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International Arbitration Practice

TermoRio v. Electranta:

Drafting Error in Arbitration Clause Leads to Vacatur of \$60 Million Award

The US Supreme Court's recent denial of certiorari in *TermoRio v. Electranta* underscores the critical importance of expert attention to the drafting of dispute resolution clauses in contracts for transnational investments.

TermoRio had contracted to generate and sell electricity to Electranta, a state-owned utility in Colombia. When Electranta's business was subsequently privatized, the state company stopped buying and paying for electricity. TermoRio brought a claim under the dispute resolution provision in the agreement, which provided for arbitration governed by the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules"). The parties had agreed that the seat of the arbitration would be Colombia. The duly constituted tribunal eventually awarded TermoRio over US\$60 million in damages.

Two days after the award was issued, however, Colombia's highest administrative court (the Council of State) applied Colombian law to vacate the award because that law "did not expressly permit the use of ICC procedural rules in arbitration." In other words, the rules chosen by the parties were held not to be valid under the law of Colombia, where the arbitration was held and the award rendered. The US Supreme Court's denial of certiorari left standing the decision of the Court of Appeals for the DC Circuit refusing to reinstate the award, holding that no cause of action exists to reinstate an award that has been set aside by a court of competent jurisdiction in the country in which the award was rendered. [Click here to view a copy of the Court of Appeals decision.](#)

An award rendered in any State that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") must be enforced in the municipal courts of any other State that is a party to the Convention, with limited exceptions. One of those exceptions denies enforcement if the award has been lawfully set aside by a competent authority in the State in which the award was made. In this instance, the District Court ruled that this exception applied because the Colombia court had lawfully set aside the award.

The implications of this case for the negotiation and drafting of transnational investment contracts are clear. Ensuring that a dispute resolution clause operates effectively requires, among other things, careful selection of the seat of the arbitration. That choice determines the procedural law that will govern any arbitration, including the standards and procedures for vacating an award. The courts of the seat of the arbitration are the only courts empowered under the New York Convention to vacate an arbitral award. Once vacated by those courts, an award will not, absent exceptional circumstances, be enforced by courts in other countries that are signatories to the Convention, including the United States, despite the

otherwise strong public policy favoring enforcement of arbitration agreements and awards.

The choice of arbitral seat requires informed analysis of the substance and application of the local arbitration law. That law may limit, among other things, the extent to which parties may vary its terms by agreement, the degree to which local courts may interfere in arbitral procedures and the bases on which awards may be overturned. Local courts may have greater or lesser predilections to intervene in arbitral proceedings. As demonstrated in *TermoRio*, the choice of arbitral seat, like other essential dispute resolution terms, can determine the success or failure of an investment.

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