Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción: U.S. Courts' Narrow Discretion To Confirm Foreign Arbitral Awards that Are Annulled at the Seat of Arbitration

I. OVERVIEW

Petróleos Mexicanos (PEMEX) is the state-owned corporation responsible for controlling and managing petroleum and hydrocarbon resources in Mexico.[1] PEMEX-Exploración y Producción (PEP) is a subsidiary of PEMEX responsible for oil and natural gas exploration and production.[2] Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA) is a Mexican subsidiary of the construction company KBR, Inc.[3] In October 1997, PEP and COMMISA contracted for COMMISA to build and install two offshore natural gas platforms in the Gulf of Mexico (First Contract).[4] The First Contract included a clause that provided "any dispute [would] be settled through arbitration conducted in Mexico City in accordance with the Conciliation and Arbitration Regulations of the International Chamber of Commerce (ICC)."[5] PEP and COMMISA entered into a related contract in May 2003 (Second Contract), which contained a similar clause.[6] Both arbitration agreements were "made pursuant to the PEMEX enabling statute, which also applied to PEP as a subsidiary of PEMEX."[7]

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1. Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción, No. 10 Civ. 206(AKH), 2013 WL 4517225, at *2 (S.D.N.Y. Aug. 27, 2013).
2. *Id.*
3. *Id.* KBR, Inc., is incorporated in Delaware and headquartered in Houston, Texas. *Id.*
4. *Id.*
5. *Id.* (internal quotation marks omitted).
6. *Id.*
7. *Id.* The relevant provision provides, "In the event of international legal acts, Petróleos Mexicanos or its Affiliates may . . . execute arbitration agreements whenever deemed appropriate in furtherance of their purpose." *Id.*

In March 2004, "each party charged the other with breaching contractual obligations."[8] Conciliation efforts failed, and COMMISA filed a demand for arbitration with the ICC.[9] PEP gave COMMISA notice that it would be proceeding by administrative rescission, and COMMISA responded by filing a petition for *amparo*.[10] While the *amparo* proceedings were taking place, the ICC Tribunal was formed in December 2004.[11] The ICC Tribunal held that it had jurisdiction over all the issues in dispute and denied PEP's motion, which argued that res judicata barred the panel from hearing the parties' dispute.[12] In October 2007, PEP filed a second motion, which argued that res judicata barred the action, that COMMISA had waived its right to arbitration by filing the *amparo* action, and that the administrative rescission was "an 'act of authority' and could not be arbitrated 'since these matters are not subject to arbitration.'"[13] The ICC Tribunal disagreed and reaffirmed its earlier decision.[14]

As the arbitration continued, Mexican law underwent two significant and material changes.[15] First, under article 14(VII) of the Organic Law of the Federal Court in Tax and Administrative Matters (PEMEX Organic Law) (effective December 2007), "litigation relating to issues of compliance with the requirements of public contracts was to be litigated in a [specially established] administrative court."[16] Second, section 98 of the Law of Public Works and Related Services (effective May 2009) "required that ail [sic] cases [challenging] administrative rescissions that occurred after May 28, 2009 could not be arbitrated."[17]

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8. *Id.*

9. *Id.*

10. *Id.* at *2-3. "An *amparo* action is a judicial challenge to the validity or constitutionality of acts of a government authority." *Id.* at *3 n.5. COMMISA's action eventually made its way to the Supreme Court of Mexico, which held that the administrative rescission statutes were constitutional but did not address the question of "whether arbitrators could hear issues of administrative rescission if the parties' contracts provided that all disputes arising from the contract should be resolved by arbitration." *Id.* at *3.

11. *Id.* at *4.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at *5.

16. *Id.* In 2010, the Supreme Court of Mexico held that Mexico's Federal Tax and Administrative Justice Court was the exclusive forum to hear disputes concerning administrative rescissions. *Id.* Pursuant to the statute, a forty-five-day statute of limitations governed such matters. *Id.*

17. *Id.* The law did not address whether it applied to rescissions issued prior to its enactment. *Id.*

The arbitration proceedings progressed, and in December 2009, the ICC Tribunal issued its award.[18] The majority reaffirmed its jurisdiction, holding that res judicata was not a bar to the claim and that section 98 did not apply to the case because the PEMEX Organic Law expressly authorized PEP to enter into arbitrations.[19] Accordingly, the majority found for COMMISA on most counts and awarded COMMISA a monetary award.[20] In January 2010, COMMISA filed a petition to confirm the award in the United States District Court for the Southern District of New York.[21] The petition was granted in November 2010, and PEP appealed to the United States Court of Appeals for the Second Circuit.[22]

Simultaneously with COMMISA's January 2010 petition, PEP filed suit in Mexico's Third Judicial District Court on Civil and Labor Matters for the State of Nuevo Leon, seeking to have the award annulled.[23] The Mexican district court dismissed PEP's action, and PEP refiled in Mexico's Fifth District Court on Civil Matters for the Federal District, which also resulted in a dismissal.[24] PEP appealed the unfavorable decisions to Mexico's Eleventh Collegiate Court for the Federal District.[25] In August 2011, a three-judge panel reasoned that arbitrations were designed to settle private disputes and held that because administrative rescissions are used for the purpose of safeguarding financial resources of the state, public policy was implicated.[26] The court used section 98 as a guiding principle to strengthen its public policy argument, but denied that it was applying the section retroactively.[27] Relying on a 1994 Mexican Supreme Court decision,[28] the Eleventh Collegiate Court found that acts of authority should not be arbitrated and that the "issues arising from PEP's administrative rescission, and COMMISA's claims for breach of contract, were intertwined and inseparable" (meaning the arbitration panel was barred from hearing the issues arising from the breach of contract because it lacked jurisdiction to hear issues arising from the

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at *6.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at *7.
26. *Id.*
27. *Id.*
28. *Id.* That case described administrative rescissions as acts of authority but did not discuss arbitration. *Id.*

administrative rescission).[29] The court held that the matter should have been settled through an ordinary administrative proceeding, not by arbitrators, and instructed the lower court to nullify the award.[30] COMMISA filed a damages claim against PEP in Mexico's Federal Tax and Administrative Justice Court (the exclusive forum for disputes concerning administrative rescissions under section 98) in November 2012, but the court held that this action was barred by the forty-five-day statute of limitations enumerated in the statute.[31]

In response to the Eleventh Collegiate Court's decision, the Second Circuit vacated the judgment issued by the Southern District of New York and remanded the case for further proceedings to address the effect of the foreign court's nullification.[32] The Second Circuit ordered the district court to address "whether enforcement of the award should be denied because it 'has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.'"[33]

The United States District Court for the Southern District of New York *held* that where basic notions of justice are violated, deference to a foreign court's decree annulling an arbitration award is not required. *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción*, No. 10 Civ. 206(AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 27, 2013).

II. BACKGROUND

In 1975, the Organization of American States (OAS) sponsored the First Specialized Inter-American Conference on Private International Law.[34] The result of this conference was the Inter-American Convention on International Commercial Arbitration (Panama Convention),[35] which addressed the "need of international business to ensure the enforcement in national courts of arbitration agreements and arbitral awards relating to international commercial transactions."[36] The Panama Convention

29. *Id.* at *7-8.
30. *Id.* at *8.
31. *Id.* at *9.
32. *Id.* at *1, *9.
33. *Id.* at *9 (quoting United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(e), June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention]).
34. John P. Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1, 1 (2000).
35. Inter-American Convention on International Commercial Arbitration, *concluded* Jan. 30, 1975, 1438 U.N.T.S. 245 [hereinafter Panama Convention].
36. Bowman, *supra* note 34, at 5. Nineteen countries are party to the Panama Convention, including the United States and Mexico. *See B-35: Inter-American Convention on*

responded to shortcomings of Latin American arbitral regimes by making "fundamental changes in the existing legal framework of international commercial arbitration."[37]

The Panama Convention is enforceable in the United States pursuant to the Federal Arbitration Act (FAA), which allows a party to an arbitral award to apply to a court for an order confirming that award.[38] "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."[39] Article 5(1)(e) of the Panama Convention provides one such ground:

> The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested [t]hat the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.[40]

Therefore, under this article, a court *may* set aside an award if a competent authority in the state at the seat of arbitration has annulled it.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[41] adopted in 1958, is another key instrument in governing international arbitration.[42] The New York Convention and the Panama Convention have been found to be similar enough that precedents under one are generally applicable to the other.[43]

A number of cases have addressed the discretion U.S. courts have in setting aside or confirming arbitral awards under the Panama and New

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International Commercial Arbitration, ORG. OF AM. STATES, http://www.oas.org/juridico/english/sigs/b-35.html (last visited Apr. 4, 2014).

37. Bowman, *supra* note 34, at 6 (quoting Charles R. Norberg, *International Arbitration and ADR in the Western Hemisphere*, 14 INST. TRANSNAT'L ARB. 3, 3 (2000) (internal quotation marks omitted)). These shortcomings included the refusal of courts to enforce agreements to arbitrate future disputes, the existence of broad grounds for attacking arbitral awards, and restrictions against nonnationals acting as arbitrators. *Id.* at 8.

38. 9 U.S.C. §§ 207, 301-302 (2012); *see* Bowman, *supra* note 34, at 70-72, 81-84.

39. 9 U.S.C. § 207.

40. Panama Convention, *supra* note 35, art. 5(1)(e).

41. New York Convention, *supra* note 33.

42. *See New York Arbitration Convention*, N.Y. ARB. CONVENTION, http://www.NewYorkConvention.org (last visited Apr. 1, 2014).

43. *See, e.g.*, Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 45 (2d Cir. 1994) (noting that both conventions are meant to achieve the same results and that their key provisions adopt the same standards).

York Conventions.[44] In *In re Chromalloy Aeroservices*, the United States District Court for the District of Columbia confirmed an award that had been overturned by a competent authority in Egypt.[45] *Chromalloy* involved a contract between Chromalloy Aeroservices, Inc. (CAS), a U.S. corporation, and the Air Force of the Arab Republic of Egypt (Egypt).[46] Egypt terminated the agreement, and CAS subsequently rejected the cancellation and commenced arbitration proceedings on the basis of the arbitration clause contained in the parties' contract.[47]

The arbitration panel in *Chromalloy* ruled in favor of CAS and issued an award.[48] CAS sought to confirm the award in the U.S. district court, and Egypt simultaneously appealed the arbitral award to the Egyptian court of appeal.[49] After the Egyptian court suspended the award, Egypt argued that the U.S. district court should deny CAS's request for confirmation of the award out of deference to the Egyptian court's decision.[50] The U.S. district court declined to defer to the Egyptian court's decision and issued a broad holding—because the parties' contract provided that the arbitration would be final, binding, and not subject to any appeal, Egypt had violated the terms of the contract by appealing.[51] The U.S. district court noted that U.S. public policy favors the enforcement of binding arbitration clauses and held that a "decision by this Court to recognize the decision of the Egyptian court would violate [that] policy."[52]

Three years later, in *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, the Second Circuit addressed the issue of whether or not to confirm an annulled arbitral award.[53] *Baker Marine* concerned three companies involved in Nigeria's oil industry—Baker Marine, Danos, and Chevron—who had collectively entered into a contract to provide barge services.[54] Baker Marine charged the other parties with violating the contract, and

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44. *See* TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 938 (D.C. Cir. 2007); Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 197 (2d Cir. 1999); Spier v. Calzaturificio Tecnica, S.p.A., 71 F. Supp. 2d 279, 288 (S.D.N.Y. 1999); *In re* Chromalloy Aeroservices, 939 F. Supp. 907, 914 (D.D.C. 1996).

45. *Chromalloy*, 939 F. Supp. at 908. This case involved a discussion of the court's discretion under the New York Convention. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 912.

52. *Id.* at 913.

53. 191 F.3d 194, 196 (2d Cir. 1999). Like *Chromalloy*, this case evaluated the court's discretion to confirm an award under the New York Convention. *Id.* at 195.

54. *Id.*

pursuant to the contract, the parties submitted to arbitration before a panel in Nigeria.[55] Baker Marine was successful against both Danos and Chevron and sought enforcement of both awards in a Nigerian court.[56] The Nigerian court set aside both awards on numerous grounds.[57]

Baker Marine subsequently brought an action in the United States District Court for the Northern District of New York, seeking to have the awards confirmed.[58] The district court held that it would be improper to enforce the award because it had been set aside by the Nigerian court; Baker Marine appealed, and the Second Circuit affirmed the district court's decision.[59] The Second Circuit did not accept Baker Marine's contention that the use of the word "may" in the New York Convention meant that courts were allowed to confirm previously annulled awards and held that "Baker Marine [had] shown *no adequate reason* for refusing to recognize the judgments of the Nigerian court."[60] The Second Circuit emphasized the practicality behind its decision—if a party whose arbitration award was vacated at the site of the award could simply obtain enforcement under the laws of another nation, losing parties would pursue actions from country to country until they could find a court that would grant enforcement.[61]

In *TermoRio S.A. E.S.P. v. Electranta S.P.*, the United States Court of Appeals for the District of Columbia Circuit similarly declined to enforce a previously annulled arbitration award.[62] In that case, when Electranta allegedly failed to meet its obligations under the parties' agreement, the dispute was submitted to a Colombian tribunal in accordance with their agreement.[63] The tribunal issued an award in favor of TermoRio, and Electranta filed a writ in a Colombian court seeking to have the award overturned.[64] Colombia's highest administrative court, the

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55. *Id.*

56. *Id.* at 195-96.

57. *Id.* at 196. With regard to Chevron's action, the court found "that the arbitrators had improperly awarded punitive damages, gone beyond the scope of the submissions, [and] incorrectly admitted parole evidence." *Id.* With regard to Danos's action, the court found that the award was unsupported by the evidence. *Id.*

58. *Id.*

59. *Id.* at 198.

60. *Id.* at 197 (emphasis added); *see also* Spier v. Calzaturificio Tecnica, S.p.A., 71 F. Supp. 2d 279, 288 (S.D.N.Y. 1999) (holding that the plaintiff's "reference to the permissive 'may' in Article V(1) . . . does not assist him since, as in *Baker Marine*, [he] has shown no adequate reason for refusing to recognize the judgments of the Italian courts").

61. *Baker Marine*, 191 F.3d at 197 n.2.

62. 487 F.3d 928, 930 (D.C. Cir. 2007). Like *Baker Marine* and *Chromalloy*, this case considered a court's discretion under the New York Convention. *Id.*

63. *Id.* at 929.

64. *Id.*

Consejo de Estado, annulled the award on the ground that the arbitration clause in the parties' contract violated Colombian law.[65] TermoRio filed suit in the U.S. district court seeking enforcement of the tribunal's award.[66] The district court dismissed the action, and TermoRio appealed.[67]

The D.C. Circuit affirmed the district court's dismissal, concluding that under the New York Convention, a secondary state "normally may not enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary Contracting State."[68] Because the Colombian court was found to be a competent authority and nothing in the factual record indicated "that the judgment of that court [was] other than authentic," the court held that the arbitration award should be set aside.[69] Like the Second Circuit in *Baker Marine*, the D.C. Circuit emphasized the practicality of their decision because to confirm the award "would seriously 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."[70]

Though *TermoRio* was critical of the broad holding in *Chromalloy*,[71] *Chromalloy* remains good law and both *Baker Marine* and *TermoRio* recognized that a court should be more hesitant to defer to a nullification judgment that conflicts with fundamental notions of fairness.[72] In *Baker Marine*, the Second Circuit specifically distinguished the facts and outcome of that case from *Chromalloy* by pointing out that "[r]ecognition of the Nigerian judgment in this case does not conflict with United States public policy,"[73] implying that where recognition of a judgment *does* conflict with public policy, deferral may not be warranted. Despite its wariness of *Chromalloy*'s broad holding, the D.C. Circuit in *TermoRio* recognized, "[T]here is a narrow public policy gloss on Article V(1)(e) of the [New York] Convention and that a foreign judgment is

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65. *Id.*
66. *Id.*
67. *Id.* at 929-30.
68. *Id.* at 935.
69. *Id.*
70. *Id.* at 936.
71. *See id.* at 937. Because the case was "plainly distinguishable," the court in *TermoRio* declined to determine whether the *Chromalloy* holding was correct but noted that courts should defer to nullifications despite "the Convention policy in favor of enforcement of arbitration awards." *Id.*
72. *See id.*; Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 197 n.3 (2d Cir. 1999).
73. *Baker Marine*, 191 F.3d at 197 n.3.

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.'"[74]

III. THE COURT'S DECISION

In the noted case, the Southern District of New York held that the decision of the Mexican court vacating the arbitral award violated basic notions of justice and that deference was therefore not required.[75] The court relied on the standard set forth in *TermoRio* and distinguished the facts in the noted case from the facts in *TermoRio* and *Baker Marine*.[76] The court concluded that previous case law indicated that the use of the word "may" in article 5(1)(e) of the Panama Convention gave it narrow discretion.[77] The court found that COMMISA was reasonably led to believe that the dispute could be arbitrated, that PEP had the authority to enter into the arbitration contract,[78] and that the North American Free Trade Agreement (NAFTA) and PEP's own conduct supported these conclusions.[79] The court found that Mexico's Eleventh Collegiate Court's reliance on section 98 of the Law of Public Works and Related Services was critical to its decision and criticized the *unfairness* of this retroactive application.[80] The court also held that the unfairness was exacerbated by the fact that the "application of Section 98 was undertaken to favor a state enterprise over a private party" and "the fact that the Eleventh Collegiate Court's decision left COMMISA without a remedy to litigate the merits of the dispute."[81]

The court framed the issue as this: "What, if any, is the discretion of a court asked to confirm an arbitration award that has been nullified by a competent authority of the state in which the arbitration was held?"[82] Based on the language of article 5(1)(e) of the Panama Convention, the court concluded that the statutory phrase "may" gave it the discretion to confirm the award.[83] Based on *TermoRio* and *Baker Marine*, the court

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74. *TermoRio*, 487 F.3d at 939 (quoting Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981)).

75. Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción, No. 10 Civ. 206(AKH), 2013 WL 4517225, at *14 (S.D.N.Y. Aug. 27, 2013).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at *15.

80. *Id.* at *15-16.

81. *Id.* at *16.

82. *Id.* at *14.

83. *Id.*

concluded that its ability to exercise this discretion was narrow and dependent on whether the judgment violated basic notions of justice.[84]

The court discussed the facts surrounding the making of the contract and COMMISA's reasonable expectations and found that when COMMISA entered into the contract in 2004, it had "every reason to believe that its dispute with PEP could be arbitrated."[85] The arbitration clause was broadly worded and mandatory, and PEP had the authority to enter into the arbitration provision based on the PEMEX Organic Law.[86] The court also briefly discussed NAFTA, which authorizes the arbitration of disputes between private parties and a signatory nation in cases where state enterprises had contracted in the public interest.[87] Based on these considerations, the court found that Mexico had clearly agreed that it could be subject to arbitration in cases like the one at issue and reasoned that this suggested that Mexico believed its instrumentalities were subject to arbitration as well.[88] Additionally, the court found that PEP's own conduct showed that it considered itself subject to arbitration.[89]

The court also discussed the Eleventh Collegiate Court's application of section 98 of the Law of Public Works and Related Services.[90] Although the Eleventh Collegiate Court stated that it was not actually retroactively applying section 98, the district court found that the use of section 98 was critical to its decision.[91] The 1994 Mexican Supreme Court case that the Eleventh Collegiate Court purported to base its decision upon *did not mention arbitration* and was only marginally relevant to the case at hand.[92] Thus, the district court found that section 98 had been applied retroactively and remarked upon the unfairness associated with this application.[93] The circumstances and law at the time the parties entered into the contract gave COMMISA the expectation that its dispute could be arbitrated,[94] and the 1994 Mexican Supreme Court decision did not give COMMISA sufficient notice "that the statute that

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84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at *15.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at *15-16. The court quoted *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66 (1994), which stated, "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Corporación Mexicana de Mantenimiento Integral*, 2013 WL 4517225, at *16.
94. *Corporación Mexicana de Mantenimiento Integral*, 2013 WL 4517225, at *16.

specifically empowered PEP to arbitrate and the arbitration clauses PEP had agreed to should have been ignored."[95]

To bolster its finding of unfairness, the district court discussed a number of ways in which the unfairness of applying section 98 was exacerbated.[96] First, the court took issue with the fact that the retroactive application was undertaken to favor a state enterprise over a private party.[97] According to the court, this went against the basic principle of justice that when a sovereign agrees to contract with a private party, "a court hearing a dispute regarding that contract should treat [the parties] as equals."[98] Second, the fact that the Eleventh Collegiate Court applied a law that came into effect after the parties entered into their contract left COMMISA without a remedy to litigate the merits of the dispute.[99] By the time the Eleventh Collegiate Court issued its opinion, the forty-five-day statute of limitations under section 98 barred COMMISA from bringing a suit in the exclusive forum, Mexico's Federal Tax and Administrative Justice Court.[100] The court considered this lack of remedy to be particularly unjust.[101]

In sum, the court held that the Eleventh Collegiate Court's decision violated basic notions of justice by applying a law that was not in existence at the time of the parties' contract and leaving COMMISA without an ability to litigate its claims.[102] For these reasons, the court found the facts of the noted case to be distinguishable from those in *Baker Marine* and *TermoRio* where no such legitimate reasons existed for confirming a previously annulled award.[103] Accordingly, the court found it appropriate to exercise its narrow discretion to confirm an arbitral award previously annulled by a competent authority in the state in which the arbitration was held.[104]

IV. ANALYSIS

The decision in the noted case reaffirms the relevance of the *Chromalloy* decision, which allowed U.S. courts to enforce an arbitral award even where it has been annulled by a competent authority in the

95. *Id.*
96. *Id.* at *16-17.
97. *Id.* at *16.
98. *Id.*
99. *Id.*
100. *Id.* at *17.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*

state in which the arbitration was held.[105] The Southern District of New York could conceivably have interpreted the refusal to confirm previously annulled awards in *Baker Marine* and *TermoRio* to indicate a stricter standard, but chose to continue to uphold the discretion of U.S. courts. However, the noted case approves of the general approach from *Baker Marine* and *TermoRio*—any discretion a court has to confirm a previously annulled award is narrow and dependent on the existence of certain circumstances.[106] The noted case therefore highlights an approach that will likely be taken by U.S. courts in the future regarding the confirmation of foreign arbitral awards: whether a foreign annulment judgment violates fundamental notions of fairness appears to have been solidified as the critical consideration in deciding whether a court will confirm an award.

The noted case can also serve as a comparative guide on the approach likely to be taken by U.S. courts and the approaches taken by courts in other jurisdictions. The scope of a court's discretion to confirm previously annulled foreign arbitral awards under the Panama and New York Conventions is an emerging issue in international law.[107] The United States is one of only a few jurisdictions that has thus far had development in case law indicating the approach courts should take when dealing with this issue.[108] The U.S. approach allowing narrow discretion falls on a spectrum between both narrower and broader approaches taken in other jurisdictions,[109] and the noted case provides tentative guidance on how U.S. courts may view this developing international issue.[110]

The discretion approved by the Southern District of New York is most similar to the approach that has been taken in Dutch courts.[111] In

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105. *See In re* Chromalloy Aeroservices, 939 F. Supp. 907, 908 (D.D.C. 1996); *Arbitral Award Enforced in the United States Although Annulled Abroad*, LATHAM & WATKINS (Sept. 4, 2013), http://www.lw.com (follow "Knowledge Library" hyperlink; then follow "Thought Leadership" hyperlink; then search "Search Thought Leadership" for "arbitral award enforced in United States although annulled abroad").

106. *Arbitral Award Enforced in the United States Although Annulled Abroad*, *supra* note 105, at 4.

107. *See* INT'L CHAMBER OF COMMERCE, ICC GUIDE TO NATIONAL PROCEDURES FOR RECOGNITION AND ENFORCEMENT OF AWARDS UNDER THE NEW YORK CONVENTION 20 (2012) [hereinafter ICC GUIDE].

108. *Id.*

109. *Id.*

110. It must also be remembered, however, that the noted case was decided by a U.S. district court and that it still remains possible for the Second Circuit to overturn the district court's decision as an overreaching of the standard established by *Baker Marine*.

111. *See Arbitral Award Enforced in the United States Although Annulled Abroad*, *supra* note 105, at 3-4 (summarizing and commenting on Dutch cases Yukos Capital S.A.R.L. v. OAO Rosneft and Maximov v. NLMK).

Maximov v. NLMK, the Amsterdam Court of Appeal considered the fairness of the nullification of arbitral awards rendered in Russia—and thereafter set aside by a Russian court—in deciding whether to confirm the award.[112] The Dutch court held that the foreign judgment annulling the award should be deferred to unless there were specific indications that the judgment was made as the result of an unfair trial.[113] This test is similar to the approach used in the noted case.[114]

The narrow discretion approach seen in the noted case and the Dutch case can be compared to the more liberal approach taken by French courts.[115] In *Maximov v. NLMK*, the Paris Court de Grande Instance confirmed the arbitral awards delivered in Russia—and thereafter set aside by a Russian court—without inquiring into the annulment proceedings.[116] The French court held that the annulment by the Russian court was simply not a sufficient reason to refuse to recognize the award in France.[117] This holding indicates that the French approach allows for much broader discretion than allowed for in the noted case or the Dutch case.[118] According to the *ICC Guide to National Procedures for Recognition and Enforcement of Awards Under the New York Convention* (*ICC Guide*), there are a number of other countries where—like the United States, France, and the Netherlands—enforcement of awards previously set aside is likely available conditioned upon varying standards and considerations (though courts in these countries have yet to decide the issue).[119]

There are also jurisdictions that hold the view that the award very likely *cannot* be enforced once it has been set aside by an authority in the seat of arbitration.[120] Germany and Switzerland are two countries that are likely to refuse to enforce an award previously set aside, and the *ICC Guide* suggests that a number of other countries are likely to follow this

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112. *Id.*

113. *Id.*

114. *See* Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción, No. 10 Civ. 206(AKH), 2013 WL 4517225, at *17 (S.D.N.Y. Aug. 27, 2013).

115. *See Arbitral Award Enforced in the United States Although Annulled Abroad*, *supra* note 105, at 3-4 (summarizing and commenting on French cases Société Hilmarton Ltd. v. Société OTV and Maximov v. NLMK).

116. *Id.*

117. *Id.*

118. *See id.*; *Corporación Mexicana de Mantenimiento Integral*, 2013 WL 4517225, at *17.

119. *See* ICC GUIDE, *supra* note 107, at 20.

120. *Id.*

strict approach of deferral when courts are presented with the issue in the future.[121]

The noted case also reemphasizes to international businesses the importance of making wise selections when choosing a seat of arbitration.[122] In protecting their interests, "parties should take great care to select a seat of arbitration with a tradition of respecting the finality of arbitration awards."[123] The noted case confirms the value to parties in acquiring a familiarity with the approaches taken in different jurisdictions when addressing the issue of confirming previously annulled awards. A party trying to enforce a previously annulled award should seek recognition in a jurisdiction that allows courts broader discretion to enforce the award.[124] For example, a party might seek to have its award enforced in France, a jurisdiction that takes a more liberal approach to recognizing previously annulled awards, provided its counterparty has assets in that jurisdiction that may be collected against.[125]

The noted case more specifically illustrates tentative guidelines to be considered by businesses contracting with parties with assets in the United States. Parties seeking to enforce arbitral awards in U.S. courts should be aware that while U.S. courts are more likely to follow a comparatively liberal policy toward confirming a previously annulled award than some jurisdictions, the court's discretion is still limited to situations where notions of fundamental fairness are violated.[126]

V. CONCLUSION

The noted case's use of an approach giving U.S. courts narrow discretion to confirm previously annulled arbitral awards is best appreciated in consideration of the current state of this issue internationally under the New York and Panama Conventions. The noted case clarifies the scope of the discretion a court may exercise to confirm

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121. *See id.*

122. *Arbitral Award Enforced in the United States Although Annulled Abroad*, *supra* note 105, at 4.

123. Laurence Shore et al., *US District Court Confirms Arbitral Award Against Pemex That Was Nullified at Its Seat*, LEXOLOGY (Sept. 18, 2013), http://www.lexology.com/library/detail.aspx?g=730cacb8-d61e-4ba4-a430-003f15ac62aa; *see also Arbitral Award Enforced in the United States Although Annulled Abroad*, *supra* note 105, at 4.

124. *See Arbitral Award Enforced in the United States Although Annulled Abroad*, *supra* note 105, at 4.

125. *See id.* at 2, 4.

126. *See id.*; Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción, No. 10 Civ. 206(AKH), 2013 WL 4517225, at *13 (S.D.N.Y. Aug. 27, 2013).

such an award and highlights the importance of judicial deference barring violations of fundamental notions of fairness. Going forward, this case provides other U.S. courts with a standard to consider when addressing issues of arbitral awards annulled at the seat of arbitration.

Further, the discretion to enforce previously annulled awards is an issue increasingly facing courts in jurisdictions around the world. Knowledge of the current law on this issue is essential to international parties' considerations including which seat of arbitration may best protect their interests, which countries are more likely to annul an arbitral award, and which countries are more likely to confirm a previously annulled award. The United States is currently one of the few jurisdictions that offer judicial guidance for parties to consider when entering into contracts with arbitration clauses, especially with foreign sovereigns. As courts continue to develop case law on this issue, the noted case will likely serve to guide both courts and international parties.

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