# Is the D.D.C. Becoming a Specialized Enforcement Court?

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### *Introduction*

The enforcement bar is becoming more specialized. This development follows the trend in U.S. litigation towards increasing specialization and the growth of niche practice industries; but it also stems from specific changes to the enforcement regime that are addressed in this article and that have important implications for the life-cycle of an international arbitration.

This trend towards specialization is driven by: (1) the number and average length of enforcement actions; and primarily, (2) recent changes to the enforcement procedure, causing more enforcement cases to be brought in the United States District Court for the District of Colombia ("D.D.C.").

This article examines enforcement actions in the D.D.C. over the last six months, December 2018 to May 2019. Initial experience indicates several tendencies and trends. It posits that a motion/petition to confirm an arbitral award is no longer an adjunct stage to an ICSID award but a standalone procedure and a tough fight; it also considers whether the D.D.C. has become a default venue and "specialized court" for the enforcement of international arbitral awards.

### *Background*

The goal of every arbitration is to secure a final and enforceable award. The same

transaction or occurrence can give rise to awards under the New York Convention (1958) and the Washington (ICSID) Convention (1966). Until recently, commentators observed "[a] striking disparity between the two enforcement systems", distinguishing between ICSID annulment committees, on the one hand, and domestic court proceedings under the New York Convention, on the other. Kenneth B. Reisenfeld and Joshua M. Robbins writing in *Finality under the Washington and New York Conventions: Another Swing of the Pendulum?* concluded in 2017 that ICSID is a preferable venue based on "ICSID's potential finality advantage".

In 2017, the ICSID enforcement stream experienced a systemic change. *Mobil Cerro Negro v. Bolivarian Repub. Venezuela*, 863 F.3d 96 (2d Cir. 2017), the first federal appellate court to address the procedure for converting an ICSID award into a federal judgment, held that the ICSID Convention and its enabling statute, 22 U.S.C. § 1650(a), are subject to the procedures under the Foreign Sovereign Immunities Act of 1976 ("FSIA") for obtaining jurisdiction over a foreign sovereign. Previously, there had been a disagreement between and within district courts in multiple circuits as to the procedure for enforcement and whether an *ex parte* summary procedure was sufficient.

In *Mobil Cerro Negro v. Bolivarian Repub. Venezuela*, the Second Circuit held that the FSIA requires a plenary procedure for enforcement even of ICSID awards: petitioners must file a complaint and satisfy service (four methods of service) and venue requirements. In addition, the defendant sovereign must have the opportunity to appear and file responsive pleadings. The enforcement action is completed when a motion to dismiss or a motion for judgment on the pleadings/summary judgment is granted. Finally, under 28 U.S.C. § 1391(f) of the FSIA, the D.D.C. is the default (but not exclusive) venue for actions against foreign sovereigns.

### *Enforcement Outcomes in the D.D.C.*

The Second Circuit's decision has corralled more ICSID enforcement actions into the D.D.C. and extended the lifetime of an ICSID arbitration. Arguably, the plenary proceeding has resulted in delay, additional costs and affected settlement opportunities and enforcement outcomes. A survey of enforcement actions in the D.D.C. in the past six months reveals such trends. The cases discussed below involve enforcement actions relating to ICSID awards against Venezuela and Spain.

### *Venezuela Cases*

*Tidewater Inv. SRL v. Bolivarian Repub. Venezuela*, No. 17-1457, 2018 WL 6605633 (D.D.C. December 17, 2018) ended in a default judgment after Venezuela failed to appear or respond to the complaint. The court was satisfied that it had personal jurisdiction after Tidewater attempted all four methods of service on Venezuela under the FSIA. Although Tidewater had initially secured an *ex parte* judgment in the United States District Court for the Southern District of New York ("S.D.N.Y.") from a 2015 ICSID award, Venezuela was able to vacate that judgment following *Mobil Cerro Negro*'s change in the law. The enforcement action was filed in the D.D.C. in July 21, 2017. The time to judgment was more than three years.

Another enforcement action of a 2015 ICSID award against Venezuela, *OI European Group BV v. Bolivarian Republic of Venezuela*, Case No. 16-1533, was confirmed on May 21, 2019. Venezuela moved for a stay as a result of changes in government, but the court found that this stay was "unnecessary" and "would only serve to delay plaintiff's entitlement to judgment in a case that has been pending for three years and has already been stayed once before". The case was originally filed in July 27, 2016. The court granted Venezuela's earlier motion for a stay pending a decision on annulment, which was rendered on December 6, 2018. A similar action is pending from a 2017 ICSID award, *Koch Minerals Sàrl v. Bolivarian Repub. Venezuela*, Case No. 17-2559. The complaint was filed on November 28, 2017.

### *Spain Cases*

Eiser Infrastructure Ltd. was granted an *ex parte* judgment, enforcing its 2017 ICSID award on May 23, 2017 in the S.D.N.Y. The same court later vacated that judgment on November 13, 2017, after the Second Circuit's *Mobil Cerro Negro* decision. Eiser Infrastructure Ltd. then re-filed its petition to confirm the arbitral award in the D.D.C. on July 19, 2018, Case No. 18-1686.

The enforcement action in the D.D.C. has gone through multiple rounds of briefing on reciprocal motions to dismiss and for summary judgment. Spain is raising jurisdictional objections to enforcement. Judge Kollar-Kotelly has accepted an amicus brief from the European Commission in support of the Kingdom of Spain, March 18, 2019.

Masdar Solar & Wind Cooperatif U.A. also initiated an action on September 28, 2018 to enforce a 2018 ICSID award against Spain—Masdar Solar & Wind

Cooperatief U.A. v. Kingdom of Spain, Case No. 18-2254. On May 3, the European Commission filed a motion for leave to enter the case as *amicus curiae*.

***Observations and Conclusions***

A foreign arbitral award can always be enforced under the New York Convention; but a major advantage of enforcement of an ICSID award under the ICSID Convention is the supposed simple, streamlined, and spontaneous enforcement at the end of the ICSID's internal review (annulment) process. However, an examination of a small sample of enforcement cases in the D.D.C. from the past six months suggests that enforcement actions under the ICSID Convention are operating on a similar timeline—due in part to similar procedural practices—to enforcement actions under the New York Convention.

The effects of *Mobil Cerro Negro*, however, are still being captured. One effect to watch for is whether the D.D.C. will effectively become the default venue for enforcement actions in general. Another possible effect is the diminution in value of an ICSID award over a non-ICSID award; or a downgrade of the U.S. as the default country for enforcement. *Ex parte* enforcement procedures for ICSID awards continue to be used in such countries as the United Kingdom; nevertheless, in the United States, the opportunity for responsive pleadings created by the Second Circuit has turned what was intended to be a summary procedure into new rounds of litigation. This activity has led to a robust enforcement practice centered around the D.D.C. (blocks away from ICSID) and is an interesting development viewed in the context of renewed debate over an ICSID appeals facility.

Time will tell the repercussions to and responses of the ICSID system. Under Article 53(1) of the ICSID Convention, an award "shall not be subject to any appeal or any other remedy" and shall only be "stayed pursuant to relevant provisions of this Convention", such as a stay of enforcement pending an application for annulment (Article 52(5)). These requirements are arguably not being fulfilled as a result of the Second Circuit's *Mobil Cerro Negro* decision. As Judge Kelly states, in *Tidewater*, district courts have only a "perfunctory role" to play in these actions.

The policy concern behind requiring the FSIA procedures, as registered by the Department of State in its third-party submission in *Mobil Cerro Negro*, is to afford foreign sovereigns proper notice, the same treatment the United States would hope to be afforded in foreign courts. But these recently clarified procedures for

enforcement of ICSID awards are having a major impact on the length and life-cycle of an ICSID arbitration and the choice of arbitral venue.