



North America

United States

GULF PETRO TRADING CO INC v NIGERIAN NATIONAL PETROLEUM CORP

Challenge of Foreign Arbitration Awards

LT Foreign awards; International commercial arbitration; Jurisdiction; Remedies; Striking out; United States

Bar on collateral attacks on foreign arbitration awards; New York Convention; res judicata; international comity; enforcement and challenges of awards in primary and secondary jurisdictions; fraud

Northern District of Texas; Eastern District of Texas; 5th Cir. Court of Appeal, F.3d, 2008 WL 62546 (5th Cir.), January 7, 2008

Facts

Initial Proceedings

The judgment is the latest development in a long-running saga arising out of a 1993 agreement between a Texas company, Petrec International, Inc (Petrec), a wholly-owned subsidiary of Gulf Petro Trading Company Inc, and the Nigerian National Petroleum Corporation (NNPC). That agreement provided for Petrec to set up Petrec (Nigeria) Ltd (PNL) to reclaim and salvage slop oil created by NNPC's operations. A dispute arose between the parties: Petrec alleged that NNPC had both failed to contribute its share of capital to PNL and refused to provide access for the salvage operation. In accordance with an arbitration agreement, Petrec initiated arbitration proceedings before a three member Tribunal in the Chamber of Commerce and Industry of Geneva.

In a Partial Award, the Tribunal decided that Petrec had standing to pursue its claim and found that NNPC had failed to contribute its share of capital to PNL, but that Petrec did not have an exclusive right to the slop oil. Following a hearing regarding damages (at which NNPC again challenged Petrec's standing by introducing evidence that Petrec was incorporated several years after execution of the agreement and after the date of the demand for arbitration), the arbitrators issued their Final Award on October 9, 2001 and decided that Petrec lacked standing to maintain its claims against NNPC. Petrec challenged the Final Award in the Swiss Federal Court. In April 2002, the Swiss Federal Court upheld the arbitrators' Final Award.

Petrec then filed a claim in the Northern District of Texas, seeking confirmation of the Partial Award. This was dismissed for lack of subject-matter jurisdiction, on the ground that the suit was effectively a request that the Final Award be set aside or modified. The court held that the type of relief sought was precluded under the New York Convention and by the doctrines of *res judicata* and international comity. This decision was affirmed by the Court of Appeals for the Fifth Circuit.

Current Proceedings

In September 2005, Petrec initiated these proceedings in the Eastern District of Texas, alleging that the Final Award was procured by fraud, bribery and corruption. In particular, Petrec alleged that it had a letter evidencing a US\$25 million bribe paid by NNPC to one of the arbitrators in exchange for a favourable award. It also alleged that two of the three arbitrators engaged in undisclosed dealings and ex parte communications with NNPC.

The complaint requested damages based on federal statutory law, Texas common law, and Texas statutory law. One count specifically requested the Court to vacate the Final Award pursuant to the Federal Arbitration Act.

On March 15, 2006, the District Court granted the defendants' motion to dismiss, on the ground that it had no jurisdiction under the New York Convention to vacate or modify the Final Award. Although only one count directly sought to vacate the award the other counts regarding alleged bribery and conspiracy would, if successful, have rendered the award invalid. Moreover, the damages sought were the damages Petrec would have been entitled to if it had won the arbitration. According to the District Court, its suit was therefore an impermissible collateral attack on the Final Award. Petrec appealed to the Court of Appeals for the Fifth Circuit.

Held

The Court of Appeals for the Fifth Circuit reviewed the dismissal for lack of subject-matter jurisdiction *de novo*, applying the same standard as the District Court. On appeal, Petrec accepted its claim seeking to vacate the Final Award was properly dismissed, but contested the lower court's dismissal of the other claims.

The Fifth Circuit held that the award at issue was clearly a foreign award for New York Convention purposes, and drew a clear distinction between the regimes for review of arbitration awards in the courts of the jurisdiction in which the award is made ("primary jurisdiction") and the place where recognition or enforcement of the award is sought ("secondary jurisdiction"). Primary jurisdiction allows a court to annul an award on the grounds available under local law; secondary jurisdiction is limited by the New York Convention to assessing whether the award should be recognised and enforced within that jurisdiction. Article V of the Convention sets out the exclusive grounds on which courts of secondary jurisdiction can refuse to recognise or enforce an award.

Petrec argued that its claims were not a collateral attack on the Final Award but rather discrete claims regarding racketeering and conspiratorial conduct. It asserted that it was not attempting to relitigate facts and defences raised in the arbitration. The Fifth Circuit found that there could be a collateral attack without an attempt to relitigate facts and defences raised below. In this instance, the harm alleged to have been suffered by the claimants was not caused by the wrongdoing itself but rather by the impact it allegedly had on the Final Award. The relief sought was effectively the award the claimants thought they should have received in the arbitration, together with the costs and consequential damages stemming from the unfavourable award. According to the New York Convention it is appropriate to seek this kind of relief in the primary jurisdiction, but not in the secondary jurisdiction.

The Fifth Circuit concluded that all of Petrec's claims constituted an indirect attack on the Award, and should therefore be rejected.

Comment

In this case, the Fifth Circuit adopted a strict view of the New York Convention's mandate that courts of secondary jurisdiction do not have the authority to modify a foreign award. In reaching this decision, the Fifth Circuit closely examined several cases involving enforcement of domestic arbitration awards under the Federal Arbitration Act. One of those cases, *Corey v New York Stock Exchange* 691 F.2d 1205 (6th Cir. 1982), involved a plaintiff's lawsuit against the New York Stock Exchange, in which he claimed that he was deprived of a fair arbitral process because the NYSE's selection of the panel violated NYSE rules. The Sixth Circuit concluded that, even though the plaintiff did not use terms such as "vacation, modification, or correction of the arbitration award," the alleged harm was an unfavourable award. Therefore, the Sixth Circuit concluded that the lower court had no jurisdiction to consider the challenge.

In *Gulf Petro*, the Fifth Circuit followed the functional analysis set forth in *Corey*, where the court must examine the interaction among the alleged wrongdoing, purported harm, and the underlying arbitration award. If—as in *Gulf Petro*—“the harm was not caused by the wrongdoing in and of itself, but rather by the impact of the acts complained of on the award,” courts cannot consider the lawsuit because it is nothing more than a thinly veiled attack on the arbitration award.

Through this decision, the Fifth Circuit has made plain the broad dictates of the New York Convention’s prohibition on attacking the validity of an award in a court of secondary jurisdiction. In so doing, the court rejected the alarmist scenario described by Petrec, i.e. that allowing the District Court decision to stand would “render unenforceable statutes that make it a crime to obstruct justice or suborn the corruption of an arbitration panel”. The Fifth Circuit was quite right that the issue turns on the relief sought, rather than the causes of action. In *Gulf Petro*, the remedy sought by the plaintiff/appellant was identical to the relief it would have received had the arbitral panel ruled in its favour.

This decision serves to remind parties to arbitration clauses of the importance of carefully selecting not only the governing law applicable to the arbitration but also the situs of the arbitration, as it is the latter that will determine the primary jurisdiction remedies available to a disgruntled party at the close of the proceedings. When the time for enforcement arrives, the remedies available in the courts of the secondary jurisdiction are likely to be very limited and narrow in scope.

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THE CZECH REPUBLIC v EUROPEAN MEDIA VENTURES SA

Tribunals’ jurisdiction under BITs

 *Arbitration clauses; Czech Republic; Expropriation; International investment disputes; Jurisdiction; Luxembourg; Measure of damages; Treaty interpretation; Tribunals*

Bilateral investment treaties; jurisdiction; scope of an arbitration clause; Vienna Convention; textual versus teleological interpretation; the right to arbitrate; protection and promotion of investments.

Commercial Court, [2007] EWHC 2851 (Comm), Simon J.

¹ [2007] EWHC 2851 (Comm).

Introduction

Bilateral Investment Treaties (BITs) between states offer to investors from one contracting state direct arbitration rights against the other contracting state. Usually, capital-importing states try and limit the scope of the arbitration rights given to investors and capital-exporting states try to expand these rights as much as possible. The result of these different negotiating perspectives coupled with the unequal bargaining powers of states is that the precise scope and extent of such a direct right varies from treaty to treaty.

Many BITs signed by the ex-communist states usually contain a limited arbitration clause; for example, the older Chinese BITs limit the scope of arbitration to the amount of compensation payable for expropriation. The wording of one such clause was in issue before the English High Court in *The Czech Republic v European Media Ventures SA*¹ when the BIT tribunal’s award on jurisdiction was challenged under s.67(1)(a) of the Arbitration Act 1996.

The Czech Republic contended that the BIT tribunal did not have substantive jurisdiction given the limited scope of the arbitration clause in Art.8 of the relevant BIT. Simon J. determined the question of the tribunal’s substantive jurisdiction over liability and quantum of compensation for expropriation in favour of the investor, upholding the jurisdiction award made by the BIT tribunal itself.