Articles + Publications | August 4, 2023

Eleventh Circuit Joins Others on Applicability of Domestic FAA Grounds to Vacate Nondomestic Arbitration Awards

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Earlier this year[1] the Eleventh Circuit Court of Appeals joined the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. circuits in the much-anticipated *en banc* decision of *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, where it held that the grounds for vacatur under Chapter 1 of the Federal Arbitration Act (FAA) may also apply to nondomestic arbitration awards (*e.g.,* arbitration awards rendered in the U.S. but involving a non-U.S. party).[2] The court's decision overruled two of its prior cases, holding that Article V of the New York Convention and Chapter 2 of the FAA provided the exclusive grounds for challenging the enforcement of a nondomestic arbitration award.[3] The decision is of significance because it brings the Eleventh Circuit — which encompasses the increasingly popular arbitration seats of Atlanta and Miami — in line with other circuit courts that have considered this issue.[4]

General Background

For purposes of the FAA, there are three types of arbitration awards: (1) foreign awards made outside the U.S.; (2) purely domestic awards made within the U.S. and arising out of a commercial relationship between U.S. parties; and (3) nondomestic awards issued within the U.S. but involving noncitizen parties or other international elements.[5]

Although the New York Convention (codified in Chapter 2 of the FAA) provides specific grounds to "refuse" the "recognition and enforcement" of arbitral awards, these standards are different from the grounds to "vacate" an award under domestic U.S. arbitration law. For instance, Section 10 of Chapter 1 of the FAA, provides that an award may be "vacated" for four reasons, including if:

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

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

(3) 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) The arbitrators exceeded their powers or imperfectly executed them so that a mutual, final, and definite award upon the subject matter submitted was not made.[6]

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In contrast, Article V(1) of the New York Convention states that a court may "refuse" to "recognize and enforce" an award for reasons such as: (a) the parties' legal incapacity or the invalidity of the agreement, (b) lack of proper notice of the appointment of the arbitrator or of the arbitration proceedings; (c) the award "contains decisions on matters beyond the scope of the submission to arbitration"; (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."[7] Further, Article V(2) of the New York Convention provides that recognition and enforcement may also 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.[8]

It is undisputed that the "vacatur" grounds in Chapter 1 of the FAA apply to domestic arbitration proceedings.[9] Similarly, there is consensus that the grounds to "refuse" to "recognize and enforce" an award in Chapter 2 of the FAA, which implements the New York Convention, apply to foreign arbitral awards.[10] Yet guidance concerning the application of Chapter 1's "vacatur" standards to nondomestic awards has been less clear. Before the 2023 ruling in *Corporacion AIC, SA*, there was a split among the circuits over whether a nondomestic award could be vacated, pursuant to Chapter 1 of the FAA, or whether a party's sole and exclusive grounds for challenging a nondomestic award were based on Article V(1) of the New York Convention. The Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. circuits concluded that the vacatur grounds under Section 10 of the FAA applied to nondomestic arbitration awards.[11] The Eleventh Circuit, however, was an outlier, holding for decades that a party's ability to challenge the enforcement of a nondomestic award was controlled by the standards set out in Article V of the New York Convention — not Chapter 1 of the FAA.[12] The exclusion of Section 10 grounds for vacatur in the Eleventh Circuit made the circuit unique and arguably more attractive when foreign parties chose to seat their arbitration.

The *Corporacion AIC, SA* Case

Corporacion arose out of a construction dispute between two Guatemalan companies, Hidroelectrica Santa Rita S.A. (HSR) and Corporacion AIC, SA (AIC). An arbitral tribunal seated in Miami, FL, largely ruled in favor of HSR, ordering AIC to return the $7 million in advance payment.[13] AIC sought to vacate the award on the grounds that the arbitrators "exceeded their powers" under Section 10(a)(4) of the FAA.[14] The U.S. District Court for the Southern District of Florida rejected AIC's petition and motion to vacate because, according to Eleventh Circuit precedent, a party in a case involving a nondomestic arbitration award can only "invoke the defenses set forth in the New York Convention … [therefore] *AIC cannot rely upon Section 10 of the FAA as a basis for vacatur*."[15] On appeal, the Eleventh Circuit affirmed the district court's refusal to vacate the award, but urged the court to take up the issue *en banc*, which it did.[16]

The Eleventh Circuit Overrules Its Precedent

On April 13, the Eleventh Circuit issued its *en banc* opinion and held:

[T]hat in a case under the [New York] Convention where the United States is the primary jurisdiction — the jurisdiction where the arbitration was seated or whose law governed the conduct of the arbitration — the grounds for vacatur of an arbitral award are set out in domestic law, currently Chapter 1 of the FAA.[17]

The court explained that its prior precedent erroneously "equated the defenses to recognition and enforcement with the grounds for vacatur"[18] and that this was "plainly and palpably wrong."[19] The Court also noted that its prior precedent is in tension with the Supreme Court's understanding of the New York Convention, and in conflict with the views of its sister circuits.[20]

Focusing on a textual analysis of the New York Convention and FAA, the Eleventh Circuit started by noting that the terms "recognition, enforcement and confirmation" of an award as used in the New York Convention and Chapter 2 of the FAA must be distinguished from the terms "set aside, suspend, annul or vacate" the award.[21] According to the Court of Appeals, the terms "recognition, confirmation, and enforcement," "seek to give effect to an arbitral award, while vacatur challenges the validity of the award and seeks to have it declared null and void."[22]

Conclusion

Given the prior rulings in *Corporacion AIC* and prevailing approach in various sister circuits, the Eleventh Circuit's ultimate decision to overturn its prior precedent may not have been surprising. Nevertheless, practitioners and parties who chose to seat their arbitrations within the Eleventh Circuit, will now have to grapple with a new legal environment and think strategically about how questions concerning vacatur will affect arbitration awards issued in the circuit.

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[1] An earlier version of this client advisory was published on December 14, 2022. *See* Matthew H. Adler, Albert Bates Jr., Leslie Davis, et al., *Change in Course? The Eleventh Circuit May Soon Join Most Circuits on the Applicability of FAA Grounds to Vacate Nondomestic Arbitration Awards*, Troutman Pepper (Dec. 14, 2022), https://www.troutman.com/insights/a-change-in-course-the-eleventh-circuit-may-soon-join-most-circuits-on-the-applicability-of-faa-grounds-to-vacate-nondomestic-arbitration-awards.html

[2] *See Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 66 F.4th 876, 880 (11th Cir. 2023); *see also Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997); *Ario v. Underwriting Members at Lloyds*, 618 F.3d 277, 292 (3d Cir. 2010); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 368 (5th Cir. 2004); *Gulf Petro Trading Co., Inc. v. Nigerian Nat. Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008); *Jacada (Eur.), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 709 (6th Cir. 2005), *abrogated on other grounds by Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997); *HayDay Farms, Inc. v. FeeDx Holdings, Inc.*, 55 F.4th 1232, 1240 (9th Cir. 2022); *Goldgroup Res., Inc. v. DynaResource de Mexico, S.A. de C.V.*, 994 F.3d 1181, 1190 (10th Cir. 2021); *Republic of Argentina v. AWG Grp. LTD.*, 894 F.3d 327, 332 (D.C. Cir. 2018).

[3] *See 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, e.g.*, *Yusuf*, 126 F.3d at 21; *Ario*, 618 F.3d at 292; *Karaha Bodas Co.*, 364 F.3d at 368; *Gulf Petro Trading*

Co., Inc., 512 F.3d at 746; *Jacada (Eur.),* 401 F.3d at 709; *Lander Co.*, 107 F.3d at 481.

[5] *See* 9 U.S.C. § 202; *Corporacion AIC, SA*, 2023 WL 2922297, at *1.

[6] 9 U.S.C. § 10(a).

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter New York Convention].

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

[9] *See* 9 U.S.C. §§ 1-16.

[10] *See* 9 U.S.C. §§ 201-208; New York Convention, *supra* note 7, art. I.

[11] *See, e.g.*, *Ario*, 618 F.3d at 292; *Yusuf*, 126 F.3d at 21; *Karaha Bodas Co.*, 364 F.3d at 368; *Lander Co.*, 107 F.3d at 481.

[12] *See Indus. Risk Insurers*, 141 F.3d at 1446 (“[T]he Convention’s enumeration of defenses is exclusive.”).

[13] *Corporacion AIC, S.A. v. Hidroelectrica Santa Rita, S.A.*, 2020 WL 4485226, at *2 (S.D. Fla. Apr. 16, 2020), *report and recommendation adopted*, 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), *and on reh’g en banc,* 66 F.4th 876 (11th Cir. 2023), *and vacated and remanded sub nom.*, 66 F.4th 876 (11th Cir. 2023).

[14] *Id*. at *3.

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

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

[17] *Corporacion AIC, SA*, 66 F.4that 880.

[18] *Id.* at 881.

[19] *Id.* at 888.

[20] *Id.* at 889. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020).

[21] *Id.* at 882–83.

[22] *Id.* at 883.

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