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A Change in Course? The Eleventh Circuit May Soon Join Most Circuits on the Applicability of FAA Grounds to Vacate Nondomestic Arbitration Awards

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In October 2022, the Eleventh Circuit Court of Appeals granted a petition to rehear the case of *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A. en banc* to determine whether enforcement challenges of nondomestic arbitration awards are exclusively governed by the standards set forth in Article V of the New York Convention as codified by Chapter 2 of the Federal Arbitration Act (FAA).[1] In doing so, the Eleventh Circuit appears poised to realign itself with the majority of other federal circuits and hold that the vacatur standards set out in Section 10 of Chapter 1 of the FAA (Section 10) may also apply to nondomestic arbitration awards.[2] Such a ruling would overturn more than two decades of prevailing precedent within the Eleventh Circuit that nondomestic arbitration awards may only be challenged by the grounds set forth in the New York Convention and not by those set forth in Section 10 of the FAA.[3] Arbitration users should pay careful attention to this case because it represents a potential sea change to the relatively deferential award enforcement standards in the Eleventh Circuit.

Relevant Background

For purposes of the FAA, there are three types of arbitration awards: (1) foreign awards made outside the United States; (2) purely domestic awards made within the United States and arising out of a commercial relationship between U.S. parties; and (3) nondomestic awards issued within the United States but involving noncitizen parties or other international elements.[4]

Chapter 1 of the FAA specifically applies to domestic arbitration proceedings.[5] Chapter 2 of the FAA, which implements the New York Convention, applies to foreign and nondomestic awards.[6] However, there is a split among the circuits over whether the standards for vacatur of domestic arbitration awards under Section 10 of the FAA also apply to nondomestic arbitration awards.[7]

Indeed, while the majority of federal circuits have concluded that Section 10 of the FAA applies to nondomestic arbitration awards, the Eleventh Circuit has held that a party's ability to vacate such an award is exclusively controlled by the standards for nonenforcement under the New York Convention.[8] This is important because the standards for vacatur under Section 10 are different from the standards for nonenforcement of an arbitration award under the New York Convention. Specifically, according to Section 10 of Chapter 1 of the FAA, an award may be vacated under four individual grounds:

(1) where the award was procured by corruption, fraud, or undue means;

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(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where 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) where 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.[9]

By contrast, under Article V(1) of the New York Convention, a court may refuse to enforce an award for various reasons including: (a) the parties' legal incapacity or the invalidity of the agreement "under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"; (b) "[t]he 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"; (c) the award "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"; (d) the arbitration "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"; and (e) "[t]he 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."[10] Further, Article V(2) of the New York Convention provides that recognition and enforcement may be refused if (a) "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country" and for (b) public policy reasons.[11]

While the standards for vacatur under Section 10 of the FAA and the standards for nonenforcement under the New York Convention are similar in concept, as shown above, they are textually distinct, and courts around the United States have interpreted and applied these standards differently.[12]

Thus, the question of whether the vacatur standards under Section 10 of the FAA apply to nondomestic awards carries relatively significant consequences over how future parties must assess whether nondomestic arbitration awards will be enforced in the Eleventh Circuit.

The *Corporacion AIC, SA* Case

In *Corporacion AIC, SA*, Hidroelectrica Santa Rita S.A. (HSR) engaged Corporacion AIC, SA (AIC) in March 2012 to construct a hydroelectric powerplant on the Icbolay River in Guatemala.[13] The project was not supported by the local community, and shortly after the commencement of the work, members of the local opposition blockaded access to the site and threated construction personnel.[14] As a result, in October 2013, HSR issued a *force majeure* notice, ordering AIC to suspend work.[15] Later, in March 2015, HSR issued a notice of termination for convenience and discontinued the project.[16]

Under the contract, HSR commenced international arbitration according to the Rules of Arbitration of the International Chamber of Commerce in Miami, FL, seeking, among other things, reimbursement of more than $7 million in advance payments.[17] AIC sought dismissal of HSR's claims and payment of damages, costs,

reimbursement for amounts owed to its subcontractor, and attorneys' fees and expenses.[18] The arbitral tribunal largely ruled in favor of HSR, but granted AIC about $2.5 million in earnings.[19]

Disappointed with the outcome of the arbitration, AIC sought to vacate the award in the Southern District of Florida on the basis that the arbitrators "exceeded their powers" under Section 10(a)(4) of the FAA.[20] AIC argued that the arbitrators exceeded their authority because they (1) created new joinder requirements and refused to allow AIC to join its subcontractor to the proceedings; (2) created a new condition precedent to the contract regarding anti-corruption provisions; (3) refused to follow Guatemalan law; (4) failed to follow the contract regarding recovery of fees and costs; and (5) required AIC to post a second set of bonds.[21] The district court rejected AIC's arguments and denied AIC's petition and motion to vacate because, according to Eleventh Circuit precedent, "a party can only invoke the defenses set forth in the New York Convention to vacate this international arbitration award. *AIC cannot rely upon Section 10 of the FAA as a basis for vacatur*."[22]

AIC subsequently appealed. However, the U.S. Court of Appeals for the Eleventh Circuit affirmed a district court's refusal to vacate the award.[23] According to the Court of Appeals, it could not reach the merits of whether vacatur was warranted because controlling precedent "compelled [it] to say that [it] may not vacate the arbitration award in this case … on the exceeding powers ground, a domestic ground for vacatur not explicitly listed in Article V of the New York Convention."[24]

Critically, in so ruling, the panel made abundantly clear that it believed that the Eleventh Circuit "is out of line with Supreme Court precedent" and urged an *en banc* court to take up the issue.[25]

As Judge Tjoflat, writing for the majority, explained: Eleventh Circuit precedent "failed to consider that domestic defenses to enforcement of arbitration awards were nestled in Article V(1)(e)" of the New York Convention.[26] Specifically, Article V(1)(e) of the New York Convention states that "[r]ecognition and enforcement of the award may be refused" if "[t]he award … *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*."[27] According to the majority in *Corporacion AIC, SA*, notwithstanding controlling precedent, Article V(1)(e) must mean that where an arbitration award is the product of an arbitration seated in the United States or an arbitration governed by the arbitration laws of the United States, the U.S. courts must have the authority to "set aside" the award under its domestic law, including Section 10 of the FAA.[28] Thus, because the underlying arbitration in *Corporacion AIC, SA* was located in Miami, the Court of Appeals reasoned that Section 10 of the FAA should afford AIC grounds to possibly vacate the arbitration award.

Accordingly, on October 5, 2022, the court granted a petition to rehear *Corporacion AIC, SA en banc*.[29] In doing, the Court of Appeals casts doubt on the ongoing viability of the Eleventh Circuit's approach to the enforcement of nondomestic arbitration awards.

En banc briefing for the parties will conclude by February 1, 2023, and oral argument is scheduled to take place on February 13, 2023. For arbitration users, particularly those in the Eleventh Circuit, the Court of Appeal's decision in *Corporacion AIC, SA* is a case to watch.

[1] *See Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 50 F.4th 97, 98 (11th Cir. 2022).

[2] *See, e.g.*, *Goldgroup Res., Inc. v. DynaResource de Mexico, S.A. de C.V.*, 994 F.3d 1181, 1189-90 (10th Cir. 2021); *Ario v. Underwriting Members at Lloyds*, 618 F.3d 277, 292 (3d Cir. 2010); *Gulf Petro Trading Co., Inc. v. Nigerian Nat. Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

[3] *See Earth Sci. Tech, Inc. v. Impact UA, Inc.*, 809 F. App'x 600, 605 (11th Cir. 2020); *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1302 (11th Cir. 2019); Indus. *Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998).

[4] *See* 9 U.S.C. § 202; *Indus. Risk Insurers*, 141 F.3d at 1441.

[5] *See* 9 U.S.C. §§ 1-16.

[6] *See* 9 U.S.C. §§ 201-208; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter New York Convention].

[7] *Compare Goldgroup Res., Inc.*, 994 F.3d at 1190 (10th Cir. 2021) ("We therefore conclude that FAA defenses are available in proceedings to confirm a nondomestic arbitration award rendered in or under the law of the United States."), *with Inversiones*, 921 F.3d at 1301 ("[T]he defenses enumerated by the Convention provide the exclusive grounds for vacating an award subject to the Convention.").

[8] *See Indus. Risk Insurers*, 141 F.3d at 1446 ("[T]he Convention's enumeration of defenses is exclusive.").

[9] 9 U.S.C. § 10(a).

[10] New York Convention, *supra* note 6, art. V(1).

[11] *Id.* art. V(2).

[12] While Chapter 2 has been narrowly construed, vacatur provisions under Chapter 1 have allowed for the inclusion of common law grounds, such as the "arbitrary and capricious" and "manifest disregard of the law" standards. *See, e.g.*, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) ("Defenses to enforcement under the New York Convention are construed narrowly"); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 91 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010) ("We have also recognized that the district court may vacate an arbitral award that exhibits a 'manifest disregard' of the law [under Section 10 of the FAA]."); *Indus. Risk Insurers*, 141 F.3d at 1445-46 ("[D]omestic arbitral awards may be vacated for six different reasons; four are enumerated by the FAA and two are non-statutory defenses against enforcement, derived by the courts from the statutory list … . The two non-statutory defenses against enforcement of a domestic award are 1) that the award is "arbitrary and capricious" and 2) that enforcement of the award would be contrary to public policy.").

[13] *Corporacion AIC, S.A. v. Hidroelectrica Santa Rita*, S.A., No. 19-20294-CV, 2020 WL 4485226, at *1 (S.D.

Fla. Apr. 16, 2020), *report and recommendation adopted*, No. 19-20294-CIV, 2020 WL 4478424 (S.D. Fla. Aug. 4, 2020), *aff'd sub nom.*, 34 F.4th 1290 (11th Cir. 2022), *reh'g en banc granted, opinion vacated*, 50 F.4th 97 (11th Cir. 2022).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at *2; *see Hidroelectrica Santa Rita, S.A. v. Corporacion AIC, S.A.*, Partial Award, ICC Case No. 21398/RD/MK, ¶ 15, 2019 WL 1237006 (ICC Int'l Ct. Arb. 2017).

[18] *Corporacion AIC, S.A.*, 2020 WL 4485226, at *2.

[19] *Id.*

[20] *Id.* at *3.

[21] *Id.*

[22] *Id.* at *4 (emphasis added).

[23] *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 34 F.4th 1290, 1292 (11th Cir.), *reh'g en banc granted, opinion vacated*, 50 F.4th 97 (11th Cir. 2022).

[24] *Id.* at 1297.

[25] *Id.* at 1292.

[26] *Id.* at 1298.

[27] New York Convention, *supra* note 6 art. V(1)(e) (emphasis added).

[28] *Id.* at 1299.

[29] *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 50 F.4th 97, 98 (11th Cir. 2022).

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