Kluwer Arbitration Blog

Securing payment of arbitral awards — from Venezuela to Albania

Catherine H. Gibson · Friday, May 6th, 2016

Recently the U.S. Executive Branch made headlines by *agreeing* with Venezuela. In particular, the Executive Branch filed an *amicus curiae* submission in New York federal appeals court in which it agreed with Venezuela regarding the treatment of ICSID awards in U.S. courts. According to the U.S. Executive (and Venezuela), a party seeking recognition of an ICSID award in U.S. courts must meet a number of formal requirements under the Foreign Sovereign Immunities Act for personal jurisdiction, venue, and service of process. Although U.S. courts have reached differing results on this issue – as described here – federal district courts in New York had previously permitted parties to avoid such formal requirements and obtain recognition of ICSID awards through *ex parte* motions. In reaching the decision currently on appeal, the New York federal district court summarized these awards in its opinion.

It remains to be seen whether the New York federal appeals court will agree with the U.S. Executive Branch and diverge from previous district court decisions – and ultimately whether the U.S. Supreme Court will decide the issue. Regardless of how the narrow issue of recognition of ICSID awards in U.S. courts is resolved, however, the larger question of how to secure payment of arbitral awards remains open. Although most arbitral awards are complied with voluntarily, obtaining payment of an award against a recalcitrant respondent state can pose challenges. In some prior cases, payment has ultimately resulted from political or diplomatic compromises, rather than strictly judicial solutions.

In the broader arena of international dispute settlement, this problem is not new. It took nearly fifty years for Albania to pay the monetary damages awarded against it by the International Court of Justice in the 1949 *Corfu Channel* decision. In fact, Albania refused to participate in the reparation phase of the case at all, and took the position in a letter to the ICJ registrar that the question of fixing compensation had not been presented to the Court. After the ICJ disagreed with Albania's position and proceeded to fix compensation, Albania refused to pay. Albania's non-payment was discussed by the UK House of Commons, and a second ICJ case was filed over the proposal to hold certain Albanian gold for the purposes of satisfying the judgment. The ICJ declined to decide that case, and the issue remained unresolved until 1992, when Albania and the UK settled the matter with a memorandum of understanding.

Facilitating payment of awards in favor of U.S. claimants was clearly a priority for the United States in negotiating the Algiers Accords and creating the Iran-U.S. Claims Tribunal. As a result of these negotiating priorities, the General Declaration to the Accords requires Iran to maintain a

Security Account with a minimum balance from which awards rendered against Iran by the Tribunal would be paid. Ironically, difficulties with payment of Tribunal awards arose nevertheless – but regarding awards *in Iran's favor*, and against private U.S. claimants. Specifically, in Iran Aircraft Industries v. Avco, a U.S. court refused to enforce a Tribunal award that required a U.S. party to pay certain amounts to Iran pursuant to a counter-claim. In the end, however, the Tribunal held in Case No. A27 that the U.S. court's decision violated the Algiers Accords.

Non-payment of a damages award has also arisen more recently pursuant to an award by the International Tribunal for the Law of the Sea (ITLOS). There, however, payment was achieved relatively quickly. In 1999, ITLOS rendered a $2 million damages award against Guinea in the The M/V "Saiga"(No. 2) Case. After Guinea failed to pay this amount for about one year, the claimant in that case, Saint Vincent and the Grenadines, sent a letter to Guinea (copying ITLOS) seeking to settle the issue. After Guinea failed to respond to this letter, Saint Vincent and the Grenadines complained to the UN Secretary General. This second letter apparently succeeded, and in April 2001 – just two years after the judgment was rendered – Saint Vincent and the Grenadines informed ITLOS that the parties had reached an "amicable agreement" on the issue of compensation.

It appears that such compromise solutions at the political level may remain a possibility, at least under the investment chapter of the Trans-Pacific Partnership Agreement (TPP). Specifically, TPP article 9.29(11) permits an investor's home state to seek state-to-state dispute settlement if a TPP party respondent state fails to abide by or comply with a final award. As that provision states:

> If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 28.7 (Establishment of a Panel). The requesting Party may seek in those proceedings:
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> (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
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> (b) in accordance with Article 28.17 (Initial Report), a recommendation that the respondent abide by or comply with the final award.

This provision, which is also included in the 2012 U.S. Model BIT, creates a procedure that would allow investors to enlist the assistance of their home government and state-to-state arbitration in seeking payment of an arbitral award against a recalcitrant state. By creating such a procedure, TPP and agreements with similar provisions create a pathway that investors may use — with assistance of their home states — to seek payment of awards through political compromise solutions, regardless of the formal requirements that may be imposed for judicial enforcement. If U.S. courts ultimately require investors to meet formal requirements of jurisdiction, venue, and service of process as the U.S. Executive Branch has suggested — at least with respect to ICSID awards — such compromise solutions may become more attractive.

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