As mentioned in a previous post, I wanted to discuss with you some recent U.S. court decisions which have delineated the standards followed by local courts in enforcing annulled arbitral awards.

As is well-known, once an arbitral award is rendered, parties to a dispute often race to the courts: The winning party seeks the enforcement of the award while the losing party seeks its annulment.

Of course, if the losing party is successful in obtaining the annulment of an arbitral award, this situation can seriously complicate and even jeopardize the enforcement proceedings initiated by the winning party. Indeed, the New York Convention provides that a court may refuse to enforce a foreign award if "a competent authority" has set the award aside or has suspended it.

Notably, the wording of the Convention, and in particular the use of the word “may” (instead of “shall”), has given rise to discussions on whether a court remains entitled to enforce an
award that has been set aside. This issue is particularly delicate as it often involves policy considerations.

In the United States, several court decisions have recently reassessed the standards to be applied by the courts when enforcing annulled awards.

The first of those decisions was rendered by the U.S. Court of Appeals for the Second Circuit, in 2016, in Commisa v. Pemex.

In Pemex, an award in favour of Commisa, a Mexican subsidiary of a U.S. company, was later annulled by a Mexican court on the ground that Mexican law did not allow the claim to be settled by arbitration. Despite the annulment of the award, Commisa sought the enforcement of the award before U.S. courts. In its decision, the Second Circuit held that U.S. courts were “constrained by the prudential concern of international comity” and would “enforce an annulled award only if the annulment is repugnant to fundamental notions of what is decent and just” in the United States.

In that case, the Second Circuit found that the award had to be enforced since the Mexican Court — when annulling the award — had vindicated “fundamental notions of decency and justice” by retroactively applying administrative laws in a manner that rendered the case non-arbitrable.

That position was later refined in Getma v. Guinea. In that case, an arbitral institution had fixed the arbitrators’ fees and had warned that any agreement with the parties to increase those fees would lead to the annulment of the award. Despite this warning, the arbitrators issued their decision awarding EUR. 39 million to Getma and sought an increase of their fees. Seizing this opportunity, Guinea sought (and obtained) the annulment of the award. When Getma nonetheless sought the enforcement of the award in the U.S., the D.C. Circuit court applied the doctrine previously expressed in Pemex but found that there was nothing in the annulment of the award that was
repugnant to the “United States’ most fundamental notions of morality and justice“. 

In a decision rendered a few days after Getma, however, the Second Circuit made clear, in Thai-Lao Lignite (20 July 2017), that international comity should still be given significant weight and that the standard of “fundamental notions of what is decent and just in the United States” only applies in “rare circumstances”.

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The three cases examined above show the tension that lies at the heart of this doctrinal debate. When reviewing foreign court decisions and enforcing an annulled arbitral award, a national court will often be faced with a difficult balancing task, especially in relation to sovereignty issues.

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