which it is appropriate to deny the enforcement of an award.

⁷⁵ *In re Chromalloy*, 939 F. Supp. at 913.

⁷⁶ *Id.* at 914.

⁷⁷ *Id.* at 911.

⁷⁸ *Id.* at 911–14 (citing *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, Int'l, 493 U.S. 400, 409 (1990)).

⁷⁹ Jared Hanson, Note, *Setting Aside Public Policy: The 'Pemex' Decision and the Case for Enforcing International Arbitral Awards Set Aside as Contrary to Public Policy*, 45 GEO. J. INT'L L. 825, 849 (2014).

of the original contract.⁸⁰ The arbitral panel awarded Baker Marine over \$2 million from Danos and Chevron.⁸¹ Danos and Chevron both separately appealed the award in Nigerian courts, while Baker Marine attempted to enforce the award in the Northern District of New York.⁸² Unlike the D.C. District Court in *Chromalloy*, the district court in *Baker Marine* refused to enforce the award because doing so would violate principles of international comity.⁸³ On appeal, the Second Circuit upheld the district court's ruling.⁸⁴ The court interpreted the FAA to "ensur[e] that private agreements to arbitrate are enforced according to their terms."⁸⁵ Consequently, rather than focusing on the rights Baker Marine would have under American law, the court deferred to the contractual requirement of Nigeria as the arbitral forum and Nigerian law as the choice of law.⁸⁶

This scope of enforcement, or rather absence of a scope of enforcement, parallels the Southern District of New York's decision in *Spier v. Calzaturificio Tecnica S.p.A.*⁸⁷ In *Spier*, arbitration proceedings began in accordance with the terms of a contract between an engineer and an Italian corporation.⁸⁸ Despite the arbitrators unanimously finding for the engineer, the corporation sought to have the award overturned in an Italian court.⁸⁹ The court relied on Article VI⁹⁰ of the New York Convention to ultimately hold that the award should first be validated by the Italian courts before being considered in the United States.⁹¹ The court deferred to the rule of comity, reasoning that because the Italian government is a competent authority,

it [was] better to permit the validity of [the] Italian arbitral award to be first tested under Italian law by Italian courts. That is preferable to an American court seeking to apply the law of the foreign country where the award was made, and entering an

⁸⁰ *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 195 (2d Cir. 1999).

⁸¹ *Id.* at 196.

⁸² *Id.*

⁸³ *Id.* (stating that under the New York Convention, FAA, and principles of comity "it would not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts").

⁸⁴ *Id.* at 198.

⁸⁵ *Id.* at 197.

⁸⁶ *Id.*

⁸⁷ *Spier v. Calzaturificio Tecnica S.p.A.*, 663 F. Supp. 871 (S.D.N.Y. 1987).

⁸⁸ *Id.* at 872.

⁸⁹ *Id.*

⁹⁰ See The New York Convention art. (6), June 10, 1958, 21 U.S.T. 2517.

⁹¹ *Spier*, 663 F. Supp. at 875.

order enforcing an award later condemned by the courts of that foreign country.⁹²

While some differences do exist between the rationales in *Spier* and *Baker Marine*, in both instances the courts deferred to the national courts of the forum where the arbitral award was issued. This reliance on the principle of comity stands in stark contrast to the emphasis placed on the application of American law by the D.C. District Court in *Chromalloy*. It is evident that during the twenty years between the D.C. District Court's decision in *Chromalloy* and the 2013 decision by the Southern District of New York in *COMMISA v. PEP*, the effect of *Chromalloy* was hardly felt as courts declined to enforce awards that had been annulled or set aside at the seat of arbitration.⁹³

C. Limited Enforcement Authority

In *TermoRio*, the D.C. Circuit slightly widened the enforceability of annulled awards, dependent upon whether the award violated basic notions of justice.⁹⁴ Yet, the court never outlined what such a violation would entail. The dispute in *TermoRio* arose after a breach of a contract between an energy generator, TermoRio S.A. E.S.P., and a state-owned public utility company.⁹⁵ Here, the arbitral tribunal in Colombia found in favor of TermoRio, but this award was later nullified by the highest Colombian administrative court because the contract's arbitration clause violated Colombian law.⁹⁶ TermoRio filed suit in the District Court against Electranta and the Colombian government, seeking to have the original award enforced.⁹⁷ The court dismissed TermoRio's claim because the decision to nullify the award was made by a competent authority.⁹⁸

The D.C. Circuit Court considered a similar rationale in *TermoRio*, as it did in *Chromalloy*. There, the court analyzed the U.S. policy in favor of arbitral dispute resolution, the rule of comity, and the enforcement exceptions enumerated in the New York Convention.⁹⁹ The court considered public policy and acknowledged the importance of "limit[ing] the occasions when a foreign judgment is ignored on [the] grounds of public policy."¹⁰⁰

⁹² *Id.*

⁹³ Hanson, *supra* note 79, at 849.

⁹⁴ *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 939 (D.C. Cir. 2007).

⁹⁵ *Id.* at 929.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 930.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 938.

Ultimately, the court decided that enforcing the award would “undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully ‘set aside’ by a competent authority in the State in which the award was made.”¹⁰¹ The only exception to this is when “a foreign judgment is unenforceable as against public policy to the extent that it is ‘repugnant to fundamental notions of what is decent and just in the United States,’ ” yet the court did not define what would constitute such an extreme violation of U.S. public policy.¹⁰² The Second Circuit’s decision in *COMMISA v. PEP* finally offered insight into public policy principles that justify the enforcement of an annulled award.

IV. INTERNATIONAL APPROACHES TO ENFORCEMENT

The Second Circuit’s enforcement approach broadened the scope of the enforceability of arbitral awards within the United States. It aligned more closely with European states that have enforced awards based on public policy to accord with domestic or international policy. This enforcement rationale is an equally protectionist response to the protectionist nature of the Mexican government and other foreign states that have insulated their government-owned industries from arbitration.

A. Ability to Annul Arbitral Awards

Many governments have found that they do not have the ability to annul awards arbitrated in another state, yet they have created a “work-around” of sorts to enforce awards annulled in other states, allowing them to insert their policy preferences and protect parties against what they view as corruption or illegitimate decisions. As previously discussed,

the New York Convention sets only the minimum conditions for the recognition and enforcement of foreign arbitral awards and “does not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon.”¹⁰³

¹⁰¹ *Id.* at 936.

¹⁰² *Id.* at 939 (quoting *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)).

¹⁰³ HAMID G. GHARAVI, *THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD* 77 (2002).

The United Nations Commission on International Trade Law (UNCITRAL) Rules, has adopted “[t]he principle of the exclusive jurisdiction of courts at the place of arbitration to annul arbitral awards. . . . ‘only if the place of arbitration is in the territory of [the] State.’”¹⁰⁴ A number of states have adopted this principle.¹⁰⁵ Some states, such as France have taken this principle further and will enforce awards annulled outside their jurisdiction “in accordance with the views of the place of enforcement.”¹⁰⁶

While clearly the minority, a number of states have adopted this view, allowing the enforcement of awards annulled in the arbitral forum in accordance with the legal principles valued in the country of enforcement.¹⁰⁷ The scope of enforcement and the rationales vary between countries, with France arguably having the greatest latitude to enforce annulled awards.¹⁰⁸ These enforcement theories allow states to advance both their domestic judicial policies, as well as their policies regarding international legal values.

1. France: Broad Enforcement Authority

The French courts first adopted the practice of enforcing awards annulled at the seat of arbitration without giving deference to international comity.¹⁰⁹ The French courts have faced this decision a number of times and have looked to

¹⁰⁴ See *id.* at 12 (citing United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006*, art. 34(2)(1) (Vienna: United Nations, 2008).

¹⁰⁵ See GHARAVI, *supra* note 103, at 13–14 for a complete list of the states that have adopted this principle. The list includes states such as: Colombia, England, Finland, France, Germany, Greece, Hungary, India, Iran, Lebanon, Mexico, Russia, and The Netherlands.

¹⁰⁶ See Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 39 (1999). Legal scholars have argued that allowing the enforcement of annulled awards discourages states from developing arbitration in its jurisdiction. Gaillard argues that in enforcing an annulled award, a “state’s sovereignty over its territory is not in question” because the enforcement concerns “the international effect of decisions concerning arbitration rendered on a state’s territory,” and issues surrounding the enforcement of such awards should be made “in accordance with views of the place of enforcement.” *Id.* Accord GHARAVI, *supra* note 103, at 77–86.

¹⁰⁷ See *Bulletin: ICC Guide to National Procedures for Recognition and Enforcement of Awards Under the New York Convention*, 23 ICC ICARB. BULL., special supplement (2012), for a general overview on countries’ responses to the question, “When, if ever, can a party obtain recognition of foreign awards which have been set aside by the competent authority referred to in Article V(1)(e) of the New York Convention?”

¹⁰⁸ See Gaillard, *supra* note 106, at 18; GHARAVI, *supra* note 103, at 86.

¹⁰⁹ GHARAVI, *supra* note 103, at 86.

“international public policy” as a reason to recognize annulled awards.¹¹⁰ In *Société Pablak Ticaret Limited Sirketi v. Norsolor S.A.*, France’s *cour de cassation* recognized an award that had been set aside in Austria after an arbitral decision regarding a contractual dispute between Pabalk, a Turkish company, and Norsolor, a French company.¹¹¹ The *cour de cassation* held that Article 7 of the New York Convention “[did] not deprive any interested party of any right it may have to avail itself of an arbitral award in a manner and to the extent allowed by the law where such award is sought to be relied upon.”¹¹² Over the next three decades, the French courts refined the French view on the enforcement of annulled awards.

In *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*, the same court clarified their ability to enforce annulled decisions.¹¹³ The court affirmed the lower court’s enforcement of an award annulled in the arbitral forum in Switzerland on the basis that it was an international award, not tied to the annulment in Switzerland, and it remained in existence even if “set aside and its recognition in France [is] not contrary to international public policy.”¹¹⁴ The Swiss courts had annulled the original award favoring Hilmarton, yet the French court’s enforcement decision benefitted Omnium de Traitement et de Valorisation S.A., a French company rather than Hilmarton, a British company.¹¹⁵

In 2007, in *Putrabali Adyamulia v. Rena Holding*, France recognized an award annulled in the arbitral forum in London.¹¹⁶ In 2001, after arbitration proceedings surrounding a breach of contract between an Indonesian company, Putrabali, and a French company, Rena Holding, the arbitral tribunal found in favor of Rena Holding.¹¹⁷ Putrabali appealed to the High Court of London, which annulled the original award and found in favor of Putrabali.¹¹⁸ Rena Holding sought to have the original award enforced in

¹¹⁰ *Société Pablak Ticaret Limited Sirketi v. Norsolor S.A.*, Cour de cassation [Cass.] [supreme court for judicial matters] Oct. 9, 1984, 83-11.355 (Fr.), http://newyorkconvention1958.org/index.php?lvl=notice_display&id=118.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ GHARAVI, *supra* note 103, at 79.

¹¹⁴ *Société Hilmarton Ltd. v. Société OTV*, Cour de cassation [Cass.] [supreme court for judicial matters] Mar. 23, 1994, 92-15.137 (Fr.), http://newyorkconvention1958.org/index.php?lvl=notice_display+id=140+opac_view=6.

¹¹⁵ *Id.*

¹¹⁶ *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, Cour de cassation [Cass.] [supreme court for judicial matters] June 29, 2007, 05-18.053 (Fr.), http://newyorkconvention1958.org/index.php?lvl=notice_display&id=176.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Paris, where the court enforced the original award, in their favor.¹¹⁹ The French court ultimately held that the arbitral award was enforceable because “an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.”¹²⁰

Most recently, in *Maximov v. Novolipetsky Steel Mill (NLMK)*, the French *cour de cassation* enforced an award that the arbitral forum in Russia had previously annulled.¹²¹ Despite the differences in these holdings, the French *cour de cassation* has repeatedly enforced annulled awards on the notion that the awards are not tied to the policies of the arbitral forum, despite contravening principles of international comity.¹²²

2. *The Netherlands: Narrow Enforcement Authority*

Dutch courts have also asserted their ability to enforce awards annulled at the seat of arbitration, albeit, with a much narrower approach. They have exercised their discretion in enforcing awards on the basis of specific evidence that the annulment was a result of unfair proceedings.¹²³ In *Yukos Capital S.A.R.L. v. OAO Rosneft*, the Court of Appeal in Amsterdam enforced an award that had been set aside in Russia, the arbitral forum.¹²⁴ The court reasoned that “it [was] in this way plausible that the judgments of the Russian civil court in which the arbitrat[ion] awards were set aside the result of a judicial process that must be qualified as partial and dependent.”¹²⁵ Despite its narrower approach, the Dutch court reached the

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Maximov v. Novolipetsky Steel Mill (NLMK)*, Cour de cassation [Cass.] [supreme court for judicial matters] Jan. 30, 2012, 9A40-35844/2011-69-311 (Fr.). For a discussion of this decision see Herbert Smith Freehills LLP, *French Court Recognised an Arbitral Award Issued Under the Rules of the ICAC at the Russian Chamber of Commerce and Industry Regardless of its Having Been Set Aside by Russian Courts*, LEXOLOGY (June 18, 2012), <https://www.lexology.com/library/detail.aspx?g=c68ff4e8-29e3-46b0-bc92-bf259d84f3da>.

¹²² See *Société Pablak Ticaret Limited Sirketi v. Norsolor S.A.*, Cour de cassation [Cass.] [supreme court for judicial matters] Oct. 9, 1984, 83-11.355 (Fr.); *Société Hilmarton Ltd. v. Société OTV*, Cour de cassation [Cass.] [supreme court for judicial matters] Mar. 23, 1994, 92-15.137 (Fr.); *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, Cour de cassation [Cass.] [supreme court for judicial matters] June 29, 2007, 05-18.053 (Fr.).

¹²³ See *Bulletin: ICC Guide to National Procedures for Recognition and Enforcement of Awards Under the New York Convention*, *supra* note 107.

¹²⁴ Amsterdam Court of Appeals judgment of 28 April 2009, *Yukos Capital S.A.R.L. v. OAO Rosneft* 200.005.269/01 (Neth.).

¹²⁵ *Id.*

same conclusion in *Maximov v. NLMK*.¹²⁶ Here, the Amsterdam Court of Appeal found that the Russian arbitration court's annulment of the arbitration award was "defective in respect of such essential issues that it no longer can be said that [it] was a fair trial."¹²⁷ Based off of the Dutch decisions in *Maximov* and *Yukos*, there is a heavy emphasis on the fairness of award procedure in the arbitral forum, reflecting the importance of impartiality and equality in arbitral proceedings.

3. No Enforcement Authority

Other states, such as the United Kingdom and Germany, take an opposite approach. In Germany, courts defer to principles of international comity in declining to enforce annulled awards.¹²⁸ The Hungarian legislature's "Enforcement Act" lays out a step-by-step analysis for enforcing awards rendered in other jurisdictions, leaving little discretionary authority for courts to enforce awards annulled in the arbitral forum.¹²⁹ In the United Kingdom, there is a strong policy of respecting international comity by enforcing awards, so long as they are not contrary to public policy in the arbitral forum.¹³⁰ English courts defer to other states, "even if English law would have arrived at a different result on the ground that the underlying contract breached public policy because its performance involved a breach of statutory regulation in the place of performance."¹³¹

B. The Paulsson—van den Berg Debate

Despite a plain language reading of the New York Convention, there is heavily commentated disagreement about the enforceability of annulled awards that centers around the role of the seat of the arbitration. For the purposes of this discussion, it is assumed that arbitral seats have a right to set

¹²⁶ Hof Amsterdam 18 September 2012, 200.100.508/01 m.nt. (*Maximov/NLMK*) (Neth.). The original text and a translation is available at [https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I5b54f0491ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=aa5a775f-9157-4921-9557-eb0820c89785&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I5b54f0491ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=aa5a775f-9157-4921-9557-eb0820c89785&contextData=(sc.Default)&firstPage=true&bhcp=1).

¹²⁷ *Id.*

¹²⁸ See *Bulletin: ICC Guide to National Procedures for Recognition and Enforcement of Awards Under the New York Convention*, *supra* note 107.

¹²⁹ *Id.* But see generally 1994 évi LIII. törvény a bírósági végrehajtásról [*Act LIII of 1994 on Judicial Enforcement*].

¹³⁰ See *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.* (1999), 2 All ER 146 (Comm.) 146 (Eng.).

¹³¹ *Id.*

aside awards, but nonetheless it is important to consider where this argument falls within the debate.

Arbitration scholars, Jan Paulsson and Albert Jan van den Berg infamously debated the scope of the New York Convention regarding the enforcement of annulled arbitration awards. Paulsson argued that all annulments do not have to be given effect by the enforcing state.¹³² In his analysis of the New York Convention, Paulsson explained that a “core objective” of the New York Convention was “to free the international arbitral process from domination by the law of the place of arbitration.”¹³³ Paulsson advocated for enforcement courts to “consider the grounds upon which awards are set aside, and exercise their discretion to disregard” annulments based on local standards in the forum state.¹³⁴ Conversely, van den Berg posited that the “generally accepted rule” regarding annulled awards under the New York Convention is that set aside awards cannot be enforced elsewhere because “[the] concentration of judicial control over the arbitral process [is] at the place of arbitration.”¹³⁵ Van den Berg explains that if an enforcing court concluded that it could not enforce the annulled award under the New York Convention, it could look to its domestic law, but even under its domestic law it is unlikely that there is such a basis to enforce an annulled award.¹³⁶

Regardless of the differences between the pro-enforcement and no enforcement approaches taken by states and scholars, a state’s enforcement stance reflects its judicial values. Paulsson and van den Berg are both arguably correct in their views of the scope of enforcement of the New York Convention. While a state’s enforcement decisions do not necessarily favor entities in the place of enforcement, they do favor their state’s judicial values and allow those values to be advanced in response to protectionist arbitral decisions and laws in the arbitral forum.¹³⁷

¹³² Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC ICARB. BULL. 14 (May 1998).

¹³³ *Id.* at 18.

¹³⁴ *Id.* at 30.

¹³⁵ Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9 ICC ICARB. BULL. 15 (Nov. 1998).

¹³⁶ *Id.* at 16 (explaining that the only exception to this is France, where domestic law allows for the enforcement of annulled awards). *Id.*

¹³⁷ See Gaillard, *supra* note 106, at 41–42, for a discussion of why France’s enforcement of annulled awards should not raise concerns about neutrality.

V. ANALYZING THE PROTECTIONIST RATIONALE IN ENFORCING ANNULLED AWARDS

While enforcing annulled awards allows states to protect their own industries and subsidiaries against protectionist actions by other states, this pro-enforcement ability also protects Western judicial policies and values. The Southern District of New York and the Second Circuit followed the pro-enforcement interpretation by enforcing the award annulled by the Mexican courts because doing so was necessary to “vindicate ‘fundamental notions of what is decent and just’ in the United States.”¹³⁸ This protectionist decision is evidenced by the invocation of American jurisprudence policies in the court’s discussion of whether to enforce an award regarding a contract that specifically applied the laws of Mexico.¹³⁹ The Second Circuit’s constitutional analysis considered principles of judicial equity and ideas of government taking.¹⁴⁰ Ultimately, the Second Circuit declined to defer to the Mexican decision and chose to protect its own “basic standards of justice in the United States.”¹⁴¹ This court’s decision in *COMMISA v. PEP* falls somewhere in between Paulsson and van den Berg’s take on the scope of the New York Convention because the court used the New York Convention to enforce the annulled award based on U.S. domestic legal principles.

A. *Protectionism in COMMISA v. PEP*

The Second Circuit first considered Mexico’s retroactive ban on *COMMISA*’s claim against *PEP* because of the May 2009 passage of Section 98 of the Law of Public Works and Related Services. This section prevented arbitration in situations regarding “administrative rescission [and] early termination of the contracts.”¹⁴² The court outlined four provisions “embedded” in the Constitution, which govern the retroactive application of laws:

- The Ex Post Facto Clause’s ban on retroactive application of penal legislation;

¹³⁸ *COMMISA v. PEP*, 832 F.3d 92, 107 (2d Cir. 2016).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 111 (“[W]e do not think that the Southern District second-guessed the Eleventh Collegiate Court, which appears only to have been implementing the law of Mexico. Rather, the Southern District exercised discretion, as allowed by treaty, to assess whether the nullification of the award offends basic standards of justice in the United States.”).

¹⁴² *Id.* at 99.

- The proscription against states retroactively impairing the obligation of contracts;
- The prohibition on Bills of Attainder, stopping legislatures from ‘singling out disfavored persons and meting out summary punishment for past conduct’; and
- The Due Process Clause, and corresponding rights to ‘fair notice.’¹⁴³

Based on these constitutional principles, as well as precedent, the court found that “[r]etroactivity is not favored in the law,” particularly because of “the unfairness associated with such application.”¹⁴⁴ While the court declined to refute the Mexican court’s statement that it was not retroactively applying Section 98 according to Mexican law, the court found that the effect of the award violated key constitutional principles and “resulted in a retroactive application of Section 98 as a matter of *United States* law.”¹⁴⁵ Moreover, the court’s final assertion that “PEP is part of the government that promulgated the law” explains the court’s view that this decision reflected government expropriation without compensation and contradicts well-established principles of American law.¹⁴⁶

After analyzing Mexico’s annulment in light of the U.S. Constitution, the Court considered judicial policy concerning litigants’ right to bring claims and the applicable statute of limitations. The court identified numerous precedential decisions affirming that “litigants with legal claims should have an opportunity to bring those claims somewhere.”¹⁴⁷ “Absent confirmation of the award, COMMISA would lose the opportunity to bring its claims because of the change in Mexican law subjecting COMMISA’s claims to the forty-five-day statute of limitations in the Tax and Administrative Court.”¹⁴⁸ Moreover, because the claims had been presented to the Mexican District Court, they would be barred by *res judicata*, despite having never actually

¹⁴³ *Id.* at 108.

¹⁴⁴ *Id.* (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, 962 F. Supp. 2d 642, 659 (S.D.N.Y. 2013)).

¹⁴⁵ *Id.* (“[I]t is incontestable that the capacity of PEP to arbitrate was established in prior law; that it was withdrawn with respect to certain disputes that had already arisen; and that it was withdrawn in a way that frustrated contractual expectation, undid an arbitral award, and precluded redress by COMMISA in any forum.”).

¹⁴⁶ *Id.* at 109.

¹⁴⁷ *Id.* (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1911); *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012)).

¹⁴⁸ *Id.* at 110.

been heard.¹⁴⁹ The court then addressed the “equitable concerns” surrounding claim preclusion raised by the Mexican Court’s annulment—COMMISA’s claims had been barred twice in Mexican court, in violation of the basic U.S. principles of claim preclusion.¹⁵⁰

Finally, the court considered “[g]overnment [e]xpropriation [w]ithout [c]ompensation.”¹⁵¹ The court found that PEP, acting for the Mexican government, rescinded the contract with COMMISA, and then the Mexican legislature “frustrated relief that had been granted to COMMISA” before barring its claim based on the statute of limitations and *res judicata*.¹⁵² Ultimately, this “amounted to a taking of private property without compensation for the benefit of the government.”¹⁵³ The court invoked U.S. judicial policy by stating that this would be an unconstitutional taking in the U.S. and a violation of NAFTA.¹⁵⁴

Despite the application of U.S. judicial policy in interpreting the enforceability of a Mexican contract annulled in Mexico, commentators have concluded that the Southern District of New York and Second Circuit’s decisions align with the pro-enforcement policy of other states, although the U.S.’ rationale is different than the broad enforcement approach of France.¹⁵⁵

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* COMMISA’s failed *amparo* action prevented the arbitral panel from adjudicating the claim, and later § 98 resulted in the Tax and Administrative Court rejecting COMMISA’s claim based on *res judicata*. “Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating [sic] issues that were or could have been raised in the action.” *Id.* (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Yet, COMMISA never had the opportunity to litigate its breach of contract claim against PEP because it was twice subjected to changing laws which barred its claim.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (citing NAFTA art. 1110, Jan. 1, 1994 “No party may . . . take a measure tantamount to nationalization or expropriation of such an investment (‘expropriation’), except . . . on payment of compensation. . .”).

¹⁵⁵ Monique Sasson, *The Question of U.S. Enforcement of Annulled Foreign Arbitral Awards*, AM. B. ASS’N (Feb. 6, 2014), <http://apps.americanbar.org/litigation/committees/adr/articles/winter2014-0214-question-of-us-enforcement.html> (stating that “[i]n the Southern District’s view, the Mexican judgment vacating the award was adopted in violation of basic notions of justice. Under the Panama and New York Conventions, this should not be regarded as a strange approach. Indeed, enforcement of awards set aside at the seat is viewed as appropriate in a number of countries, such as France, even with no showing of a violation of basic notions of justice, on the grounds that an annulled award is still alive outside the country that vacated it.”).

B. Protectionism in Arbitration: Annulling Awards and Limiting Arbitration

The Second Circuit's decision in *COMMISA v. PEP* was an effort to protect the arbitration practice as a whole, while also upholding American judicial values in light of a protectionist decision by another state.

The original agreement between *COMMISA* and *PEP* provided that:

[a]ny controversy, claim, difference, or dispute that may arise from or that is related to, or associated with, the present Contract or any instance of breach with the present Contract, shall be *definitively* settled through arbitration conducted in Mexico City, D.F., in accordance with the Conciliation and Arbitration Regulations of the International Chamber of Commerce that are in effect at that time.¹⁵⁶

According to ICC Article 34(6), “Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”¹⁵⁷ Under Article 29, awards can be annulled by an emergency arbitrator.¹⁵⁸ Yet, in the instance of *COMMISA v. PEP*, the arbitral award was annulled by the Mexican courts after a retroactive application of a modified law that prevented arbitration in contractual disputes concerning government parties.¹⁵⁹ Mexico's passage of Section 98, which changed the forum to adjudicate public contracts to the Tax and Administrative Court, insulated the Mexican government from unfavorable arbitral decisions and the uncertainty that could result from the flexible arbitral process by allowing all decisions regarding public contracts to be adjudicated in the same court, by the same pool of judges, and under the same applicable law.¹⁶⁰

This protectionist method, employed by the Mexican government in *COMMISA v. PEP*, parallels recent arbitral law changes made by the Russian government.¹⁶¹ On September 1, 2016, Russia's new international arbitration

¹⁵⁶ Memorandum of Law in Opposition to Respondent's Motion to Dismiss the Petition and in Support of Petitioner's Motion to Confirm Arbitral Award at 4, *Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V., v. Pemex-Exploración y Producción*, No. 1:10-cv-206 (AKH), 2010 WL 9512897 (S.D.N.Y. 2010).

¹⁵⁷ International Chamber of Commerce, Rules of the Court of Arbitration, art. 34 (2012).

¹⁵⁸ *Id.* art. 29.

¹⁵⁹ See *COMMISA v. PEP*, 832 F.3d 92, 99 (2d Cir. 2016).

¹⁶⁰ *Id.*

¹⁶¹ Public Works and Related Services Law, art. 98 (Mex.). *Accord* Federal'nyi Zakon RF [Federal Law “On Arbitration (Arbitral Proceedings) in the Russian Federation”], Federal

laws went into effect.¹⁶² The laws includes a list of public law disputes that are not subject to arbitration and must be adjudicated in a Russian court.¹⁶³ This list includes: “[D]isputes arising out of a government or municipal procurement of goods and services,” which could not be arbitrated prior to the enactment of these laws and can still not be arbitrated, while “administrative offences,” and “annulment of acts or decisions of public authorities” can no longer be arbitrated.¹⁶⁴

Like the Mexican government’s behavior regarding COMMISA and the invocation of Section 98, Russia’s ban on arbitration regarding a number of public contracts allows the Russian government to insulate itself from less predictable outcomes.¹⁶⁵ After decisions such as that which led to *Yukos Capital S.A.R.L. v. OAO Rosneft* in the Netherlands, it is understandable why the Russian government would seek to prevent such unfavorable outcomes by limiting the situations in which awards could be rendered against a state-controlled entity.¹⁶⁶ While arbitration allows for flexibility, and in some instances more favorable and predictable outcomes by the contracting parties when unfavorable awards have been rendered against state entities, the

Law No. 382-FZ (Dec. 29, 2015), and Federal’nyi Zakon RF [Amendments to Certain Legislative Acts of the Russian Federation and the Repeal of Article 6(1)(3) of the Federal Law on Self-Regulating Organizations in Connection with the Adoption of the Federal Law on Arbitration in the Russian Federation], Federal Law No. 409-FZ (Dec. 29, 2015).

¹⁶² Federal’nyi Zakon RF [Federal Law “On Arbitration (Arbitral Proceedings) in the Russian Federation”], Federal Law No. 382-FZ (Dec. 29, 2015), and Federal’nyi Zakon RF [Amendments to Certain Legislative Acts of the Russian Federation and the Repeal of Article 6(1)(3) of the Federal Law on Self-Regulating Organizations in Connection with the Adoption of the Federal Law on Arbitration in the Russian Federation], Federal Law No. 409-FZ (Dec. 29, 2015).

¹⁶³ Federal’nyi Zakon RF [Federal Law “On Arbitration (Arbitral Proceedings) in the Russian Federation”], Federal Law No. 382-FZ (Dec. 29, 2015), and Federal’nyi Zakon RF [Amendments to Certain Legislative Acts of the Russian Federation and the Repeal of Article 6(1)(3) of the Federal Law on Self-Regulating Organizations in Connection with the Adoption of the Federal Law on Arbitration in the Russian Federation], Federal Law No. 409-FZ (Dec. 29, 2015).

¹⁶⁴ *Id.* Accord Steven P. Finizio & Dmitry Andreev, *International Arbitration Alert: Russia Implements Arbitration Reform*, WILMER HALE (Aug. 31, 2016), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2016-08-31-russia-implements-arbitration-reform.pdf.

¹⁶⁵ Compare *COMMISA v. PEP*, 832 F.3d 92 (2d Cir. 2016), with Federal’nyi Zakon RF [Federal Law “On Arbitration (Arbitral Proceedings) in the Russian Federation”], Federal Law No. 382-FZ (Dec. 29, 2015), and Federal’nyi Zakon RF [Amendments to Certain Legislative Acts of the Russian Federation and the Repeal of Article 6(1)(3) of the Federal Law on Self-Regulating Organizations in Connection with the Adoption of the Federal Law on Arbitration in the Russian Federation], Federal Law No. 409-FZ (Dec. 29, 2015).

¹⁶⁶ See Hof Amsterdam 28 April 2009, 200.005.269/01 m.nt. (*Yukos Capital S.A.R.L./OAO Rosneft*) (Neth.). An unofficial translation of this decision is available at: https://www.iiiglobal.org/sites/default/files/media/Yukos_Capitla_SARC_V_OAO_Rosneft.PDF.

state's own judicial system appears to be a more appealing location to adjudicate disputes. Yet, decisions that protect a state entity, over an international—or even separate domestic entity—push other states to resort to their own protectionist methods by seeking to protect either their own judicial values, international legal standards, or the purpose of international arbitration. As will be explained below, this is what the U.S., France, the Netherlands and other pro-enforcement states have done in deciding to enforce awards annulled in the arbitral forum.

C. *Protecting Arbitration and Judicial Values*

International arbitration furthers “the expeditious resolution of disputes and the avoidance of protracted and expensive litigation.”¹⁶⁷ International arbitration allows the parties to decide on a dispute resolution process at the time of contracting and allows for flexibility regarding time frames, expenses, procedural decisions, confidentiality, arbitrator and expertise decisions, and finality.¹⁶⁸ While arbitral rules allow awards to be annulled in the arbitral forum by the arbitral tribunal when particular conditions are present, enforcing states have taken the opportunity to uphold these awards to further domestic judicial principles and the core purposes of international arbitration when the awards are annulled apart from the arbitral tribunal.¹⁶⁹ This is what the Second Circuit did by affirming the Southern District's decision in *COMMISA v. PEP* and what the French courts have done numerous times by enforcing annulled awards.

In *COMMISA v. PEP*, the Southern District of New York confirmed the annulled award because the retroactive application of Section 98 would effectively prevent *COMMISA* from having any recourse for the breach of a

¹⁶⁷ See *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2d Cir. 1998).

¹⁶⁸ See Sussman & Wilkinson, *supra* note 14. Accord W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 243, 245 (2010) (“[I]nternational commercial arbitration has in the past been considered to be a process that favors the application of the agreement of the parties, but also stresses compromise and the application of equitable and commercial principles to alleviate the strict application of law.”).

¹⁶⁹ See *In re Chormalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 906 (D.C. Cir. 1996); *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, Cour de cassation [Cass.] [supreme court for judicial matters] June 29, 2007, 05-18.053 (Fr.); *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.* (1999), 2 All ER 146 (Comm.) 146 (Eng.); *Société Pablak Ticaret Limited Sirketi v. Norsolor S.A.*, Cour de cassation [Cass.] [supreme court for judicial matters] Oct. 9, 1984, 83-11.355 (Fr.); Hof Amsterdam 18 Sept. 2012, m.nt. (Maximov/NLMK) (Neth.); Hof Amsterdam 28 April 2009, 200.005.269/01 m.nt. (Yukos Capital S.A.R.L./OAO Rosneft) (Neth.).

contract that it had substantially completed.¹⁷⁰ The court considered four judicial factors that are highly valued in both domestic judicial systems and the larger international legal system.¹⁷¹ International comity is also highly valued by both the U.S. courts and the international legal system.¹⁷² Yet, deferring to international comity would negate the United States' ability to consider the importance of claims having an appropriate forum, or any forum at all, when the international annulment contradicts key judicial principles, such as those outlined by the Southern District of New York and the Second Circuit in *COMMISA v. PEP*. This decision allowed the U.S. court to protect its judicial values in response to what was a protectionist effort in the arbitral forum.

France has used a similar protectionist approach by enforcing annulled awards. In *Putrabali*, the French court ultimately held that the arbitral award was enforceable because "an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought."¹⁷³ Given the court's finding that the award should not have been annulled, rather than deferring to international comity, it relied on appropriate enforcement standards in France, thereby protecting French judicial policy.¹⁷⁴ This is the same approach France has taken in other pro-enforcement decisions.¹⁷⁵ States' decisions to protect their domestic judicial values and interpretations of international judicial values protect the overall purposes of international arbitration.

¹⁷⁰ See *COMMISA v. PEP*, 832 F.3d 92 (2d Cir. 2016).

¹⁷¹ *Id.* at 107 (outlining four factors: "(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation") (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (explaining that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . ."))).

¹⁷² *Id.* at 100. The court explains that an appeals court must review a lower court's decision to not defer to international comity for abuse of discretion. This is a higher standard, under which a district court decision will be upheld so long as it "falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 400 (1990).

¹⁷³ *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, Cour de cassation [Cass.] [supreme court for judicial matters] June 29, 2007, 05-18,053 (Fr.).

¹⁷⁴ *Id.*

¹⁷⁵ See *Société Pablak Ticaret Limited Sirketi v. Norsolor S.A.*, available at Cour de cassation [Cass.] [supreme court for judicial matters] Oct. 9, 1984, 83-11.355 (Fr.).

D. Enforcing Annulled Awards: Upholding Pre-Contractual Expectations and the Purposes of International Arbitration

Enforcing annulled awards allows courts to protect contractual obligations in other forums. One of the Southern District of New York's key considerations in *COMMISA v. PEP* was "the repugnancy of retroactive legislation that disrupts contractual expectations."¹⁷⁶ In contractual disputes, the United States often defers to the expectations set out in the contract at the time the contract was made.¹⁷⁷ The court seeks to understand what the parties reasonably anticipated, or could have reasonably anticipated, at the time they made the contract.¹⁷⁸ This method of seeking to uphold the parties' expectations at the time of contracting and the considerations the parties made in deciding on the terms of their contract allows disputes to be resolved in a manner that upholds the value of the contractual process.¹⁷⁹ This is evidenced by the fact that only under certain situations, such as duress or undue influence, are contractual breaches voidable; and, therefore, not subject to stringent damages.¹⁸⁰ Moreover, within the arbitration context, U.S. courts often apply these same policies by generally deferring to the terms outlined by the parties' arbitration agreement in the original contract, unless the agreement was procedurally or substantively unconscionable.¹⁸¹ A strong preference is given to the parties' expectations and desires at the time they entered into the agreement.¹⁸²

¹⁷⁶ *COMMISA v. PEP*, 832 F.3d 92, 107 (2d Cir. 2016).

¹⁷⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 154(b) AM. LAW INST. (1981) (stating that "a party bears the risk of a mistake when (b) he is aware, *at the time the contract [was] made*, that he has only limited knowledge with respect to the facts to which the mistake relates. . . ." (emphasis added)); U.C.C. § 2-715 (stating that "[c]onsequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller *at the time of contracting* had reason to know and which could not reasonably be prevented by cover or otherwise" (emphasis added)); *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145; 9 LR Exch. 341 (holding that the breaching party is responsible for damages that were reasonably foreseeable "*at the time they made the contract . . .*" (emphasis added)).

¹⁷⁸ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 154(b); U.C.C. § 2-715; *Hadley* (1854) 156 Eng. Rep. 145.

¹⁷⁹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 154(b); U.C.C. § 2-715; *Hadley* (1854) 156 Eng. Rep. 145.

¹⁸⁰ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 177 AM. LAW INST. (1981) (explaining that a manifestation of assent induced by undue influence makes a contract voidable); *Odorizzi v. Bloomfield School Dist.*, 54 Cal. Rptr. 533 (1966) (holding that undue influence from over-persuasion can make a contract voidable).

¹⁸¹ See, e.g., *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000).

¹⁸² See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding that an arbitral award should be enforced based on the language of the parties' agreement).

At the time COMMISA and PEP contracted to build the oil platform, both parties made contractual decisions with the intent to resolve any disputes in arbitration, should they arise.¹⁸³ By allowing parties to determine the specific rules governing their contracts, arbitration agreements allow parties to negate the risks involved with entering into high-cost contracts in foreign areas, particularly when foreign governments are involved.¹⁸⁴ This is the case with COMMISA and PEP.¹⁸⁵ Given that arbitration allows the parties to select the procedural and substantive law that will be applied to adjudicate their dispute and to select their arbitrators, parties are able to ensure that they will not be subject to changing laws or policies that can unfairly prejudice an international party.¹⁸⁶ Ultimately, the agreement to arbitrate any dispute allowed COMMISA to negate, or at least minimize, the risks involved in such high-value international contracts.

In contract disputes, U.S. courts look to the contract to see if either party has allocated the risk.¹⁸⁷ Resorting to arbitration is a way for parties to specifically ensure that they have not allocated to themselves the risk of changing policies, norms, or laws when they are carrying out a contract in a foreign state.¹⁸⁸ Moreover, arbitration allows parties to separate their claims from their own states or the location of the dispute by allowing parties to determine procedural and substantive rules.¹⁸⁹ COMMISA's right to arbitrate any dispute that arose out of its contract with PEP was a way to ensure that the risk was not allocated to COMMISA and that it would be protected from any unforeseen changes that would affect its rights in the Mexican judicial system.

¹⁸³ COMMISA v. PEP, 832 F.3d 92, 98 (2d Cir. 2016).

¹⁸⁴ *See id.*

¹⁸⁵ *See* Sussman & Wilkinson, *supra* note 14.

¹⁸⁶ *Id.*

¹⁸⁷ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 154(a) AM. LAW INST. (1981) (stating that “[a] party bears the risk of a mistake when (a) *the risk is allocated to him by agreement of the parties. . .*” (emphasis added)); Aluminum Co. of Am. v. Essex Grp., Inc., 499 F. Supp. 53, 67 (W.D. Penn. 1980) (stating that in particular situations “the court must *allocate the risk* in some reasoned way” (emphasis added)).

¹⁸⁸ *See* BORN, *supra* note 16, at 71 (explaining that “[p]recisely because national legal systems differ profoundly, parties inevitably seek to ensure that, if international disputes arise, those disputes are resolved in the forum that is most favorable to their interests”).

¹⁸⁹ *Id.* at 73–74 (explaining that “[o]ne of the central objectives of international arbitration agreements is to provide a neutral forum for dispute resolution, detached from either the parties or their respective home state governments”).

E. Upholding the Parties' Informed Expectations

U.S. courts generally defer to arbitration when parties explicitly allow for this in their original contract. Similar to the flexibility arbitration affords parties, allowing parties to determine at the time of contracting that any disputes that may arise will be adjudicated by arbitration permits the parties to have informed expectations about what laws will govern their contract. This is particularly important when multiple jurisdictions are concerned with fulfilling expectations outlined in a contract.

At the time COMMISA and PEP entered into their original contract, they explicitly stated that all disputes would be adjudicated through arbitration. Consequently, when COMMISA sought arbitration to resolve this contractual breach between the parties, COMMISA believed this arbitral award would be final unless there was a reason to set it aside under the Panama Convention.¹⁹⁰ Here, that was not the case. Mexico changed its law regarding government procurement contracts and retroactively applied this law to the original contract between COMMISA and PEP.¹⁹¹ The retroactive application of laws negated the informed expectations the parties had at the time they entered into the contract.¹⁹² While the retroactive application of laws can occur with administrative laws, there is a strong preference against the retroactive application of laws in the United States.¹⁹³ Retroactively applying Mexico's ban on arbitration involving government procurement contracts not only prevented COMMISA from having its claim arbitrated, but it also prevented COMMISA from having any recourse for its breach of contract. This total ban on a forum in which COMMISA could have its claim heard violated not only COMMISA's expectation that it would have an arbitral forum in which its dispute could be heard, but also its expectation that there would be a forum in which to hear its dispute. This violates a core principle of the U.S. legal system—one's right to have their dispute heard in a court of law.¹⁹⁴

¹⁹⁰ See *COMMISA v. PEP*, 832 F.3d 92, 108 (2d Cir. 2016).

¹⁹¹ *Id.* at 99.

¹⁹² See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (explaining that retroactively enforced statutes raise concerns about the Legislature's power "to sweep away settled expectations suddenly," and as "a means of retribution against unpopular groups or individuals").

¹⁹³ See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988) (explaining that "[r]etroactivity is not favored in the law. . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

¹⁹⁴ See *COMMISA*, 832 F.3d at 109 (explaining that "litigants with legal claims should have an opportunity to bring those claims somewhere" (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911); *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012))).

F. Protecting International Comity

Finally, despite being an international rather than a domestic principle, international comity is a core tenant of U.S. courts' decisions regarding private international law.¹⁹⁵ The United States has a strong preference of deferring to international comity to determine whether to enforce awards annulled in their arbitral forum.¹⁹⁶ This principle is explained in many arbitration enforcement decisions and in other cases of international litigation. In *First National City Bank v. Banco Nacional de Cuba*, the U.S. Supreme Court held that the executive branch, rather than judges, has the responsibility to recognize the consequences of other states implementing legislation that is "contrary to essential principles of justice and morality."¹⁹⁷ However, the Supreme Court has explained that there are certain situations in which deference to international comity would not be proper.¹⁹⁸ Such was the case in *Hartford Fire Insurance Company v. California*.¹⁹⁹ Here, the Supreme Court decided that while the lower court had the discretion to defer to international comity and refuse to consider the substance of the claim, it was improper to defer to international comity in such a significant antitrust case.²⁰⁰ Another instance is when doing so would be "repugnant to fundamental notions of what is decent and just"—this was the case in *COMMISA v. PEP*.²⁰¹

In *COMMISA v. PEP*, the Southern District of New York and the Second Circuit undoubtedly had the authority to enforce the annulled arbitration award under the New York and Panama Conventions. Yet, the United States looked to international comity before deciding to enforce the annulled award. The

¹⁹⁵ See Paul, *supra* note 18, at 19–38.

¹⁹⁶ See *In re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996) (finding that international comity was a policy to be considered, but that the United States court was not required to give it deference when it was a factor under the act of state doctrine, which had to be limited in this case); *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 930 (D.C. Cir. 2007) (deferring to international comity under the New York Convention); *Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999) (affirming the lower court's finding that "it would not be proper to enforce a foreign arbitral award under the [New York] Convention when such an award has been set aside by the Nigerian courts").

¹⁹⁷ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972).

¹⁹⁸ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 798 ("[I]nternational comity would not counsel against exercising jurisdiction in the circumstances alleged here."). In its analysis, the lower court applied the tri-partite "Timberlane" test. The third prong of this analysis considers "the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness." *Timberlane Lumber Co. v. Bank of Am.*, 749 F.2d 1378, 1382 (9th Cir. 1984)).

²⁰¹ *COMMISA v. PEP*, 832 F.3d 92, 106 (2d Cir. 2016).

Second Circuit reviewed the Southern District of New York's decision to deny international comity to Mexico's award for an abuse of discretion.²⁰² Ultimately, despite the "prudential concern of international comity," the Second Circuit concluded that deferring to international comity in this situation would offend U.S. public policy.²⁰³ The circumstances surrounding *COMMISA v. PEP* were similar to those outlined in *Hartford Fire Insurance Company v. California*, as it was decided that the court could not blindly defer to international comity because doing so would violate U.S. public policy by choosing an outcome that favored the retroactive application of laws.²⁰⁴

G. Possible Enforcement Scenarios in the United States

The situation in *COMMISA v. PEP* posed a unique set of circumstances for the Southern District of New York and then the Second Circuit to grapple with in determining whether to enforce the award that the Mexican court later annulled. The parties explicitly contracted for arbitration to resolve any dispute that may arise during the course of the relationship.²⁰⁵ This arbitration provision was intended to ensure the speedy, fair, and flexible adjudication of disputes, should they arise.²⁰⁶ The United States has a strong principle in favor of arbitration when parties have particularly contracted for arbitration.²⁰⁷ Despite the reasons the parties have for choosing to arbitrate their disputes rather than take them to a court, it is possible, but unlikely, that considering the principle of international comity, the Southern District of New York would not have enforced the annulled award even if *COMMISA* had the opportunity to have its claim heard in any legal forum in Mexico.

In *COMMISA v. PEP*, the Mexican legislature changed the applicable statute of limitations for government procurement disputes from ten years to forty-five days.²⁰⁸ This action completely barred *COMMISA* from initiating a law suit because more than forty-five days had passed before *COMMISA* brought its claim to the Tax and Administrative Court.²⁰⁹ Even if *COMMISA* had been able to litigate its claim in court, it is still unlikely that

²⁰² *Id.* at 100 (citing *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999)).

²⁰³ *Id.* at 106 (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)).

²⁰⁴ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *COMMISA v. PEP*, 832 F.3d 92 (2d Cir. 2016).

²⁰⁵ *COMMISA*, 832 F.3d at 98.

²⁰⁶ See generally *Sussman & Wilkinson*, *supra* note 14; *BORN*, *supra* note 16, at 73.

²⁰⁷ See, e.g., *In re RealNetworks*, No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000).

²⁰⁸ See *COMMISA*, 832 F.3d at 99.

²⁰⁹ *Id.*

the Second Circuit would have upheld this decision. Arbitration allows parties to select a forum that will limit national bias and foster impartial decisions.²¹⁰ Impartiality is not guaranteed when local courts are left to adjudicate a dispute between a local party and a foreign party.²¹¹ Even considering principles of international comity, upholding the decision of the Mexican court to set aside *COMMISA*'s award would have undermined the United States' policy of deferring to the parties' expectations at the time of contracting because the parties explicitly contracted for arbitration to resolve any dispute that might arise.²¹²

While *COMMISA v. PEP* was in many ways viewed as a revolutionary decision by the Second Circuit, it is not likely to lead to an influx of enforcement cases for U.S. courts to adjudicate. Only in certain, rare circumstances, such as the one outlined in *COMMISA v. PEP*, will U.S. courts be likely to enforce an annulled award because enforcing such an award violates international comity. Regardless, by choosing to enforce or not to enforce an award annulled by the protectionist decision of another state, the United States is protecting core principles of contract law, one's right to have their claim heard, the purposes of international arbitration, and international comity.

VI. CONCLUSION

While in *COMMISA v. PEP* the United States appears to have adopted the same broad enforcement authority as the French courts have adopted, the Second Circuit's affirmation of the Southern District of New York's award closely follows the narrow enforcement authority adopted in *Chromalloy* some twenty years prior. The United States sits squarely in the middle of the enforcement spectrum by adopting this narrow-enforcement authority approach, and this is the best place for U.S. courts to remain. By exercising a narrow-enforcement authority, U.S. courts can protect U.S. judicial values, while also protecting core international judicial principles, such as international comity—another value of the U.S. legal system.

²¹⁰ See BORN, *supra* note 16, at 75 (explaining that “[i]nternational arbitration permits parties to play a substantial role in selecting the members of the [arbitral] tribunal . . . reducing the risks of partiality or parochial prejudice”).

²¹¹ See *id.* at 73–75.

²¹² See *COMMISA*, 832 F.3d at 98.