Lexis®PSL ARBITRATION

US court enjoins foreign enforcement of annulled arbitral award (Citigroup v Fiorilla)

First published on Lexis®PSL Arbitration on 01/09/2017

Arbitration analysis: Steven Finizio, partner, and Samir Deger-Sen at WilmerHale reflect on the decision in Citigroup v Fiorilla in which an appellate state court in New York affirmed an injunction against a party seeking enforcement in France of an arbitral award that had previously been annulled in New York.

Original news

Citigroup Global Mkts Inc v Fiorilla 151 A.D.3d 665, 54 N.Y.S.3d 586, 587 (N.Y. App. Div. 2017)

Note: unless otherwise indicated, the US judgments cited below are (not reported by LexisNexis® UK.

What was the background to the decision?

In 2010, John Fiorilla commenced an arbitration against Citigroup under the Financial Industry Regulatory Authority (FINRA) arbitration rules. Fiorilla alleged that Citigroup, which acted as his investment manager, was responsible for losses he incurred in the market crash because it failed to adequately hedge his portfolio. On the eve of the arbitration hearing, Fiorilla apparently agreed to settle his claim with Citigroup, authorising his counsel to accept any offer above $775,000. His counsel then reached an agreement with Citigroup's counsel to settle the claim for $800,000 and notified FINRA of the settlement agreement.

Ten days later, however, Fiorilla wrote to FINRA claiming that his counsel acted without authority in settling the case. Citigroup objected, but the tribunal, proceeded with the arbitration, and ultimately issued an award in Fiorilla's favor for $10,750,000 plus interest.

Citigroup then filed a motion to vacate the award in the New York Supreme Court, which is the trial level court in the New York state judicial system. The motion was filed with Justice Ramos, who has been designated as the judge responsible for hearing all cases relating to international arbitration filed in the New York state courts. Fiorilla argued before Justice Ramos that the tribunal's failure to consider the settlement agreement was grounds for vacating the award under the US Federal Arbitration Act (FAA). In 2015, Justice Ramos granted Citigroup's motion to vacate the award on the basis that it 'manifestly disregarded the law' by failing to enforce the settlement agreement, and the intermediate state court of appeals (the Appellate Division) affirmed.

While the FAA does not contain any explicit provision allowing vacatur of an award based on a tribunal's error of law, some courts, including those in New York, have vacated awards based on a finding that a tribunal had 'manifestly disregarded the law' or similar standards. For example, some courts have held the New York Civil Practice Law and Rules (CPLR) implicitly allows for an award to be annulled if the tribunal's decision is

'totally irrational'. See, for example, *Sands Brothers & Co Ltd v Generex Pharmaceuticals Inc,* 749 NYS.2d 17, 18 (1st Dept, 2002). Although some courts suggest that the 'manifest disregard' doctrine is implied in Section 10(4) of the FAA, the viability of that analysis was called into question by the US Supreme Court's decision in *Hall Street Associates, LLC v Mattel Inc,* 552 U.S. 576 (2008), in which that court held that the grounds for annulment in the FAA are exclusive. Since then, the Supreme Court has not resolved the question whether 'manifest disregard' is a valid basis for annulling an award. The decision in *Fiorilla* and other cases reflect the fact that many US courts continue to apply the doctrine when considering arbitral awards, although very few awards are actually annulled on the basis of 'manifest disregard'.

Despite the fact that the award had been annulled, Fiorilla commenced an ex parte proceeding in France for recognition and enforcement of the award, and apparently did not inform the French court that the award had been annulled. Fiorilla succeeded in his enforcement action in France, and took steps to seize the assets of Citigroup affiliates in France and their counterparties.

Fiorilla then returned to Justice Ramos, arguing that, out of comity for the French courts, he should now reconsider his judgment annulling the award. In response, Citigroup filed a cross-motion requesting an injunction against Fiorilla to prevent him from seizing Citigroup assets in France. Justice Ramos denied Fiorilla's motion and granted Citigroup's cross-motion, issuing an anti-suit injunction that barred Fiorilla from continuing his efforts to enforce the award, including in France. Fiorilla then appealed that decision to the Appellate Division.

What did the court decide?

The Appellate Division affirmed the anti-suit injunction issued by Justice Ramos. The Appellate Division issued a short order that did not provide a detailed explanation for its decision. Most of the order focused on whether Fiorilla was entitled to re-litigate whether the award should have been vacated in the first place. The Appellate Division noted in describing the background of the dispute that 'this action has no connection to France', and concluded, without any further discussion that Justice Ramos 'properly enjoined respondent from enforcing the vacated award, including in France, in the interests of protecting the New York judgment on the merits'. The court also noted that '[t]he record demonstrates that respondent commenced the French proceeding in bad faith' and that Justice Ramos 'properly declined to apply the doctrine of comity to the French court's recognition of the vacated award.'

Why is the decision significant?

In addressing whether the anti-suit injunction was proper, and Fiorilla should be enjoined from enforcing the annulled award in France, the Appellate Division did not refer to the United Nations Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention), which, by its terms, permits the enforcement of a foreign arbitral award even when it has been vacated in the seat of arbitration.

The New York Convention requires each contracting party to enforce foreign arbitral awards, but Article V(1)(e) provides that enforcement 'may be refused' if 'the award has been set aside or suspended by a competent authority of the country in which… that award was made.' A number of courts have recognised that, by stating that a court 'may' (but not 'shall') decline enforcement of a vacated award, the Convention expressly permits awards vacated in the arbitral seat to be enforced in foreign jurisdictions, and leaves the ultimate decision on enforcement to the discretion of the foreign court.

In fact, the federal courts based in New York have enforced awards vacated by courts in the arbitral seat. In its 2016 decision in *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v*

Pemex-Exploracion Y Produccion, 832 F.3d 92, 106 (2d Cir. 2016), the US Court of Appeals for the Second Circuit upheld a decision by a federal trial court in New York to enforce an arbitral award that had been annulled in the Mexican courts. In its decision in *Pemex*, the Second Circuit expressly relied on the fact that the Inter-American Convention on International Commercial Arbitration (the Panama Convention), which has identical language to that in Article V of the New York Convention, permits enforcement of a foreign arbitral award that had been annulled in the arbitral seat, although it also held that it was only appropriate to do so where refusing to enforce the annulled award would be contrary to US public policy. For more information on the Pemex decision, see News Analysis: Annulled Commisa v Pemex arbitration award enforced.

It also is rare for a US court to enjoin a foreign court from enforcing an arbitration award, and the Appellate Division did not provide any explanation for taking a different approach in this case. While there have been some instances where US courts have issued pro-arbitration injunctions by enjoining parties from seeking annulment of awards in foreign states, US courts are generally hesitant to issue anti-suit injunctions, for reasons including concerns for the principle of international judicial comity. In this regard, the Second Circuit has held that 'an anti-suit injunction will issue to preclude participation in [foreign] litigation only when the strongest equitable factors favor its use.' *Paramedics Electromedicina Comercial Ltda v GE Med Sys Info Techs Inc*, 369 F.3d 645, 654 (2d Cir. 2004).

Given that the Appellate Division's order addresses the issues raised by the anti-suit injunction in three sentences, it is unclear what consideration the court gave to them or what the basis was for its conclusion. Although it provided no other comment or reasoning, the Appellate Division did state that Fiorilla 'commenced the French proceeding in bad faith' and its decision may have turned on that fact-specific consideration. Unfortunately, the court did not explain the bad faith finding further or the implications that finding had for its decision.

The court's concern may have been that the proceedings in France were *ex parte* and Fiorilla failed to inform the French court that the award had been annulled (and the French court may therefore have understood it was obligated to enforce the award under the New York Convention). However, the court did not provide enough explanation to make such a concern clear.

If the court's concern was merely that Fiorilla sought to enforce an annulled award in a foreign jurisdiction 'that had no connection' to the case, then its decision to uphold an anti-suit injunction is much more worrying, and difficult to reconcile with either the New York Convention or the usual approach to anti-suit injunctions by US courts. Moreover, even if the court's concern was that Fiorilla had not informed the French court that the award had been annulled, it did not explain why that could not have been adequately addressed by Citigroup raising the issue in the French courts, rather than through an anti-suit injunction.

It is difficult to assess the importance of the Appellate Division's decision for international arbitration practice. Although further explanation for the court's decision would have been useful, and the lack of explanation may result in further confusion about the enforcement of annulled awards under the New York Convention and the use of anti-suit injunctions, most actions to annul international arbitration awards are addressed in the US federal courts, not the state courts, and the decision has no precedential value outside of the New York state courts. Its persuasive value also may be limited because it is a very cursory order issued by an intermediate state court that may turn on a fact specific finding of bad faith.

Nonetheless, New York is an important arbitral seat. Even if cases involving international arbitrations are likely to be decided in the federal courts, it is notable that the New York state courts continue to vacate awards based on implied doctrines, such as 'manifest disregard of the law', that allow the courts to second-guess the reasoning of an arbitral tribunal. Moreover, the *Fiorilla* decision may reflect that the New York state courts are willing to eschew the traditional caution toward anti-suit injunctions and to do so with regard to foreign enforcement actions that are permitted under the terms of the New York Convention under the

guise of protecting the judgment of a New York court. It is, however, too soon to tell whether *Fiorilla* is a fact-specific outlier or part of a larger trend.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

For a free trial, click here.