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Litigators of the Week: Richard Marooney Jr. of King & Spalding and Paul Clement of Bancroft PLLC

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Most lawsuits don't present American judges with the choice of whether to defer to a foreign court ruling. But that's the unique situation that arose in a KBR Inc. subsidiary's contract dispute with Mexico's state-owned oil company, Pemex.

On Tuesday, a legal team helmed by Richard Marooney Jr. of King & Spalding and Paul Clement of Bancroft PLLC secured an appeals court ruling for their client, KBR's Mexican unit COMMISA, that should put Pemex on the hook for more than $465 million.

The decision from the U.S. Court of Appeals for the Second Circuit comes in a long-running legal battle that's played out in multiple venues, including an international arbitration tribunal, federal court in New York and a court in Mexico. Marooney, who took the lead for COMMISA in U.S. district court, gave a full-fledged endorsement of the Second Circuit's conclusion.

"This is the only right decision here," he said in an interview on Thursday. "This is a unique circumstance."

The dispute grew out of a 1997 contract calling for COMMISA to build oil platforms that Pemex planned to use in the Gulf of Mexico. The contract included an arbitration clause directing any disputes to the International Chamber of Commerce (ICC).

Several years in to the construction project, the two sides began to butt heads—Pemex insisted that the oil platforms be fully built before they were placed in the gulf, but COMMISA thought the plan was impractical given their weight, according to court papers. The spat bubbled over in 2004, when Pemex rescinded the contract, claiming that COMMISA had missed deadlines and effectively abandoned the project. Pemex also seized the platforms, which at that point were almost complete, and kicked COMMISA out of work sites.

COMMISA, represented by King & Spalding's Robert Meadows and Charles Correll Jr., turned to the ICC, which formally began arbitration proceedings in May 2005. The tribunal found Pemex had breached the contract, and in 2009 handed COMMISA a $300 million award. Marooney then took the reins for COMMISA, rushing to federal court in Manhattan to have the award confirmed.

U.S. District Judge Alvin Hellerstein confirmed the award in 2010, setting off dual challenges by Pemex. The Mexican oil company, represented in the U.S. by Hogan Lovells, appealed Hellerstein's ruling to the Second Circuit. Pemex simultaneously lodged a challenge in Mexican court.

With the U.S. appeal pending, the Mexican court found that recent changes in Mexico's laws effectively stripped the arbitration panel of jurisdiction over the contract fight, and the Mexican court annulled the $300 million award. In light of those events, the Second Circuit sent the case back to Hellerstein to consider what impact, if any, the Mexican court's ruling should have.

With Marooney leading the way for COMMISA in a three-day evidentiary hearing in 2013, Hellerstein ultimately decided to again confirm the arbitration award. The Manhattan judge declined to defer to the Mexican court's decision and later entered judgment against Pemex for a little more than $465 million—a total that included about $59 million in interest and $106 million that COMMISA had posted in performance bonds under the contract, in addition to the $300 million arbitration award.

As the dispute wore on, COMMISA's legal team had to wade through a complex landscape—complete with proceedings in two countries and changes to Mexican law in the midst of the legal battle—that could have bogged down their case. One key strategy, Marooney said, was to tie their arguments back to fundamental questions of fairness.

"We just tried to keep it simple," he said. "In some ways, it's not complicated-- Pemex agreed to arbitrate, they arbitrated and they lost."

Clement, who led the appellate briefing and argued at the Second Circuit in November 2014, picked up on that theme during the appeal. But, he told us on Thursday, he also "didn't want to come in there asking the court to confirm the award without some understanding that it was a big ask."

"One of our objectives was to try to cut through the complexity a little bit and keep in mind how fundamentally unfair this was to COMMISA," said Clement. "This wasn't garden-variety unfairness."

Beyond the legal intricacies at play, the case also set up an interesting dynamic among COMMISA's lawyers. Clement, a former U.S. solicitor general, had spent many years at King & Spalding before a high-profile resignation in 2011, amid a conflict over his representation of House Republicans defending the now-stricken Defense of Marriage Act. But, judging by the outcome of COMMISA's case, Clement and his former firm have no trouble working together nowadays.

“It couldn’t have been a better relationship,” said Clement. “It was really great to work with them.”

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