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# Second Circuit Forecloses Use of *Ex Parte* Procedure to Enforce Arbitral Awards Against Foreign Governments

*By Ted Posner and Glenda Bleiberg*

On July 11, the U.S. Court of Appeals for the Second Circuit rendered an important judgment regarding enforcement of an approximately $1.6 billion arbitration award (since reduced to about $188 million) in favor of subsidiaries of ExxonMobil Corporation and against the government of Venezuela. The case, *Mobil Cerro Negro, Ltd., et al. v. Bolivarian Republic of Venezuela* (2d Cir., No. 15-707), addressed the question whether a creditor under an award rendered by an arbitral tribunal of the International Centre for Settlement of Investment Disputes ("ICSID"), an organization within the World Bank, may pursue enforcement of the award against a foreign sovereign debtor through an *ex parte* petition to a U.S. District Court. In several prior cases, the U.S. District Court for the Southern District of New York had held that an *ex parte* petition was an appropriate means for an ICSID arbitral award creditor to seek enforcement of its award against a foreign sovereign debtor. Conversely, the U.S. District Court for the District of Columbia had held that the only path to enforcement against a foreign sovereign debtor is through a plenary proceeding, in which jurisdiction over the award debtor, which, in an ICSID arbitration usually will be a foreign sovereign, must be obtained in accordance with the Foreign Sovereign Immunities Act ("FSIA"). In its July 11 judgment, the Second Circuit agreed with the D.C. District Court and thus foreclosed the possibility of enforcing ICSID awards through *ex parte* petitions.

In the case below, the Mobil Cerro Negro arbitration award creditors had filed an *ex parte* petition in the U.S. District Court for the Southern District of New York the day after an ICSID arbitration tribunal had rendered the award. The petition sought to convert the award into a U.S. District Court judgment, which would facilitate future actions to collect the money owed under the award. The District Court granted the petition, and Venezuela then moved to vacate the judgment for lack of subject matter and personal jurisdiction. The basis for granting the petition was the federal statute implementing ICSID's founding treaty, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (22 U.S.C. § 1650a, the "ICSID statute"), read in conjunction with New York's statute on the recognition and enforcement of foreign judgments (N.Y. CPLR Art. 54) ("foreign" here referring to judgments of U.S. courts or other U.S. state courts entitled to full faith and credit). In the court's view, since the ICSID implementing statute does not specify a means for enforcing an ICSID award, it was appropriate to borrow the procedure prescribed by the law of

New York (*i.e.*, the state in which the U.S. District Court is located). Venezuela's motion to vacate was based on the contention that the FSIA is the only basis for a court to exercise jurisdiction over a foreign sovereign. The District Court rejected Venezuela's motion. Venezuela's appeal put squarely before the Second Circuit the question of how to reconcile the ICSID implementing statute with the FSIA.

The Second Circuit agreed with Venezuela (as supported by an *amicus* brief submitted by the United States), holding that the FSIA provides the exclusive basis for obtaining jurisdiction over a foreign sovereign in a proceeding to enforce an ICSID arbitral award. Investors that rely on ICSID arbitration to pursue grievances against the foreign States in which they have made their investments will see this decision as an unfortunate development, constraining their options for pursuit of enforcement in the United States and likely extending the time required for enforcement.

For over 50 years, the ICSID Convention has provided a framework for the resolution of disputes between States and investors of other States. One of the perceived benefits for investors of pursuing claims under the ICSID Convention rather than other alternative channels is the virtual automaticity of recognition and enforcement of ICSID arbitral awards. Thus, Article 54 of the ICSID Convention requires a State that is party to the Convention to "recognize an award rendered pursuant to [the ICSID] 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."

In the United States, the statute implementing the ICSID Convention provides that the pecuniary obligations imposed by an ICSID 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 statute further provides that the Federal Arbitration Act shall not apply to enforcement of ICSID awards and that U.S. District Courts shall have exclusive jurisdiction over actions and proceedings to enforce ICSID awards, regardless of the amount in controversy.

In the *Mobil Cerro Negro* case, as in other cases involving the enforcement of ICSID awards, the U.S. District Court for the Southern District of New York interpreted the ICSID implementing statute's reference to giving full faith and credit to an award "as if the award were a final judgment of a court of general jurisdiction of one of the several States" as an invitation to refer to New York's statute on the recognition and enforcement of foreign judgments. That statute (N.Y. CPLR, Art. 54) provides for the recognition and enforcement of a "foreign judgment" (again, here understood to mean a judgment of a federal court or a court of another U.S. state) through submission of an *ex parte* petition. Accordingly, the *Mobil Cerro Negro* court agreed to enter judgment on the ICSID award on the basis of an *ex parte* petition by the award creditor.

By contrast, the FSIA prescribes detailed rules on when a court may exercise jurisdiction over a foreign sovereign and does not contemplate the use of *ex parte* petitions. Under the FSIA, a foreign State generally is immune from the jurisdiction of U.S. courts unless one of several enumerated exceptions applies. As relevant here, those exceptions include an action in which a foreign State has waived its immunity (28 U.S.C. § 1605(a)(1)) and an action to "confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the . . . award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards" (28 U.S.C. § 1605(a)(6)). If an exception to immunity applies, then a court will have subject matter jurisdiction over the action against the foreign sovereign. It also will have personal jurisdiction, provided that the plaintiff has complied with the FSIA's service requirements (28 U.S.C. § 1608). Additionally, the FSIA prescribes a venue requirement. In particular, absent another territorial nexus to the United States, an action against a foreign sovereign must be brought in the U.S. District Court for the District of Columbia (28 U.S.C. § 1391(f)(4)).

The question before the Second Circuit was whether the ICSID Convention implementing statute amounts

to an exception to the FSIA. The court held that it does not and that even when it comes to the recognition and enforcement of an ICSID award, the FSIA remains the exclusive means for a court to exercise subject matter and personal jurisdiction over a foreign sovereign.

First, the Second Circuit recalled that the U.S. Supreme Court (notably, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989)) has referred to the FSIA as "sole basis for obtaining jurisdiction over a foreign state" in U.S. courts and has characterized the FSIA as a comprehensive legislative scheme for dealing with sovereign immunity. In view of that characterization, the court doubted that the ICSID statute could serve as an independent basis for assuming jurisdiction over a foreign sovereign. Second, the court found that the FSIA does not conflict with the ICSID statute, since the FSIA expressly provides for jurisdiction over actions to enforce international arbitral awards. The ability to comply with the FSIA and still give effect to the ICSID statute is a further reason to refrain from interpreting the latter as an exception to the former, according to the Second Circuit.

Furthermore, the court referred to the ICSID statute's legislative history, which supports the idea that Congress understood and intended that actions against foreign States under that statute would remain subject to prevailing rules regarding sovereign immunity.

The Second Circuit went on to hold that in addition to providing the sole basis for a court to exercise subject matter jurisdiction over a foreign sovereign, the FSIA also provides the sole basis for exercising personal jurisdiction. Thus, the FSIA's conditions regarding service of a complaint on a foreign sovereign must be met in order for the court to have jurisdiction. That requirement excludes the possibility of enforcement by *ex parte* petition. As additional support for its holding, the Second Circuit referred to the legislative history of the ICSID statute, which suggests that the drafters contemplated enforcement via plenary (rather than summary) proceeding. And, the court noted that allowing *ex parte* petitions based on borrowing from applicable U.S. state procedures would create a hodge-podge of enforcement mechanisms, contrary to the nationwide uniformity of enforcement practice that Congress presumably meant to accomplish with the ICSID statute.

Despite excluding the possibility of enforcement of an ICSID award against a foreign State by *ex parte* petition, the Second Circuit made a point of emphasizing that courts have "the responsibility under the [ICSID] Convention and Section 1650a to enforce ICSID awards as final." In other words, insisting on enforcement via plenary proceeding is not contrary to the Convention's and statute's objective of minimizing the bases for challenging enforcement of an ICSID award.

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