

July 13, 2017

Arbitration

***Exxon Mobil v. Venezuela* Decision: U.S. Court of Appeals for the Second Circuit Decides that Actions To Enforce ICSID Arbitration Awards Must Comply with the U.S. Foreign Sovereign Immunities Act**

SUMMARY

In a line of cases extending back more than 30 years, United States district courts located in New York have allowed parties to turn arbitration awards rendered under the rules of the World Bank's International Center for the Settlement of Investment Disputes ("ICSID") into enforceable court judgments pursuant to summary, often *ex parte*, proceedings under New York state law. The U.S. Court of Appeals for the Second Circuit decided on July 11, 2017 that actions to enforce ICSID arbitration awards must comply with the personal jurisdiction, service and venue requirements of the U.S. Foreign Sovereign Immunities Act ("FSIA"), requiring plenary proceedings upon notice. *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir. July 11, 2017). This decision aligns the Second Circuit with the practices in other U.S. federal courts, and means that enforcement procedures will now take somewhat longer in New York courts than has been the case.

BACKGROUND

The United States ratified the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* ("ICSID Convention") in 1966. Later that year, the U.S. Congress passed implementing legislation, 22 U.S.C. § 1650a, which provides, in relevant part, that ICSID awards "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."¹ Section 1650a also confers federal district courts with exclusive jurisdiction over actions and proceedings concerning ICSID awards.²

The FSIA, adopted in 1976, provides that, "[s]ubject to existing international agreements to which the United States is a party," sovereign states and entities are immune from the jurisdiction of U.S. state and

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federal courts unless (1) an exception from immunity applies and (2) such sovereign state or entity is served process in accordance with the FSIA.³ An action brought to enforce an arbitral agreement or confirm an arbitral award is one of the exceptions.⁴

However, while the FSIA specifies requirements for suing a foreign sovereign or sovereign entity and Section 1650a sets forth the effect of an enforced ICSID award, neither expressly stipulates the process by which an ICSID award may be enforced by a federal court. As a consequence, two approaches have emerged. The first approach — adopted by district courts in New York — has interpreted Section 1650a as requiring “some sort of summary procedure,” thereby permitting enforcement of an ICSID award as a federal judgment through *ex parte* proceedings under state law.⁵ By contrast, the alternative approach of other district courts has been to require ICSID award creditors to initiate a plenary action in compliance with the personal jurisdiction, service and venue requirements of the FSIA.⁶

In this instance, the issue before the Second Circuit was whether an ICSID award may be enforced on an *ex parte* basis.

CASE HISTORY

In 2007, the Venezuelan government nationalized the country's oil industry, seizing assets including those of subsidiaries and related entities of Exxon Mobil (collectively, “Exxon Mobil”).

On October 9, 2014, an ICSID arbitral tribunal made a \$1.6 billion award (plus interest) in favor of Exxon Mobil.⁷ The following day, in the U.S. District Court for the Southern District of New York, Exxon Mobil filed, and was granted, an *ex parte* order recognizing the award pursuant to Section 1650a.

After receiving notice of the *ex parte* judgment, Venezuela moved to vacate. This motion was denied in 2015 by Judge Paul A. Engelmayer of the Southern District, applying and explaining at some length the *ex parte* approach adopted in the earlier New York decisions.⁸ Venezuela appealed.

DECISION

On appeal, at the request of the Second Circuit, the U.S. Department of State submitted an *amicus curiae* brief setting forth the views of the United States Government. The State Department supported Venezuela's position, opining that the FSIA is the sole source of subject matter jurisdiction over an action to enforce an ICSID award against a foreign sovereign and that the FSIA's procedural rules must be followed in such proceedings.⁹

On July 11, 2017, the Second Circuit agreed. Reversing its own prior non-precedential decision,¹⁰ it decided that the FSIA — and *not* Section 1650a — “provides the sole source of jurisdiction – subject matter and personal – for federal courts over actions brought to enforce ICSID awards against foreign sovereigns.”¹¹ Specifically, ICSID award creditors must “fil[e] a federal action on the award against the

sovereign, serv[e] the sovereign with process in compliance with the FSIA and meet[] the FSIA's venue requirements before seeking entry of a federal judgment, whether through a motion for judgment on the pleadings or a summary judgment.”¹²

The Second Circuit was guided both by its interpretation of congressional intent as well as the doctrine of international comity. In the first respect, the Court concluded that when Congress introduced Section 1650a, it was aware that “federal courts generally require that a civil action be filed, with notice to the judgment creditor, before enforcing a state court judgment.” As such, the Court found, it is “reasonable to conclude that Congress . . . would have contemplated that ICSID awards would be enforced in federal court by judgment entered on an action filed – and not on an *ex parte* petition – on an ICSID award.”¹³ In the second respect, the Second Circuit held that “[t]he FSIA’s procedural requirements regarding notice and venue serve Congress’s stated goals of promoting comity with other sovereigns and ensuring the United States’ consistency of approach with respect to federal courts’ interactions with foreign sovereigns.”¹⁴ Relying on a prior United States Supreme Court ruling and the FSIA’s legislative history, the Court found that, “although the question is not free from doubt,” the FSIA’s carve-out for “existing international agreements” excludes prior treaties from the FSIA’s otherwise comprehensive reach “only when they expressly conflict with the Act’s immunity provisions.”¹⁵ Finding that Section 1650a can be reconciled with the FSIA, because Section 1650a does not address the procedural aspects of enforcing ICSID awards, the Court concluded that the two do not expressly conflict.¹⁶

The Second Circuit remanded the case with instructions to dismiss Exxon Mobil’s *ex parte* petition without prejudice, allowing Exxon Mobil to file a future enforcement action in compliance with the FSIA.

IMPLICATIONS

As a consequence of the Second Circuit’s decision, an ICSID award creditor seeking enforcement of an award in New York will need to ensure compliance with the FSIA, including the service requirements. These requirements, set out in Section 1608 of the statute, often require compliance with applicable international service conventions that take several months. The additional compliance requirements of the FSIA may, to an extent, result in a more protracted enforcement process, particularly where an award creditor is seeking enforcement against an unresponsive or evasive foreign state or state entity. The Second Circuit noted, however, that once service is accomplished, a judgment might be obtained through relatively expedited summary procedures.¹⁷ Under these procedures, the award debtor may contest the U.S. court’s jurisdiction to enforce the award, such as on venue grounds, and make non-merits challenges to the ICSID award, such as to question the finality of the award, but, consistent with the ICSID Convention, the debtor may not challenge the merits of the award.¹⁸ As a result, these summary procedures will likely require a few more months.

The Second Circuit’s decision may change the procedural calculus in one other respect. Under the federal venue statute, actions against foreign states must generally be brought “in any judicial district in

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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,” or in the federal court in the District of Columbia.¹⁹ Under the expedited procedures previously followed by the New York district courts, actions could be brought in any federal court in the country, just like an action on a judgment of a state court.²⁰ To that extent, the new procedures will limit the courts in which action on the award may be brought and may favor the courts in the District of Columbia, where no special proof of venue is required, in many cases.

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ENDNOTES

- ¹ 22 U.S.C. § 1650a(a).
- ² 22 U.S.C. § 1650a(b).
- ³ 28 U.S.C. § 1330(b).
- ⁴ 28 U.S.C. § 1605(a)(6).
- ⁵ See, e.g., *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009); *Liberian E. Timber Corp. v. Government of Republic of Liberia* (“LETICO”), 650 F. Supp. 73 (S.D.N.Y. 1986), *aff’d mem.*, 854 F.2d 1314 (2d Cir. 1987); see also *Miminco, LLC v. Democratic Republic of Congo*, 79 F. Supp. 3d 213, 217 n.3 (D.D.C. 2015).
- ⁶ See, e.g., *Micula v. Government of Romania*, 104 F. Supp. 3d 42 (D.D.C. 2015); *Continental Casualty Co. v. Argentine Republic*, 893 F. Supp. 2d 747 (E.D. Va. 2012).
- ⁷ *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27.
- ⁸ *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573, 579-83 (S.D.N.Y. 2015).
- ⁹ See *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707, slip op. at 30 (2d Cir. July 11, 2017) (“*Mobil Cerro Negro*”).
- ¹⁰ *LETICO*, 854 F.2d 1314 (2d Cir. 1987).
- ¹¹ *Mobil Cerro Negro*, No. 15-707, slip op. at 33.
- ¹² *Id.* at 5.
- ¹³ *Id.* at 55.
- ¹⁴ *Id.* at 5.
- ¹⁵ *Id.* at 36-37 (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) and HR Rep No. 94-1487, at 6616).
- ¹⁶ *Id.* at 37.
- ¹⁷ *Id.* at 45.
- ¹⁸ *Id.* at 46, 52.
- ¹⁹ 28 U.S.C. § 1391(f).
- ²⁰ See *Mobil Cerro Negro*, No. 15-707, slip op. at 11, 18-20.

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