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International Arbitration

Expert Analysis

Streamlined Procedure for Recognition Of Awards in New York Courts

By **John Fellas**

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) was designed to promote investment in one country by nationals of another country by establishing a neutral mechanism by which a host signatory country and investors from another signatory country can resolve their disputes—arbitration administered by the International Centre for the Settlement of Investment Disputes (ICSID). There are over 150 signatories, including the United States, to the treaty.

There have been numerous high-stakes international arbitrations administered by the ICSID, often pursuant to a bilateral investment treaty, resulting in large arbitration awards. This article concerns the enforcement of ICSID awards in the New York federal courts. In a recent, thorough and well-reasoned decision in *Mobil Cerro Negro v. Bolivarian Republic of Venezuela*, 2015 WL 631409 (Feb. 13, S.D.N.Y.), Judge Paul A. Engelmayer held that parties may use a streamlined, ex parte procedure to enforce ICSID awards, and that the defenses of lack of personal jurisdiction and improper venue are inapplicable even when enforcement is sought against a foreign sovereign.

This same ex parte procedure was successfully used to enforce an ICSID award against Romania just over a week ago in New York. *Micula v. The Gov't of Romania*, Case No. 1:15-MC-00107 ((Amended Order and Judgment) S.D.N.Y., April 28, 2015)). By contrast, the U.S. District Court for the District of Columbia had earlier refused to permit one of the same petitioners to use a streamlined, ex parte procedure to enforce the same ICSID award in its court, but required, instead, that it file a plenary action. *Micula v. The Gov't of Romania*, Case No. 1:14-CV-00600-APM ((Order) D.D.C, April 16, 2015)).

> In one case, Judge Paul A. Engelmayer held that parties may use a streamlined, ex parte procedure to enforce ICSID awards.

Mobil is worth examining not only for what it says about the procedure for the enforcement of ICSID awards in New York but also for its implications for the viability of jurisdictional defenses in actions to enforce awards falling under another international arbitration convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to which there are also over 150 signatories, including the United States.

Differences in Conventions

The New York Convention applies to arbitration agreements and awards generally; it requires each contracting state to enforce agreements to arbitrate and arbitration awards, subject to certain specified exceptions. The ICSID Convention, by contrast, applies only to "legal dispute(s) arising directly out of an investment" involving "a Contracting State…and a national of another Contracting State." It is not uncommon for ICSID cases to be dismissed for failing to meet these jurisdictional requirements. See, e.g., *Poštová banka, a.s. and ISTROKAPITAL S.E. v. Hellenic Republic of Greece*, (ICSID Case No. ARB/13/8) (Award April 9, 2015) (dismissing case since Greek government bonds allegedly held by a Slovak bank and a Greek company were not an investment); *Venoklim Holding v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/22) (Award April 4, 2015) (dismissing case since Dutch company claiming against Venezuela was not a foreign investor).

The ICSID Convention differs from the New York Convention when it comes to the role of the courts in reviewing their respective awards. National courts have the authority to review awards that fall under the New York Convention on certain limited grounds set forth in Article V (e.g., lack of due process, public policy, excess of jurisdiction by the arbitrators) and may refuse to recognize

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and enforce an award if the party resisting enforcement establishes one of those of grounds. Moreover, a party may seek to vacate a New York Convention award in the appropriate court at the place of arbitration on certain narrow grounds under local law.

ICSID awards, by contrast, are not subject to any review by national courts. Rather, the ICSID Convention is self-contained; if a party wishes to challenge an ICSID award it can do so only within the terms of the ICSID Convention. That Convention contemplates only three types of post-award proceedings — interpretation (Article 50), revision (Article 51) or annulment (Article 52). An annulment proceeding, which is the strongest of the three post-award challenges, is held before an "ad hoc committee" operating under the auspices of the ICSID. Article 54 of the ICSID Convention provides that a national court "shall recognize" an award "as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."

The contrasting enforcement provisions of the two Conventions are codified in two different U.S. statutes: New York Convention awards are governed by the Federal Arbitration Act (FAA), ICSID awards by 22 USC §1650. Section 207 of the FAA provides that a court shall recognize a New York Convention award unless it finds that one of the Article V grounds for non-recognition has been established. By contrast, §1650(a) provides that "[t]he pecuniary obligations" of 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." Section 1650(a) is, however, silent on the precise procedure for the conversion of an ICSID award into a judgment of a U.S. court. That was the issue in *Mobil*.

'Mobil v. Venezuela'

Mobil concerned an ICSID arbitration between Mobil and Venezuela brought pursuant to a bilateral investment treaty. Mobil secured an arbitration award in its favor for $1.6 billion. It sought to enforce that award by making an ex parte application in the District Court for the Southern District of New York, relying on CPLR Article 54, which applies to "any judgment…of a court of the United States or any other court which is entitled to full faith and credit in this state…." and which does not require that the court have personal jurisdiction over the judgment debtor. See, e.g., David D. Siegel, NY Practice §435 (4th ed.). Prevailing parties in ICSID cases have relied on the streamlined, ex parte procedure in Article 54 to enforce their awards for almost 30 years. See, e.g., *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, No. M–68, 1986 U.S. Dist. LEXIS 31062 (S.D.N.Y. Sept. 10, 1986); *Siag v. Arab Republic of Egypt*, No. M–82 (PKC), 2009 WL 1834562 (June 19, 2009).

> Judge Engelmayer in 'Mobil' emphasized that §1650(a) explicitly states that the FAA does not apply to ICSID awards and contains the phrase "full faith and credit," one "conspicuously absent from Chapter 2 of the FAA, the enabling statute for the New York Convention."

The court granted Mobil's application and entered final judgment for $1.6 billion plus interest. Venezuela moved to vacate that judgment on two grounds. First, it argued that Mobil's use of the CPLR Article 54 procedure was inconsistent with §1650(a) and that prior cases authorizing its use were wrongly decided. Second, it said that even if that procedure could be used in §1650(a) cases, the Foreign Sovereign Immunities Act (FSIA) barred its use against a foreign sovereign. Judge Engelmayer rejected both of Venezuela's arguments and upheld the use of the streamlined, ex parte procedure in CPLR Article 54 for the enforcement of ICSID awards.

With respect to Venezuela's first objection, the court characterized the issue before it as whether it was appropriate to look "to the law of the forum state, here, New York, to fill the procedural gap in section 1650(a) as to the manner in which a recognition is to occur." The court answered that question in the affirmative for two reasons. First, it found "compelling authority" that it was proper to apply the forum state's law when a court confronts a gap in a federal statutory scheme. Second, it found that "using the streamline recognition procedure in CPLR Article 54 effectuates the policy interests underlying the ICSID enabling statute, because…it facilitates granting 'full faith and credit' to the award and enables the creditor to move towards enforcing it."

Venezuela's second objection was that, regardless of whether a party could use the ex parte procedure to enforce an ICSID award immediately after §1650(a) was enacted in 1966, the situation as to foreign sovereigns was altered in 1976 with the passage of the FSIA, which contains requirements as to service of process, personal jurisdiction and venue. Judge Engelmayer found the FSIA's text ambiguous and its legislative history silent on the question of whether the FSIA's service and other requirements had to be met in an ICSID enforcement action, and decided therefore that it was necessary to examine the FSIA "in broader context."

In doing so, Engelmayer focused on the difference, discussed above, between the ICSID and the New York Convention when it comes to national court review of awards—there is no review of awards under the former convention and some limited review under the latter. He noted that in the light of "the substantive nature of the confirmation process, the requirements of personal jurisdiction, service of process, and venue have generally been held by federal courts to apply to petitions to confirm arbitral awards under the New York Convention." He emphasized that §1650(a), by contrast, explicitly states that the FAA does not apply to ICSID awards and contains the phrase "full faith and credit,"

one "conspicuously absent from Chapter 2 of the FAA, the enabling statute for the New York Convention."

He held, therefore, that CPLR Article 54 could be used in cases that fall under the FSIA because "the contracting states to the ICSID Convention intended to put in place an expedited and automatic recognition procedure. They sought to depart from, not to double down on, the model of a contested recognition process used under the New York Convention."

New York Convention Awards

In my previous column ("Enforcing Foreign Arbitral Awards: Should Jurisdictional Defenses Apply?" NYLJ, Feb. 6, 2015), I argued that there is no good reason the defenses of lack of personal jurisdiction and forum non conveniens should apply in actions to enforce New York Convention arbitration awards, when, as New York courts have held, they do not apply in actions to enforce foreign country judgments. It could be argued that the decision in *Mobil*—which was rendered a week after that column appeared—militates in favor of permitting parties to rely on jurisdictional defenses in resisting the enforcement of New York Convention awards. This is because, the argument might run, central to the court's analysis in *Mobil* was the contrast between the role of the courts in reviewing ICSID awards as compared to New York Convention awards.

But this does not follow. Just because jurisdictional defenses are inapplicable when a statute excludes judicial review of an award for enforcement purposes, it does not follow that such defenses must be applicable when a statute authorizes some limited review. (Just because a cloudless sky entails no rain, it does not follow that a partly cloudy sky must entail rain.) It is true, as noted in my previous column, that courts have held that jurisdictional defenses apply to the enforcement of New York Convention awards. But, as I argued in that column, there is no good reason for the enforcement of such awards to be held to a higher standard than that which applies to the enforcement of foreign judgments, where courts undertake a limited review comparable to that which they undertake in actions to enforce New York Convention awards and where jurisdictional defenses have been held not to apply.

It is possible to distinguish three types of cases: (1) where a court or arbitral tribunal is asked to decide the merits of a typical dispute, i.e., whether party A is liable to party B and, if so, the relief, if any, to which party B is entitled—call this a "conventional-merits" case; (2) where a court is asked to recognize and enforce a judgment or arbitral award in a conventional-merits case and where the enforcing court is authorized to review that judgment or award on limited grounds, e.g., lack of jurisdiction or due process—a "limited-review-enforcement" case; and (3) where a court is asked to recognize and enforce a judgment or arbitral award in a conventional-merits case, but where the enforcing court is not authorized to review that judgment or award on any grounds—a "no-review-enforcement" case.

Clearly, there is a requirement that there be both personal jurisdiction and appropriate venue in conventional-merits cases. See, e.g., *Daimler v. Bauman*, 134 S.Ct. 746 (2014); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). It is likewise clear from *Mobil* that there are no such requirements in no-review-enforcement cases brought in New York courts. But what of limited-review-enforcement cases—the enforcement of New York Convention awards or of foreign country judgments? To which of the two other types of cases are they more analogous?

The rules of personal jurisdiction in conventional-merits actions, crudely, are based on protecting the legitimate expectations of a potential defendant as regards where it may be hauled into court to answer for its actions. At the time of suit, precisely what is in issue is whether a potential defendant is liable to anyone for anything. Such actions differ from both types of enforcement actions. These are brought only after a court or arbitral tribunal has considered the merits of a case and found a party liable, and only after that party has failed to comply voluntarily with its obligations under a judgment or award.

At that point, concern for the expectations of a defendant should give way to concern for the rights of a judgment or award creditor who is forced to commence an enforcement action precisely because the debtor has refused to comply with its obligations voluntarily. As a result, it is submitted that more weight should be given to the creditor's choice of forum in bringing an enforcement action than to the defendant's expectations as to where that action might be brought.

Two additional considerations support this conclusion. First, given the narrow focus of limited-review-enforcement cases, they are far less burdensome for a defendant to defend against than conventional-merits cases. Second, a creditor is unlikely to select an enforcement forum where the debtor has no assets or is unlikely to have assets in the future.

For this reason, actions to enforce New York Convention awards have more in common with actions to enforce ICSID awards than they do with conventional-merits cases. To be sure, the two types of enforcement actions differ in the scope of review undertaken by the national courts. But for the purposes of whether jurisdictional defenses should apply, what they share is far more significant than how they differ.