



## Pemex award upheld in US despite set-aside in Mexico

Kyriaki Karadelis • Friday, 30 August 2013 (2 hours ago)

A US court has confirmed an ICC award worth US\$400 million in favour of US engineering firm KBR against Mexican state oil company Pemex, even though the award has been set aside at the arbitral seat in Mexico City.



Pemex oil platform in the Gulf of Mexico

In [a decision](#) on 27 August, the US District Court for the Southern District of New York ruled that a Mexican court ruling of 2011 that set aside the award "violated basic notions of justice" because it applied a law that did not exist at the time the underlying contract was formed.

As such, the US court held it had "a narrow discretion" under the Panama Convention and a 2007 precedent from the DC Circuit, *TermoRio v Electranta*, to refuse to give comity to the nullification of an award by a foreign court.

The decision also reveals that KBR has been contemplating a NAFTA claim against Mexico in relation to the same dispute, having filed a notice of intent in February this year.

KBR subsidiary Commissa filed the ICC arbitration against a Pemex subsidiary in 2004 under two contracts from 1997 and 2003, under which Commissa was to build and install two oil platforms in the Gulf of Mexico's Bay of Campeche. Commissa accused the state entity of contractual breaches resulting in delays and costs.

In [a 2009 award](#), a majority panel consisting of Colombia's Jorge Suescún Melo and Canadian arbitrator [Henri Alvarez QC](#) granted all but one of Commissa's claims, then worth around US\$350 million including interest. They also granted one of Pemex's counterclaims, awarding the Mexican company US\$6 million to cover penalty payments owed by Commissa for missed deadlines.

Mexican arbitrator Dario Oscós Coria dissented on the basis that Commissa had already pursued legal action in Mexico over the dispute before the arbitration was

filed. Namely, Commisa had unsuccessfully challenged Pemex's rescission of the contracts in the local courts on the grounds that it was untimely, unconstitutional and inapplicable to the parties' claims, which were subject to arbitration.

Commisa's arguments went right up to the Mexican Supreme Court, which ruled in 2006 that the rescission was constitutional and that Mexico's district courts for administrative matters had jurisdiction to hear contractual disputes arising from administrative rescission – the Supreme Court did not rule, however, on the issue of arbitrability.

As the US court observed, Pemex noted its objection to the ICC panel's authority before and after the Mexican Supreme Court judgment, but continued to participate in the ICC proceedings until the end, and opted not to challenge an earlier preliminary award in which the arbitrators had accepted jurisdiction over the case.

After the final award was issued, Commisa immediately sought confirmation in New York, which was granted in November 2010. But the proceedings were then stayed pending appeal to the Second Circuit, with Pemex required to deposit US\$395 million as security with the court.

Meanwhile, Pemex moved to set the award aside in Mexico and – after two failed attempts –succeeded on appeal in September 2011. Mexico's Eleventh Collegiate Court held in a 486-page opinion that the ICC award was invalid on the grounds that arbitrators were not competent to hear cases brought against a state instrumentality. Such cases must be decided in the Mexican district courts for administrative matters alone, the Mexican court said.

In February 2012, the Second Circuit sent the case back to the New York district court, asking it to reconsider its decision confirming the award in light of the set-aside decision in Mexico.

In the latest decision reconfirming the award, the district court said it was presented with a "dilemma" over whether to give primacy to the award or the Mexican court's judgment.

After proceedings that included a three-day hearing with experts on Mexican law giving evidence for both sides, the New York court ruled that the Mexican court had based its decision on a statute that was not in existence at the time that the parties entered their contract – and had left Commisa without the ability to have its claims heard.

During the arbitration proceedings, Mexican law changed in "material ways", the US court noted. First, in 2007, a law took effect stipulating that issues of compliance with the requirements of public contracts are to be litigated in a special administrative court for tax and financial matters – a department of the executive branch of Mexico – that has a 45-day statute of limitations, much shorter than the 10-year statute of limitations applicable in the district courts for administrative matters.



Two years later, Mexico's Law of Public Works and Related Services was amended to provide that, while disputes over government contracts could generally be arbitrated, issues of administrative rescission could not. Finally, in 2010, Mexico's Supreme Court held that the special administrative court for tax and financial matters was the exclusive forum to hear disputes concerning administrative rescission.

The Mexican court based its set-aside decision on the amendment to the Law of Public Works, remarking that it was not applying the statute retroactively, but considering it simply as a guiding principle. It also cited a 1994 precedent from the Mexican Supreme Court that described administrative rescissions as "acts of authority", but had nothing itself to do with arbitration.

The US court said the Mexican court mistakenly told Commisa it should have brought its contractual case before the district courts for administrative matters, ignoring both the Law on Public Works and the 2010 decision of the Mexican Supreme Court. Indeed, Commisa did apply to the special administrative court for tax and financial matters for relief in 2012, but that court ruled that its action was barred both by the "short" statute of limitations, as well as *res judicata*.

In the three-day hearings in New York, experts for Commisa, *Claus von Wobeser* Of Von Wobeser y Sierra and *Carlos Loperena* of Loperena Lerch y Martín del Campo, criticised the Mexican court's reasoning and argued that the company had been left without a remedy.

Pemex's experts, *Francisco González de Cossío* of González de Cossío Abogados and *Roberto Hernández-García* of Comad Law Firm, argued that Commisa still had a remedy because the 2007 law did not apply to administrative rescissions that took place before it was enacted.

The US court held that Commisa had "every reason to believe that its dispute with [Pemex] could be arbitrated" when it initiated arbitration at the end of 2004. It cited the fact that the so-called "Organic Law", under which Pemex and its subsidiaries were organised as wholly-owned government entities, contemplated the possibility of arbitration – and that it was enacted following Mexico's 1994 adoption of NAFTA, which also provides for the arbitration of international disputes.

Indeed, the US court noted that it was not until the 2009 amendment to the Law of Public Works came into effect that there was a source of law to support the idea that the parties' dispute was not arbitrable on public policy grounds. The retroactive application of this statute flouted a basic principle of justice, the US court said: "where a sovereign has waived its immunity and has agreed to contract with a private party, a court hearing a dispute regarding the country should treat the private party and the sovereign as equals".

Leaving Commisa without a remedy "is particularly unjust because Commisa has been deemed to owe damages to [Pemex], even though there has been no

full hearing on the merits outside arbitration, simply because Pemex issued administrative rescission," it added. Following its victory in set-aside action in Mexico, Pemex successfully brought two lawsuits in the Mexican courts, seeking to execute an US\$80 million bond that Commisa had posted to guarantee its performance under the two original contracts, and US\$25 million in interest. To date, that bond has not been effected.

Reconfirming Commisa's award, the US court emphasised that the Mexican court's ruling is at odds with Pemex's own contracts, its enabling statute, and the law of Mexico at the time of the contracting and the entry into arbitration.

However, the US court has not yet ordered Pemex to pay a specific amount to Commisa. It has scheduled a conference for 12 September for the parties to discuss their positions on the sum that Pemex owes; whether that should take into account the unpaid performance bond, and several other matters.

Meanwhile, the US judgment mentions in passing that KBR sent a notice of intent to the Mexican government in February that it will pursue remedies under NAFTA. KBR claims the nullification of the award amounts to a breach of Mexico's fair and equitable treatment obligations under article 1105 of the treaty.

King & Spalding provided counsel to Commisa in the arbitration and the New York court proceedings. The firm declined to comment.

Claus von Wobeser, who acted as an expert for Commisa in the arbitration and the New York court proceedings, and was also counsel to the company in the Mexican courts, tells *GAR* it is highly unlikely Pemex will comply with the award. But he says the state entity has assets and bonds in the New York stock market against which the award could be enforced.

If Pemex opts to appeal the New York district court's decision, the court will also ask for the whole amount of the award to be deposited in security again – possibly including the performance bonds that von Wobeser says were "illegally collected" by Pemex against Commisa in Mexico.

Marco Tulio Venegas, a partner at Von Wobeser y Sierra who also acted for Commisa in the Mexican courts, notes the Eleventh Collegiate Court's decision has set an "adverse" precedent that whenever a public entity or government instrumentality opts to rescind a contract containing an arbitration clause, it can "render ineffective not only any award dealing with issues related to the contract but also the arbitration clause" itself. A rescission can "completely transform" the parties' contractual relationship and forces private parties to go to the state courts first to challenge the legality of the rescission, he says.

Venegas adds that the amendment to the Public Works Law "sets the grounds to having parallel litigation with the potential contradictions that may arise from it".



Pemex used in-house counsel for the arbitration, but hired a team from Hogan Lovells in New York and Miami for the New York court proceedings. The firm did not respond to a request for comment.

Pemex is also locked in a similar enforcement battle with Conproca, a subsidiary of Siemens and South Korea's SK Engineering. Conproca won an ICC award for US\$350 million plus interest in 2008 for disruptions that left it unable to upgrade an oil refinery in Cadereyta, Mexico. The company brought confirmation proceedings before the same New York district court in 2011 but these have been suspended pending the outcome of set-aside proceedings in the Mexican courts.

In the meantime, Pemex has also filed a suit against Siemens and SK Engineering under the Racketeering Influenced and Corrupt Organizations Act, alleging bribery of Mexican officials by Siemens. That suit was tossed out by a district court last month for lack of jurisdiction.

*In the US District Court for the Southern District of New York*

- Judge Hellerstein

Counsel to Commisa

- King & Spalding

Partners James Berger, Richard Marooney and Christopher Dugan with associate Kana Ellis Kaplan in New York, and partner Charles Correll in San Francisco and Jeff Bucholtz in Washington, DC

Experts for Commisa

- Claus von Wobeser, Von Wobeser y Sierra
- Carlos Loperena, Loperena Lerch y Martín del Campo

Counsel to Pemex Exploration and Production

- Hogan Lovells

Partners Dennis Tracey, Ira Martin Feinberg and Peter Joseph Denin with associate Jordan Lancaster Estes in New York, and partner Richard Lorenzo in Miami

Experts for Pemex Exploration and Production

- Francisco González de Cossío, González de Cossío Abogados
- Roberto Hernández-García, Comad Law Firm

*In the ICC arbitration proceedings*

- Jorge Suescún Melo (Chair) (Colombia)
- Henri C Alvarez (Canada)
- Darío Oscós Coria (Mexico)

Counsel to Commisa

- King & Spalding LLP

Partner Guillermo Aguilar-Alvarez and associate Ana Vohryzek in New York, with partners Bobby Meadows in Houston, Charles Correll in San Francisco and Jeff Bucholtz in Washington, DC

Counsel to Pemex Exploration and Production

- In-house counsel for Pemex: José Nestor García Reza

In Mexico's Eleventh Collegiate Court

- Judge unknown at the time of going to press

Counsel to Commisa

- Von Wobeser y Sierra

Partners Claus von Wobeser and Marco Tulio Venegas in Mexico City

Counsel to Pemex Exploration and Production

- Unknown at the time of going to press

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