

Reproduced with permission from International Trade Daily, No. 165, 08/28/2017. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Dispute Resolution

Second Circuit's Decision on Enforcing ICSID Awards: Impact and Implications

Requirements for enforcing international arbitration decisions in the U.S. have been subject to different interpretations by U.S. courts. A recent decision by the Second Circuit Court of Appeals makes the Foreign Sovereign Immunities Act the sole basis for enforcing international arbitration awards. In this Bloomberg BNA Insight, the authors explain the court's reasoning and the impact this decision will have on future arbitral awards enforcement.

By **STEPHEN KHO AND BRENDAN CASEY**

In *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 2017 BL 237848 (Jul. 11 2017), the Second Circuit Court of Appeals decided that the Foreign Sovereign Immunities Act ("FSIA") provides the sole basis for jurisdiction over foreign sovereigns in actions to enforce arbitral awards by the International Center for Settlement of Investment Disputes ("ICSID") and, as a consequence, the FSIA's requirements for venue and service must be followed when enforcing ICSID awards within the U.S.

Until the Second Circuit's ruling, this issue had been treated differently in various U.S. District Courts with some, notably the District Court for the Southern District New York ("SDNY"), deciding that the FSIA and its procedural requirements were not mandatory in ICSID award enforcement actions, while others like the

District Court of the District of Columbia ("DDC") and the Eastern District of Virginia held that the FSIA was the sole basis for jurisdiction over foreign sovereigns and its procedural requirements were mandatory. This appears to be the first U.S. Court of Appeals decision on the issue.

Enforcing ICSID Awards in U.S. Federal Courts. Prior to the Second Circuit's decision, there were questions around the procedure for "recognizing and enforcing" ICSID awards within the U.S. Article 54 of the ICSID Convention, which deals with Recognition and Enforcement of Awards, provides that:

"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."

Following U.S. signature of the ICSID Convention in 1956, the U.S. Congress enacted the ICSID enabling statute (28 USC § 1650a), which implemented the requirement of Article 54 of the ICSID Convention. Section 1650a provides:

Stephen Kho is a partner in Akin Gump's Washington, D.C., and Geneva offices, where he focuses on international trade policy and international dispute resolution. Brendan Casey is a member of the litigation group in Akin Gump's Geneva office, where he focuses on international arbitration for a variety of industries.

“An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.”

As the enabling statute does not explicitly specify the basis for jurisdiction over sovereigns or the procedure for “recognizing and enforcing” an ICSID award, District Courts were forced to interpret Section 1650 and the specific requirements for enforcement. Perhaps unsurprisingly, given the ambiguity of the enabling statute, two differing views emerged. The DDC (along with the District Court for the Eastern District of Virginia) previously held in *Micula v. Government of Romania* (“*Micula I*”), 2015 BL 153064, 104 F. Supp.3d 42, 49 (D.D.C. May 18, 2015), that the FSIA was the sole method for enforcing ICSID awards and that the FSIA’s requirements for notice and venue were mandatory in enforcement actions.

The SDNY, on the other hand, allowed entry of judgment on an ICSID award through ex parte proceedings under New York state law procedures. See *Siag v. Arab Republic of Egypt*, No. M-82, 2009 BL 383886 (S.D.N.Y. June 19, 2009); *Liberian E. Timber Corp. v. Government of Republic of Liberia* (“LETSCO”), 650 F. Supp. 73 (S.D.N.Y. Dec. 12, 1986); see also *Micula v. Government of Romania* (“*Micula II*”), No. 15 Misc. 107, 2015 BL 251966 (S.D.N.Y. Aug. 5, 2015). It is worth noting, however, that under the New York state law procedure, while the award was recognized through ex parte proceedings, the award-creditor was required to serve notice of the judgment obtained in those proceedings on the award-debtor, and required to wait 30 days after serving that notice before executing the judgment.

Mobil’s Enforcement Action Before SDNY. Mobil obtained a favorable ICSID award in October 2014 following lengthy arbitral proceedings due to Venezuela’s seizure of Mobil’s assets in the country in 2007. The arbitral tribunal found that Venezuela violated the Bilateral Investment Treaty between the Netherlands and Venezuela by its expropriation of Mobil’s assets. One day after the ICSID tribunal announced its award, Mobil applied ex parte in the SDNY to recognize the award pursuant to Section 1650a and to enter judgment on the award for its full amount in line with previous cases in the SDNY. Mobil obtained its judgment on the award and promptly notified Venezuela of the judgment as required by the New York statute.

Shortly thereafter, Venezuela moved to vacate the judgment on the grounds that the FSIA was the sole basis for jurisdiction over sovereigns and that its procedure requirements were mandatory in actions to enforce ICSID awards. Venezuela also notified the SDNY of ICSID Annulment proceedings seeking revision of the award which Venezuela had filed less than two weeks after the award was made public.

The SDNY denied Venezuela’s motion to vacate, holding that the Second Circuit has “repeatedly held that federal courts are to borrow state law to fill gaps in a federal statutory scheme” and that New York State Law (CPLR Art. 54) provided an “expeditious registra-

tion procedure” for New York to register an out-of-state judgment that is entitled to full faith and credit.

The SDNY also found that the FSIA’s notice and venue requirements were not mandatory given the wording of the enabling statute (Section 1650a). The SDNY also noted that other ICSID Convention contracting states provided for ex parte recognition of ICSID awards, in particular the U.K., France and Australia. The SDNY however, stayed enforcement of the award pending the outcome of the ICSID Annulment proceedings (which subsequently diminished the amount of the award).

Second Circuit Decision. Venezuela appealed the SDNY decision and the Second Circuit held that Section 1650a does not provide an independent grant of subject-matter jurisdiction for actions against foreign sovereigns, and that the FSIA provides the sole basis for subject-matter jurisdiction over actions to enforce ICSID awards against foreign sovereigns. As a result, plaintiffs pursuing actions to enforce ICSID awards must satisfy the FSIA’s procedural requirements, including those specifying methods for service and venue.

In its decision, the Second Circuit started by confirming the long standing precedent of the FSIA exception to Sovereign Immunity, in particular the exception in FSIA Section 1605(a)(6) relating to the enforcement of international arbitral awards against foreign sovereigns. It next analyzed whether there was a tension between the ICSID Convention and/or Section 1650a or the FSIA.

The Court found that there was no such tension between Section 1650a seeking straightforward enforceability of an ICSID award (as required by the Convention) and the FSIA mechanism of enforcement. The Court went on to focus on the uniformity that would be brought by enforcing ICSID awards within the U.S. under the FSIA as opposed to under different state procedures in each state.

Finally, the Court explained that “litigation on actions to enforce awards [under the FSIA procedures] need not be protracted.” The Court continued, “the term ‘plenary’ signals merely the need for commencing an action under Federal Rule of Civil Procedure 3, service of the Complaint in compliance with Rule 4 (as modified by the FSIA) and the opportunity for the defendant sovereign to appear and file responsive pleadings.” In the Second Circuit’s view, an action for enforcement of an ICSID award in U.S. federal court would proceed as follows:

“[A]n ICSID award-creditor may file a complaint in district court, detailing the terms of the award, establishing proper venue, and furnishing a certified copy of the award. After the complaint is filed and service effected, the award-creditor may file a motion for judgment on the pleadings, for instance, or a motion for summary judgment. The ICSID award-debtor would be a party to the action and would be able to challenge the United States court’s jurisdiction to enforce the award—for instance, on venue grounds—but would not be permitted to make substantive challenges to the award.”

Implications on Enforcing ICSID Awards Within U.S. Going Forward. With its decision, the Second Circuit has arguably made enforcing ICSID awards within the U.S. more difficult, as ICSID award creditors must now serve the foreign sovereign under the FSIA’s four-tiered pro-

cess instead of in line with the more streamlined New York State law procedures for service. On the other hand, the Second Circuit's decision has arguably made ICSID award enforcement within the U.S. more consistent, and has clarified the position for ICSID award creditors facing actions for enforcement across U.S. jurisdictions.

The Second Circuit's decision will likely shift the number of ICSID award enforcement actions away

from the SDNY (and the Second Circuit by consequence) as the FSIA's venue requirements provide that actions for enforcement must be made in the District Court for the District of Columbia or in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.