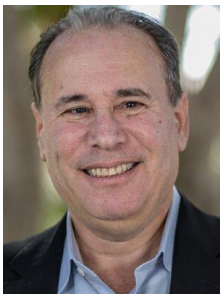
11th Circ. Ruling Widens Path To Arbitral Award Vacatur

By **David Zaslowsky** (May 1, 2023)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In a recent en banc decision, Corporación AIC SA v. Hidroeléctrica Santa Rita SA,[1] the U.S. Court of Appeals for the Eleventh Circuit held that, in cases in which the U.S. is the primary jurisdiction — the jurisdiction where the arbitration was seated or whose law governed the conduct of the arbitration — the grounds for vacating an arbitral award are set forth in domestic law, currently Chapter 1 of the Federal Arbitration Act.

This means that the grounds for vacatur are not limited to those listed for refusing award recognition under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, implemented through Chapter 2 of the FAA.[2]

This decision overrules prior Eleventh Circuit precedent and brings it in line with the other circuit courts of appeals that have addressed the same issue.

The case arose out of a 2012 contract under which Corporación AIC agreed to build, in Guatemala, a new hydroelectric power plant for Hidroeléctrica. Both companies are Guatemalan.

A dispute arose, leading to an arbitration in Miami under the auspices of the International Chamber of Commerce, and, eventually, an award in favor of Hidroeléctrica.

Although the arbitration took place in Miami, and the New York Convention concerns foreign arbitral awards, enforcement of the award in the U.S. courts was nevertheless governed by the convention.

That is because Article I of the convention states that it applies "to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

Under U.S. law, an award is considered nondomestic if, among other things, it arises out of a commercial relationship entirely between non-U.S. citizens.[3]

Unhappy with the arbitral decision, Corporación AIC filed suit in federal court in Miami seeking to vacate the award. It argued that the arbitrators had exceeded their powers, which is a ground for vacating an award under Title 9 of the U.S. Code, Section 10(a)(4) — a provision of Chapter 1 of the FAA.

The U.S. District Court for the Southern District of Florida denied the challenge because, under Eleventh Circuit precedent in Industrial Risk Insurers v. MAN Gutehoffnungshutte GmbH in 1998,[4] the grounds for vacating an arbitral award governed by the New York Convention are limited to those set out in Article V of the convention.

A panel of the Eleventh Circuit affirmed on the basis that it, too, was bound by Industrial Risk. The full Eleventh Circuit then heard the case in order to determine whether to overrule Industrial Risk, which it ultimately did.

When it decided Industrial Risk, the Eleventh Circuit noted that Title 9 of the U.S. Code,

Section 207, provided that only the enumerated defenses in the convention can be used as a defense to recognition and enforcement of an award, but then read those defenses as also constituting the only grounds for vacating an award.

The court effectively equated the defenses to recognition and enforcement with the grounds for vacatur.

In Corporación AIC, the Eleventh Circuit looked anew at the issue of its earlier equivalence. It explained that recognition and enforcement seek to give effect to an arbitral award.

It thus serves a very different purpose than vacatur, which challenges the validity of the award and seeks to have it declared null and void.

This is an especially important distinction under the convention, which operates under a regime that allocates different responsibilities to different jurisdictions.

The country that is the legal seat of the arbitration — or whose law governs the conduct of the arbitration — is referred to as the primary jurisdiction and its law, the lex arbitri, generally controls the procedural side of the proceeding.

All other countries that are signatories to the convention are considered secondary jurisdictions.

Under the New York Convention, courts in the primary jurisdiction can vacate an arbitral award, whereas courts in secondary jurisdictions can only decide whether to recognize and enforce an arbitral award.

Article V of the convention sets forth the grounds for refusing to recognize and enforce an award. As to vacatur, the Eleventh Circuit said:

> The only reference to vacatur (i.e., "set aside or suspended") in Article V is found in subsection (1)(e). Article V(1)(e) allows a court exercising secondary jurisdiction to deny a request to recognize and enforce a New York Convention award on the ground that it has been vacated by a court ("a competent authority") in the primary jurisdiction ("in which, or under the law of which, that award was made"). But it does not purport to regulate the procedures or set out the grounds for vacatur in the primary jurisdiction.[5]

Chapter 2 of the FAA implements the convention and, like Article V of the convention, focuses only on recognition and enforcement.

But Chapter 2 also provides that "Chapter 1 applies to actions and proceedings brought under [Chapter 2] to the extent that [Chapter 1] is not inconsistent with [Chapter 2] or the Convention as ratified by the United States."[6]

The Eleventh Circuit therefore held that the primary jurisdiction's domestic law — that is, U.S. law — acts as a gap filler, and provides the vacatur grounds for an arbitral award, meaning that, under Section 208, the grounds for vacatur are the ones set out in Chapter 1 of the FAA.

Furthermore, because Article V of the convention is simply silent on the grounds for vacatur, there is no conflict if Chapter 1 is applied. In holding this way, the Eleventh Circuit aligned itself with how the Second, Third, Fifth and Seventh Circuits had previously interpreted the

convention.

The U.S. Supreme Court has not yet decided this specific issue.

However, BG Group PLC v. Republic of Argentina concerned an arbitration award against Argentina that the claimant sought to enforce in federal court.[7] Both parties were foreign, and the arbitration took place in the U.S. Argentina asked the court to vacate the award, claiming in part that the arbitrators exceeded their powers.

Although Argentina eventually lost on other grounds, the Supreme Court considered a petition to vacate the arbitration award under the exceeding powers ground in Section 10(a)(4) of Chapter 1 of the FAA, implicitly supporting the position that such grounds are available to challenge a nondomestic award governed by the convention.

At least one well-known international arbitration treatise defended the decision in Industrial Risk.[8]

In addition, there is logical appeal to the argument that it makes no sense to apply inconsistent standards to the validity of an award falling under the convention — by the same court, in the same case, between the same parties — depending on whether the case has been brought to confirm the award, at the suit of the winner, or to vacate it, at the suit of the loser.[9]

Nevertheless, in reversing Industrial Risk, the Eleventh Circuit said that this decision was clearly wrong.

Corporación AIC is an important decision for a number of reasons.

First, the Eleventh Circuit covers Miami, which has been growing in importance as an arbitral forum for contracts with Latin American parties, and also covers Atlanta, which has been trying to grow its international arbitration profile through the Atlanta International Arbitration Society.

Until now, requests to vacate New York Convention arbitration awards brought in the courts of those cities, and the rest of the Eleventh Circuit, were treated differently from those brought in the rest of the country.

In addition, the decision reminds arbitration practitioners that the FAA Chapter 1 grounds for vacatur apply to arbitrations seated in the U.S., even if otherwise governed by the convention. This is not immaterial.

Corporación AIC itself concerned a challenge based on the claim that the arbitrators exceeded their powers, which is not a ground for refusing recognition under the convention.

Furthermore, refusing to recognize an award or vacating an award under the theory of manifest disregard of the law is not a concept known under the convention, or to most of the rest of the world.

In a number of circuits, however, such as the U.S. Court of Appeals for the Second Circuit — home to New York, the most popular international arbitration situs in the U.S. — manifest disregard remains very much alive as a basis for challenging an award under domestic U.S. law.

The FAA is almost 100 years old.

Looking around the world, more than 80 countries have enacted the U.N. Commission on International Trade Law Model Law on International Commercial Arbitration. It includes provisions for both vacating and recognizing awards — Articles 34 and 36, respectively.

The grounds for doing so are the same. Moreover, they track almost verbatim the grounds in the New York Convention for refusing recognition and enforcement.

Were the U.S. ever to abandon the FAA and adopt the model law instead, there would be no issues about distinctions between procedures for recognition or vacatur, nor disparate grounds for the two.

Until that happens, however, the Eleventh Circuit was probably right in joining the other circuit courts of appeals in the way to interpret Chapters 1 and 2 of the FAA, and have all U.S. courts speak with one voice on the issue.

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[1] Corporación AIC, S.A., v. Hidroeléctrica Santa Rita, S.A., 2023 U.S. App. LEXIS 8887 (11th Cir. Apr 13, 2023).

[2] 9 U.S.C. §§ 201 et seq.

[3] 9 U.S.C. § 202.

[4] 141 F.3d 1434, 1445–46 (11th Cir. 1998).

[5] 2023 U.S. App. LEXIS 8887 at * 11.

[6] 9 U.S.C. § 208.

[7] 572 U.S. 25 (2014).

[8] See Gary Brorn, International Commercial Arbitration 3211 (3d ed. 2021).

[9] See Richard W. Hulbert, The Case for Coherent Application of Chapter 2 of the Federal Arbitration Act, 22 Am. Rev. of Int'l Arb. 45, 72 (2011).