KING & SPALDING

Client Alert

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Recent Decisions Illustrate Disagreement Among U.S. Courts in Enforcing ICSID Awards

I. Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") has become a critical mechanism for the settlement of investor-State disputes and provides binding and streamlined procedures for the enforcement of arbitral awards rendered in accordance with its framework. The United States is party to the ICSID Convention and has implemented its obligations under the Convention into the U.S. Code by providing that U.S. courts must recognize every arbitral award rendered pursuant to the ICSID Convention as if it were a "final judgment of a court in [the United States]."[1] Notwithstanding this mandate, exactly what procedures federal courts may utilize to domesticate and enforce ICSID awards in the United States remains unsettled, and recent decisions of the New York and District of Columbia district courts appear to illustrate a developing rift between courts in those jurisdictions about the proper procedure to be followed when asked to enforce an ICSID award; the courts' disagreement specifically concerns whether the *ex parte* procedures for recognizing sister-state judgments under state law may be used to recognize an ICSID award. While the state of the law on this issue is still somewhat uncertain in the District of Columbia, the New York courts have made clear that ICSID award creditors may take advantage of expedited, *ex parte* procedures in seeking recognition of an ICSID award.

II. Background

The recognition and enforcement of ICSID awards is provided for in Articles 53 through 55 of the Convention. Collectively, these passages demonstrate a desire to eliminate review of awards by national courts. *See*, *e.g.*, ICSID Convention Art. 53 (awards "shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.").

Nevertheless, ICSID awards must still be brought to national courts for recognition and enforcement should the losing party refuse to comply with their terms. Article 54 of the ICSID Convention allows Contracting States with federal constitutions to treat ICSID awards as if they were final judgments of a court in a constituent state. ICSID Convention Art. 54(1). The Convention, however, does not require any particular procedure for

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recognition or enforcement of an ICSID award by the courts of each Contracting State.

Congress implemented the ICSID Convention via 22 U.S.C. § 1650a. This enabling statute 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." 22 U.S.C. § 1650a(a). Importantly, the statute only expressly mentions enforcement, and not recognition.

III. Pre-2015 Cases Involving *Ex Parte* Recognition Proceedings

Prior to 2015, only five federal district court cases had addressed the *ex parte* recognition of an ICSID award—all issued in the Southern District of New York. That court has repeatedly upheld the use of *ex parte* proceedings to confirm an ICSID award, beginning with its 1986 decision in *Liberian Eastern Timber Corp. v. Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986) ("LETCO"). In that case, the court granted LETCO's application for *ex parte* recognition, and directed entry of judgment for the amount of the award in question. *Id*. at 75. On Liberia's motion to vacate, the granting of *ex parte* recognition was upheld, but the court found it could not issue writs of execution, as Liberia's sovereign assets were protected under the FSIA. *Id*. at 76-78.

Three subsequent cases used *ex parte* procedures without directly analyzing the propriety of doing so. *See Grenada v. Grynberg*, No. 11 Misc. 45 (S.D.N.Y. Apr. 29, 2011); *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 20, 2007); *Sempra Energy Int'l v. Argentine Republic*, No. M-82 (S.D.N.Y. Nov. 14, 2007). In each of these cases, the award debtor did not object to the entry of judgment.

In 2009, the court in *Siag v. Arab Republic of Egypt*, No. M-82 (PKC), 2009 WL 1834562 (S.D.N.Y. June 19, 2009) paused to consider more fully the propriety of using Article 54's *ex parte* procedures to confirm an ICSID award . In that case, Judge Kevin Castel ultimately granted an *ex parte* recognition application after consideration of whether the foreign state award debtor was entitled to advance notice and an opportunity to be heard prior to recognition of the award. *Id*. at *1. The Court interpreted § 1650a to require that an ICSID award be treated as a final judgment of a state court, and found that Article 54 of the New York Civil Practice Law and Rules ("CPLR") set forth the appropriate procedure for recognizing out-of-state judgments in the State of New York.[2] *Id*. at **1-2. While CPLR Article 54 by its terms provides only for registration of judgments in New York *state* courts, Judge Castel took note of certain Second Circuit precedent that extended Article 54's applicability in federal courts. *Id*. at *2. The Court found that because CPLR Article 54 allows for *ex parte* recognition proceedings, it was not necessary for the award creditors to file a plenary action. *Id.* at *3.

IV. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*

In December 2014, the New York District Court once again took the opportunity to analyze whether the use of Article 54's ex parte recognition procedures was proper to confirm an ICSID award in *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015). In October 2014, various ExxonMobil entities ("Mobil") filed an *ex parte* petition in the New York District Court seeking recognition of a $1.6 billion ICSID award rendered against Venezuela. Judge Oetken, sitting in Part I, granted the petition, relying upon the precedent established in *Siag*, and Mobil promptly notified Venezuela's counsel of the Court's entry of judgment. *Mobil Cerro*, , 2015 WL 631409 at *2. A few days later, Venezuela moved to vacate the judgment, claiming that the court had erred in applying CPLR Article 54 and its streamlined *ex parte* recognition process. *Id*. Specifically, Venezuela advanced two arguments: 1) that § 1650a did not authorize borrowing from New York state law; and 2) that in any event, the Foreign Sovereign Immunities Act[3] superseded § 1650a with regard to recognition actions brought against foreign sovereigns, and that it imposes procedural requirements that Mobil Cerro did not meet. *Id*. at *3. Ultimately, Venezuela claimed a plenary lawsuit was required to enforce an ICSID award against a foreign sovereign. *Id*. Venezuela's motion came before Judge Engelmeyer.

In addressing Venezuela's first argument, the Court identified what it viewed as a crucial statutory gap in § 1650a, which is silent as to the process for recognizing ICSID awards despite the fact that such recognition is mandated by the Convention. *Id*. at *7. In order to fill this gap, the Court found it appropriate to look to state law, citing the Rules of Decision Act which provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[4] *Id*. The Court further noted that state law may be borrowed even to fill gaps in a federal statutory scheme governing a "quintessentially federal concern," citing various Second Circuit precedents in which the Court of Appeals applied state law to fill gaps in the Copyright Act, federal bankruptcy laws, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and issues concerning foreign relations. *Id*. at **8-9. Noting that Venezuela had identified no real conflict between the use of state law and some federal policy or interest, the Court concluded that the use of CPLR Article 54 as a gap-filler effectuated the policy interests underlying § 1650a by facilitating the granting of "full faith and credit" to ICSID awards as mandated by the enabling statute. *Id*. at **9-10. The Court found Venezuela's argument that borrowing state law would offend a federal interest in uniformity to be "dubious" given the fact that the ICSID Convention subjects ICSID awards to unique enforcement regimes in each of its more than 140 Contracting States. *Id*. The Court also rejected Venezuela's argument that borrowing state law would offend international comity, remarking that "[s]ymbolism aside, a foreign party has no valid ground to claim offense at a streamlined recognition procedure" for ICSID awards, which are not subject to any substantive review. *Id*. at *10. Thus, "whether Mobil applied for recognition of the award via a plenary lawsuit or an ex parte application along the lines used here, the nature of that proceeding would not expand or contract Venezuela's substantive rights." *Id*.

Venezuela's next argument was that the FSIA, passed ten years after § 1650a, supervened the ICSID enabling statute and imposed additional procedural requirements in recognition proceedings against foreign sovereigns.

The Court first rejected Venezuela's argument that it lacked subject matter jurisdiction under the FSIA; the Court found that two of the FSIA's exceptions to immunity from suit—namely Section 1605(a)(6) and 1605(a)(1)—applied to Mobil's application, given that it sought to enforce an arbitral award that was subject to the ICSID Convention, Venezuela's acceptance of which amounted to an implied waiver of jurisdictional immunity from enforcement actions. *Id*. at **12-13. The Court further dismissed Venezuela's argument that the Court lacked subject matter jurisdiction because of Mobil's failure to comply with the FSIA's service of process requirements, explaining that even if Mobil had been required to serve Venezuela with its recognition application in accordance with Section 1608 of the FSIA, its failure to do so might have deprived the Court of personal jurisdiction, but would not have affected the subject matter jurisdiction analysis. *Id*. at **13-14.

Separately, Venezuela argued that the FSIA's procedural requirements apply to recognition actions even if there is subject matter jurisdiction. *Id*. at *42. The Court also rejected this argument and determined that the FSIA could not be read to supersede any procedures for recognizing ICSID awards that were in use prior to the FSIA's enactment, relying upon several textual clues in the FSIA and other statutory sources for this conclusion. First, the Court noted that "the FSIA evinces an intention to leave existing practice under international treaties undisturbed," as Section 1604 explicitly states that a foreign state's immunity under that section is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." *Id*. at *17 (citing 28 U.S.C. § 1604). Second, the Court noted that the "FSIA repeatedly uses terms that presuppose litigation over a contested issue," suggesting that Congress did not contemplate that the FSIA would apply in proceedings where there were no substantive issues being decided. *Id*. Finally, the court found that because ICSID arbitrations were fairly uncommon at the time of the FSIA's enactment, it was reasonable to infer that Congress did not have the unique context of the ICSID award recognition in mind. *Id*. The Court also added that Section 1650a's use of the phrase "full faith and credit" likened the recognition of an ICSID award to the recognition of a sister-state judgment, a procedure that does not require personal jurisdiction over the judgment debtor in the recognizing court. *Id*. at *21.

Indeed, the Court's review of the history and text of both the ICSID Convention and § 1650a yielded the conclusion that "requiring a plenary lawsuit to obtain recognition of an ICSID award would be, at minimum, in significant tension with the intentions of the Convention and the enabling statute as to the process of recognition." *Id*. at **19-20. Specifically, the Court noted that drafters of the ICSID Convention decided that national courts' recognition of an ICSID award should be automatic, and deliberately departed from the more substantive review provisions contained within the New York Convention, which was already in existence when the ICSID Convention was being drafted. *Id*. The Court found that Venezuela's argument that an ICSID award creditor must file a plenary action to recognize an ICSID award would nonsensically give an ICSID award debtor "more process than it was due under the New York Convention, under which at least a streamlined petition-based confirmation process is used." *Id*. at *21. In sum, the Court construed the FSIA to permit *ex parte* recognition proceedings, while reaffirming that the FSIA's execution immunities would still function as a protection against seizure of a foreign state's sovereign assets. *Id*. at **21-23.

V. *Micula I*

In May 2015, three months after *Mobil Cerro* was decided, the D.C. District Court was also called upon to assess the propriety of *ex parte* ICSID award recognition in *Micula v. Govt. of Romania ("Micula I")*, No. 1:14-cv-00600 (APM), U.S. Dist. LEXIS 64461 (D.D.C. May 18, 2015). Petitioner Viorel Micula had filed a petition with the D.C. District Court for *ex parte* recognition of a $116 million ICSID award rendered against Romania. He argued that because § 1650a is silent as to the proper procedure for recognition of ICSID awards, the Court should borrow an expedited procedure from local District of Columbia law, which, like New York law, permitted the *ex parte* recognition of sister-state judgments. *Micula I*, 2015 WL 2354310 at *4. Micula also cited the line of cases dealing with *ex parte* recognition in the Southern District of New York, up to and including *Mobil Cerro*. *Id*. While Romania did not file a formal response, the Court nonetheless analyzed the question of whether it had the authority to confirm an ICSID award on an *ex parte* basis, citing the traditional importance of service of process and concerns of comity as factors motivating this scrutiny. *Id*. at **3-4.

In an opinion by Judge Amit Mehta, the Court rejected Micula's petition for *ex parte* recognition based principally on a textual analysis of § 1650a. The Court first noted an apparent split of authority concerning whether *ex parte* procedures may be used to recognize an ICSID award, citing the line of cases decided by the New York District Court which allowed such procedures, as well as a decision of the U.S. District Court for the Eastern District of Virginia ("Virginia District Court") which found that ex parte state law procedures could not be used to recognize an ICSID award. *Id*. at **5-6. The D.C. District Court agreed with the Virginia District Court's analysis, which rejected any distinction between recognition and enforcement of arbitral awards, and therefore effectively denied the existence of any statutory gap that would justify borrowing recognition procedures from state law. *Id*. at *5.

In analyzing the text § 1650a itself, the D.C. District Court emphasized that the enabling statute refers only to enforcement of awards, and not to recognition. *Id*. The Court acknowledged its obligation to enforce an ICSID award in the same manner as a state court judgment, but noted that the only proper means of recognizing a state court judgment in federal court is through an action on the judgment as a debt—or in other words a plenary proceeding. *Id*.

The D.C. District Court found statutory support for its view in the text of Section 1650a, which provides that the federal courts "shall have exclusive jurisdiction over the *actions and proceedings* under subsection (a) of this section…" *Id*. at *6 (citing 28 U.S.C. § 1650a) (emphasis supplied). Specifically, the Court found that the words "action" and "proceedings" strongly connoted a congressional intent to domesticate ICSID awards through a plenary action, as Congress could have used the word "confirm" as it did in Chapter 2 of the Federal Arbitration Act ("FAA"), implementing the provisions of the New York Convention, if it had wanted. *Id*. at *6.

Finally, the Court determined that its interpretation of Section 1650a did not conflict with the United States' obligations under the ICSID Convention because the Convention itself "does not obligate its contracting states to adopt any specific

method for fulfilling those obligations." *Id*. at *7. In reaching its conclusion that § 1650a did not permit *ex parte* recognition of ICSID awards, the *Micula* court did not engage in an analysis of the FSIA or its applicability.

Notably, Judge Mehta's decision conflicts with another decision of the D.C. District Court issued just a few months earlier in *Miminco, LLC v. Democratic Republic of the Congo*, No. CV 14-01987 (RC), 2015 WL 1061555 (D.D.C. Feb. 9, 2015), in which Judge Contreras held that "*ex parte* proceedings suffice for recognition of ICSID arbitral awards." *Id*. at *1. In *Miminco*, Judge Contreras determined that "[s]uch a procedure is consistent with the statutory mandate that ICSID awards 'shall be enforced and shall be given the same full faith and credit' as a state court judgment," and took note of the several decisions of the New York District Court employing such *ex parte* procedures. Thus, in the absence of any D.C. Circuit authority addressing the issue, the proper procedures for recognizing an ICSID award in the federal courts in the District of Columbia is currently uncertain.

VI. *Micula II*

Five days after the D.C. District Court denied Viorel Micula's *ex parte* application recognize the ICSID award, petitioners other than Mr. Micula sought *ex parte* recognition of the award in the New York District Court. *See Micula v. Government of Romania ("Micula II")*, No. 15 MISC. 107, 2015 WL 4643180, at *1 (S.D.N.Y. Aug. 5, 2015). That application was granted by Judge Buchwald sitting in Part I, and Mr. Micula was permitted to intervene in the enforcement action.

Romania sought to vacate the judgment entered by the Court, asserting that it violated the FSIA, and arguing that the Court should abstain from exercising jurisdiction on the basis of international comity, the act of state doctrine and the foreign sovereign compulsion doctrine. Judge Schofield, to whom Romania's motion was assigned, rejected each of these arguments.

Judge Schofield, relying upon Judge Engelmeyer's thorough analysis in *Mobil Cerro*, dismissed Romania's arguments that the FSIA required the petitioners to commence a plenary proceeding to confirm the ICSID award, holding that "given the spirit of the ICSID Convention (to which the United States is a party), the language of its enabling statute, the clear exceptions to the FSIA that apply, and precedent in this District, the expensive and time-consuming process of a plenary proceeding to recognize an ICSID award in the United States is unnecessary as a matter of law." Id. at *3.

Judge Schofield expressly rejected Judge Mehta's determination in the D.C. District Court's opinion that there was no statutory gap in Section 1650a, explaining that "the enabling statute should not be read to collapse all distinction between 'recognition' and 'enforcement.'" *Id.* The Court held that "[r]egardless of how state judgments are typically treated in federal courts … the ICSID Convention, a treaty to which the United States is a party, mandates both recognition and enforcement," and "by addressing only 'enforcement,' § 1650a created a statutory gap that is appropriately filled by looking to the law of the forum state…" *Id*. Finally, Judge Schofield stressed that because "there can be no substantive review of an ICSID award," "even if Petitioners were directed to commence a plenary action for recognition … nothing would change substantively." *Id*. at *4. Indeed, "[a]ll that a plenary proceeding would accomplish is delaying the inevitable recognition of the Award." *Id*.

Finally, Judge Schofield addressed Romania's sovereignty concerns. First, the Court rejected Romania's argument that because the award involved only European parties, the Court should defer to the judgment of either the EU Court of Justice or the national courts of the EU Member States with respect to the Award. Judge Schofield found that international comity did not justify a stay of the enforcement proceedings, as "the United States has a compelling interest in fulfilling its obligation under Article 54 [of the ICSID Convention] to recognize and enforce ICSID awards regardless of the actions of another state." *Id*. at *7. "To do otherwise would undermine the ICSID Convention's expansive spirit on which many American investors rely when they seek to confirm awards in the national courts of the

Convention's other member states." *Id*. Romania's act of state and foreign sovereign compulsion arguments were summarily dismissed as inapplicable by definition.

VII. Conclusion

These recent decisions represent the early stages of a discussion that will likely eventually require guidance from the federal Courts of Appeals and/or the Supreme Court, none of which has yet to opine upon whether state law *ex parte* recognition procedures may be utilized to recognize an ICSID award. Thus, in the absence of any appellate authority on the matter, ICSID award creditors should be aware of these decisions when selecting an enforcement venue. By departing from prior decisions of the D.C. District Court, *Micula I* appears to have muddied the law on the issue in the District of Columbia, leaving substantial uncertainty in that jurisdiction as to whether ICSID award creditors may utilize expedited, *ex parte* procedures to domesticate their awards. On the other hand, the New York District Court's decisions in *Mobil Cerro* and *Micula II* are fully consistent with the court's five previous cases employing the *ex parte* sister-state judgment recognition procedures authorized by New York law to confirm an ICSID award, and reinforce both the predictability and practicality that have made the New York courts a desirable enforcement venue.

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[1] 28 U.S.C. §1650a.

[2] CPLR § 5403 provides that allows for the ex parte recognition of an out-of-state judgment, but requires that the judgment creditor notify the judgment debtor of entry of the judgment within 30 days, and must wait 30 days after proof of service before he may execute on the judgment.

[3] 28 U.S.C. § 1602 *et seq*.

[4] 28 U.S.C. § 1652.