

The Case Law Chronicle

New York court decisions or filings of note for international arbitration practitioners

Case Law Chronicle: In Amicus Brief to the Second Circuit, U.S. Government Weighs In On Whether Sovereign Immunity Is a Defense to the Recognition of ICSID Award Against Venezuela

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This is the fifth installment in a regular series offered by NYIAC. Follow this series to learn about recent decisions by New York federal and state courts and for easy access to the full text of the decisions.

Introduction

NYIAC's second Case Law Chronicle addressed the landmark decision of U.S. District Court for the Southern District of New York (Engelmayer J.) in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015), in which ExxonMobil entities ("Mobil") sought to enforce a USD 1.6 billion award obtained against Venezuela under the ICSID Convention by filing an *ex parte* petition to recognize the award as a precursor to enforcement against Venezuela's assets. As described in the Case Law Chronicle, the Southern District of New York upheld a simple, mechanistic procedure for registering an ICSID award against a sovereign state, despite arguments based on sovereign immunity. Venezuela appealed that decision to the U.S. Court of Appeals for the Second Circuit, where proceedings are pending.

The U.S. Government recently filed an *amicus curiae* brief with the U.S. Court of Appeals for the Second Circuit in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, Docket No. 15-707, ECF No. 87 (Mar. 30, 2016), arguing that the Foreign Sovereign Immunities Act ("FSIA") provides the sole basis for subject matter jurisdiction to enforce an ICSID award against a sovereign state and that the U.S. District Court for the Southern District of New York erred in not following the FSIA's procedures. The U.S. Government also argues that a federal district court may not modify the interest rate adopted by an ICSID panel. The U.S. Government's brief requests the Second Circuit to overturn the district court's February 13, 2015 decision to enforce an ICSID award against Venezuela in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015).

Background

To obtain recognition in the Southern District of New York, Mobil had invoked the U.S. statute enabling the ICSID Convention, which provides that 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."¹ Given that the enabling statute does not, however, provide a procedure for how enforcement should take place, Mobil also invoked the laws of the forum state (i.e. New York) to fill this "gap" and argued that an *ex parte* proceeding is allowed since New York law only requires notice to be given to the judgment debtor after recognition of a

¹ 22 U.S.C. § 1650a(a).

judgment has been entered by the court. The district court agreed, applying New York procedural rules, and recognized the award in the *ex parte* proceeding.

Venezuela then sought appellate review of this decision before the Second Circuit. Shortly after hearing oral argument on the appeal on January 7, 2016, the Second Circuit requested the views of the U.S. Government on three questions pertinent to its review:

1. Does the FSIA provides the sole basis for a federal court’s subject matter jurisdiction to enforce an ICSID award against a sovereign state or is some other process available?
2. Does either the ICSID Convention’s enabling statute or the FSIA permit a federal court to “borrow” procedural rules of the forum state, including provisions for *ex parte* proceedings, for the judicial recognition of ICSID arbitral awards?
3. Does the ICSID Convention’s enabling statute permit a federal district court to modify the interest rate adopted by an ICSID arbitral panel to be paid on an ICSID award?

The U.S. Government’s *amicus curiae* brief, filed on March 30, 2016, addresses each of these questions.

Argument #1: the FSIA Governs an Action to Recognize and Enforce a Valid ICSID Award Against a Foreign State

On the first question, the U.S. Government states that “[t]he FSIA is the sole source of subject matter jurisdiction over an action to enforce an ICSID award against a foreign state and its rules must be followed.”² According to the U.S. Government, the district court therefore erred in holding that the ICSID Convention’s enabling statute “provides an exception to the FSIA’s exclusive grant of subject matter jurisdiction.”³

The *amicus curiae* brief explains that the FSIA’s grant of jurisdiction “supplants” grants of subject matter jurisdiction in earlier enacted statutes, such as the ICSID Convention’s enabling legislation.⁴ Although the ICSID Convention’s enabling legislation provides exclusive jurisdiction in actions to enforce ICSID awards, following passage of the FSIA, that exclusive grant only applies to actions to enforce ICSID awards against private parties. Consequently, the ICSID Convention’s enabling statute cannot be the basis for a federal court’s jurisdiction over a sovereign state—only the FSIA can now provide that jurisdiction.

Because the FSIA provides the sole basis for jurisdiction over a sovereign state in an action to recognize and enforce an ICSID award, the U.S Government further argues that the FSIA’s service and venue requirements must be followed in such an action. The *amicus curiae* brief explains that the FSIA only permits a federal court to assert personal jurisdiction over a sovereign state if an exception to immunity applies, as provided in the FSIA, and if the service and venue requirements in the FSIA are satisfied.⁵

² *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, Docket No. 15-707, ECF No. 87, at 2 (Mar. 30, 2016).

³ *Id.* at 9.

⁴ The ICSID Convention’s enabling statute was enacted in 1966. The FSIA was enacted in 1976.

⁵ The FSIA permits service by four alternative means: (1) “by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision;” (2) “if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents;” (3) if service is not possible by the first two methods, “by sending a copy of the summons and complaint and a

The U.S. Government asserts that the district court erred in concluding that requiring an ICSID award creditor to bring a plenary action with notice to the sovereign state would conflict with the ICSID Convention. According to the U.S. Government, the district court incorrectly relied on the FSIA's treaty exception to reach this conclusion because the exception only considers whether a state's sovereign immunity exists and not the procedure for how an action against the state can be brought. The brief explains that the ICSID Convention "clearly envisions" that the mechanics of enforcement proceedings of an ICSID award will be left to domestic law and that no conflict with the United States' treaty obligations under the ICSID Convention arises by imposing the FSIA's service and venue requirements on an award creditor. The FSIA's service and venue requirements also do not "presuppose" contested litigation that conflict with the streamlined process for recognition and enforcement of awards, as envisioned by the ICSID Convention.

Argument #2: Neither the ICSID Convention's Enabling Statute nor the FSIA Permits a Federal Court to "Borrow" Procedural Rules of the Forum State that Permit Ex Parte Proceedings

On the second question, the U.S. Government argues that the "proper procedure for the recognition and enforcement of an ICSID award in the United States is through the commencement of an action that complies with the FSIA."⁶ Consequently, the district court erred in borrowing procedures from state law and in allowing *ex parte* proceedings with no notice to Venezuela, both of which conflict with the FSIA.

In answering the Second Circuit's second question, the U.S. Government reiterates that requiring a plenary action for recognition of an ICSID award against a sovereign state does not conflict with the ICSID Convention or its enabling statute. Rather, according to the *amicus curiae* brief, the ICSID Convention expressly leaves the procedures for recognition and enforcement actions to be established by domestic laws and recognizes that these procedures may differ from jurisdiction to jurisdiction. Moreover, nothing in the legislative history of the U.S. enabling statute suggests that enforcement actions for ICSID awards were intended to be "automatic" or *ex parte*. The U.S. Government asserts that providing a sovereign state with notice allows the state the ability to raise certain procedural defenses that it is entitled to rely on in resisting enforcement.

In short, the U.S. Government argues that the district court conflated the principle of full faith and credit recognition of a judgment with the procedure for implementing that principle. There is therefore no reason to "borrow" a state court's procedural rules to enforce an ICSID award, and the district court erred in doing so.

Argument #3: The ICSID Convention's Enabling Statute Does Not Permit a Federal District Court to Modify the Interest Rate Adopted by an ICISD Arbitral Panel

On the third question, the U.S. Government asserts that the district court correctly rejected Venezuela's attempt to modify the interest rate applied by the ICSID tribunal to the award. According to the *amicus curiae* brief, an interest rate is a "pecuniary obligation" that the courts are required to enforce under both the ICSID Convention and its enabling statute.

notice of suit . . . by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned;" or (4) if service cannot be effect within 30 days under [the third option], "by sending . . . the summons and complaint and a notice of suit . . . by any form of mail requiring a signed receipt . . . to the Secretary of State," who then will transmit the "papers through diplomatic channels to the foreign state." 28 U.S.C. § 1608(a). As to venue, The FSIA requires that suits within its regime be brought in either the district court for the District of Columbia or in a district in "which a substantial part of the events or omissions giving rise to the claim occurred, or [where] a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(f)(1).

⁶ *Mobil Cerro Negro*, Docket No. 15-707, ECF No. 87, at 12.

The U.S. Government urges the Second Circuit to reject Venezuela's position that the "merger doctrine" should apply, which would require that the obligations owed under the arbitral award merge into a judgment at the time the judgment is entered, resulting in application of the statutory interest rate mandated by U.S. federal law rather than the rate ordered by the tribunal. The *amicus curiae* brief argues that Venezuela's interpretation not only conflicts with the United States' treaty obligations but also lead to an interpretation that would permit the same ICSID award to be valued differently depending on the interest rate in the country where an award creditor seeks to have it recognized.

Potential Impact of the Second Circuit's Decision

If the Second Circuit adopts the U.S. Government's recommended approach, which remains to be seen, it would resolve a split between the two U.S. district courts that most frequently hear actions to recognize and enforce ICSID awards: the Southern District of New York and the District of Columbia.

Three months after the Southern District of New York granted *ex parte* recognition of the ICSID award against Venezuela in *Mobil Cerro Negro*, the U.S. District Court of the District of Columbia refused recognition without notice in *Micula v. Govt. of Romania*, 104 F. Supp. 3d 42 (D.D.C. 2015). In *Micula*, the district court conducted a textual analysis of the ICSID Convention's enabling statute to conclude that the statute deals only with enforcement of awards but not recognition. Although the court did not conduct an analysis of the FSIA or its applicability, the court nonetheless concluded that recognition of an ICSID award, as a sister state judgment (as required by the enabling statute), can only be done in plenary proceedings. The district court's refusal to recognize the award in an *ex parte* proceeding departed from earlier case law in the District of Columbia.⁷

Complicating the question further, five days after the District of Columbia's decision, other award creditors in the *Micula* action sought and ultimately obtained *ex parte* recognition of the same ICSID award against Romania before the Southern District of New York in *Micula v. Government of Romania*, No. 15 Misc. 107, 2015 WL 4643180 (S.D.N.Y. Aug. 5, 2015).

As the first appellate court to weigh in on these issues, the Second Circuit's decision in *Mobil Cerro Negro* will have an important impact on the future enforcement of ICSID awards not only in New York, but also across the United States.

⁷ See *Miminco, LLC v. Democratic Republic of the Congo*, 79 F. Supp. 3d 213, 216 (D.D.C. 2015) (finding that an *ex parte* proceeding "suffice[s] for recognition of ICSID arbitral awards" and "is consistent with the statutory mandate" of the ICSID Convention's enabling statute).