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Upholding Delocalized Enforcement of ICSID Awards

Karen Halverson Cross (The John Marshall Law School) · Friday, April 24th, 2015 · Institute for Transnational Arbitration (ITA), Academic Council

In *Mobil Cerro Negro, Ltd., et al v. Bolivarian Republic of Venezuela*, a New York federal district court rejected Venezuela's sovereign immunity challenge and upheld use of an *ex parte* procedure available under New York law to convert an ICSID award into a U.S. court judgment. The decision highlights the delocalized nature of ICSID awards and illustrates how ICSID award creditors are increasingly resorting to judicial enforcement. The decision also promotes New York's reputation as a creditor-friendly jurisdiction at a time of controversy in Europe over the consistency of an intra-EU ICSID award with EU policy.

Typically, enforcement of an arbitration award against a foreign state is subject to personal jurisdiction, service of process, and venue requirements under the U.S. Foreign Sovereign Immunities Act (FSIA), in addition to New York Convention defenses. In contrast, the ICSID Convention provides for automatic recognition of awards. It requires any ICSID Contracting State to recognize and enforce an award's monetary obligation as if it were a final judgment in that state, subject only to domestic rules governing the immunity of sovereign property from execution. The U.S. legislation implementing the Convention (Section 1650a) provides that an ICSID award shall be accorded the same full faith and credit that a U.S. state judgment would enjoy.

In 2007, Mobil Corporation and several of its subsidiaries filed a request for arbitration with ICSID, seeking compensation for the expropriation by Venezuela of their interest in crude oil joint ventures they formed with Venezuela's state oil company, PDVSA. One of the Mobil subsidiaries, Mobil Cerro Negro, also commenced ICC arbitration against PDVSA, invoking an arbitration clause in one of the project agreements. In 2011, the ICC panel issued Mobil Cerro Negro a USD 747 million award. In October 2014, the ICSID panel issued a USD 1.6 billion award in favor of the Mobil subsidiaries. Several weeks later, ICSID provisionally stayed enforcement of the award pending Venezuela's application to revise it in order to prevent double recovery.

One day after the ICSID tribunal issued its award (but before ICSID stayed the award's enforcement), the Mobil subsidiaries brought an *ex parte* petition in New York federal district court to convert the award to a judgment. The court granted the petition, and Venezuela moved to vacate the judgment, arguing that the FSIA requires a creditor seeking recognition of an ICSID award to file a plenary action against the foreign state. Since the Mobil subsidiaries failed to comply with the FSIA's jurisdictional, venue, and service of process requirements, Venezuela argued that the court lacked authority to issue the judgment. Venezuela characterized the claimants' arguments in favor of expedited proceedings as unconvincing, since enforcement of the

underlying award had been stayed.

The court denied Venezuela's motion to vacate, but stayed enforcement of the judgment pending resolution of the ICSID revision proceeding. Relying on several previous *ex parte* recognition decisions, the *Mobil Cerro Negro* court found that Section 1650a, which does not specify a procedure for recognition, allows resort to *ex parte* procedures available under state law to convert an ICSID award to a federal judgment.

Venezuela also argued that the FSIA, enacted in 1976, superseded the ICSID Convention and Section 1650a. The court acknowledged that under U.S. law, the clear language of a later-in-time statute may supersede an existing treaty. However, the court invoked the *Charming Betsy* canon of statutory interpretation, the rule that wherever possible, a U.S. court should interpret a statute to avoid conflict with U.S. international obligations. In light of the FSIA's silence as to its applicability to the recognition of ICSID awards, and the ICSID Convention's aim of creating a self-contained arbitral regime with no judicial review, the *Mobil Cerro Negro* court found that the FSIA's procedural requirements do not apply to petitions to recognize ICSID awards. The court characterized the ICSID Convention as seeking "to depart from, not to double down on" the New York Convention's recognition and enforcement procedure.

Venezuela has appealed the judgment to the Second Circuit Court of Appeals. The ICSID revision proceeding is still pending. In February 2015, Venezuela filed a petition with ICSID to annul the award.

Mobil Cerro Negro is one of a small but growing number of petitions in U.S. court to enforce ICSID awards. The ICSID Convention requires Contracting States to comply with awards issued against them. For this reason, and perhaps also because ICSID is part of the World Bank Group, ICSID awards traditionally have been honored voluntarily, without the need for an award creditor to resort to judicial enforcement. Although petitions to enforce ICSID awards used to be a rarity, since 2007 there have been at least nine U.S. judicial decisions involving petitions to recognize or enforce ICSID awards against foreign states, including Grenada, Argentina, Egypt, Zimbabwe, Peru, Democratic Republic of the Congo, and Venezuela. This increase may be a function of the significant growth in investment arbitration claims adjudicated over the past decade. But the increase may also reflect a change in position by certain countries towards ICSID arbitration.

In spite of *Mobil Cerro Negro*, judicial enforcement of ICSID awards remains very difficult. The Mobil subsidiaries, like other ICSID award creditors, still face the significant challenge of finding nonimmune Venezuelan assets against which to enforce their judgment. *Mobil Cerro Negro* facilitates ICSID award enforcement in two respects. By allowing an award creditor to use *ex parte* recognition procedures, the decision allows an award to be converted to a U.S. judgment simply and quickly. Significantly, the decision also makes it easier for an award creditor to take advantage of broad post-judgment discovery available under U.S. law to enforce judgments against a foreign state. In Republic of Argentina v. NML Capital, Ltd., the U.S. Supreme Court held that the FSIA does not limit post-judgment discovery of a foreign sovereign judgment debtor's extraterritorial property. The 2014 *NML* decision upheld bank subpoena orders for information on how Argentina moves its assets around the world, orders that were intended to allow a New York federal district court to serve as a "clearinghouse for information" to assist NML in its enforcement efforts. Additional information on the *NML* decision can be found here.

Mobil Cerro Negro honors the ICSID Convention's intent to create an arbitral regime that is

independent of domestic courts, and may prompt additional ICSID award creditors to bring enforcement actions to U.S. courts. *Mobil Cerro Negro* coincides with an ongoing European debate over intra-EU investment arbitration. The European Commission recently announced that an ICSID award against Romania in favor of Swedish investors contravenes EU rules prohibiting state aid.[1)] One of the Swedish investors petitioned a U.S. court to recognize the ICSID award. On April 16, 2015, for reasons that are to be explained in a forthcoming opinion, the court dismissed the petition and directed the investor to bring a plenary enforcement action on behalf of all claimants. The April 16 order is from a District of Columbia federal district court and not the court that decided *Mobil Cerro Negro*.

References

?1 See also the recent post on the European Commission's position on the ICSID award in *Micula v. Romania*

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