With the enforcement and recognition of arbitral awards a key concern for international arbitration practitioners, **WilmerHale's Santiago Bejarano** and **Julie Thompson** examine potential procedural inconsistencies in the approach taken by two prominent US federal district courts on ICSID awards

ICSID AWARD ENFORCEMENT AND RECOGNITION: HAVE NEW YORK COURTS WON AN ADVANTAGE OVER THE DC COURTS?

A recent decision in the United States District Court for the District of Columbia indicates that a split could develop between the DC and New York courts with regards to the enforcement procedure of **International Centre for the Settlement of Investment Dispute** (ICSID) arbitration.

If such an inconsistency does, in fact, materialise, it could lead to significant consequences, including a large disparity with regards to challenges parties will face in seeking enforcement of the award against a foreign state. Ultimately, parties could choose to enforce in New York in preference to DC as a consequence of these hurdles.

New York District Court precedent features a long line of cases holding that parties seeking enforcement of an ICSID award may do so using state law procedures – including those procedures that are expedited or *ex parte*. *Ex parte* procedures are those that do not require notice be given to the respondent; instead, the applicant seeks enforcement without the respondent's participation.

In *Micula v. the Government of Romania*, the DC district court held that a party seeking

enforcement cannot do so without plenary review. Where a court conducts a plenary review, it conducts its own examination without deference to the lower court (here, the arbitral tribunal). This is contrary to the expedited *ex parte* procedure in New York, where the respondent does not even have to have notice and the court gives complete deference to the tribunal's findings.

Applicable laws

Several statutes and regulations are relevant in a court's determination of the procedure to enforce an arbitral award against a foreign state. First, under Article 54 of the Washington Convention (or, as commonly referred to, the ICSID Convention), US courts are obliged to enforce ICSID awards. Specifically, the ICSID Convention mandates contracting states to act as if an ICSID award is a final judgment of the highest court in that state, subject only to domestic rules governing the immunity of sovereign property from execution.

The ICSID Convention is incorporated into US law under section 1650, Title 22 of the US Code. 22 U.S.C. 1650 says nothing, however, about the applicable procedure with regards to recognition of awards and conversion into judgment.

Second, the United States Foreign Sovereign Immunities Act (FSIA) governs the enforcement and recognition of awards against a foreign state. Under that Act, such awards are subject to personal jurisdiction, service of process and venue requirements as well as defenses to enforcement available under the New York Convention. This contrasts with the ICSID Convention, which provides for automatic recognition of awards.

Finally, US courts follow the judicial canon entitled the 'Charming Betsy Doctrine', under which courts must interpret a statute to avoid conflict with US international obligations.

The New York approach

Overall, New York courts have made clear that parties seeking to enforce an ICSID award may take advantage of expedited, *ex parte* procedures under New York state law (*see Letco v. Liberia*, *Enron v. Argentina* and *Sempra v. Argentina*). Enforcing parties in New York may save time and utilise state procedural law, because the FSIA applies purely to contested hearings.

In the case of *Mobil Cerro Negro v. Venezuela* (2015), **Mobil Cerro Negro** sought enforcement of its award through the procedure endorsed in New York state law – permitting entry of judgment through *ex parte* action, without the Foreign Sovereign Immunities Act (FSIA). The New York district court approved such procedure, stating that it is consistent with the streamlined intent of the ICSID Convention and the enforcement objectives of the New York Convention.

Where New York uses a streamlined procedure, the court said, "the nature of that proceeding would not expand or contract Venezuela's substantive rights". Therefore, a more intensive plenary review, the court stated, is not necessary and would run counter to the objectives of international arbitration.

Further, in *Micula v. Government of Romania* (No. 2), the claimant, Micula, sought enforcement in New York, following a determination in the DC court that he must conduct plenary action for recognition (see below). The New York court held, contrary to the determination by the DC court, that requiring petitioners to conduct a plenary action for recognition would only delay the inevitable recognition of the award and would conflict with the spirit of the ICSID Convention – as analysed in *Mobil Cerro Negro*.

The DC approach

Past precedents in the DC district courts were similar to case law in New York, holding that the enforcing party could follow state law procedures when seeking recognition and ▶

enforcement (*see Miminico v. Democratic Republic of Congo*). However, the holding in *Micula* indicates a deviation from such precedent – one that could have practical implications for the enforcement and recognition of ICSID awards in the US.

Specifically, in *Micula*, the DC court rejected the use of the forum state's *ex parte* procedures and held that enforcing parties must follow the procedures defined in the FSIA. Micula argued that, because section 1650(a) is silent as to proper procedure for ICSID recognition, the expedited procedure provided for in DC law could be applied. The DC court rejected this view and concluded that Micula was required instead to institute a plenary action to convert the ICSID award against Romania into an enforceable domestic judgment.

Practical significance

The holding in *Micula* creates an environment under which New York and DC courts may impose different requirements in order for a party to enforce an ICSID award, affording different protections to the party against whom the award is being enforced.

It may be the view of some that the DC court's ruling is consistent with public policy concerns surrounding the protection of foreign sovereigns from suit in court. This may be in tension with the intention of the ICSID Convention, which sought expedited, automatic recognition to which the contracting states acquiesced.

From a practical standpoint, the approach articulated by the DC court has practical consequences, which may include procedural delays that may conflict with the nature of the ICSID Convention.

Although the DC court's approach includes greater protections for foreign states with regard to the enforcement and recognition of ICSID awards, this protection is arguably unwarranted when a state is a party to the ICSID Convention.

New York State of mind

The New York approach, on the other hand, appears to be consistent with the spirit of the ICSID Convention. It allows for the more efficient recognition of awards, and gives deference to the arbitral tribunal on questions which would otherwise be re-opened in a plenary proceeding if courts followed the DC court's approach.

Apart from the procedural advantage of an expedited proceeding under the New York approach, there is a substantive advantage in obtaining a judgment through the expedited proceeding: the party seeking enforcement can quickly apply for post-judgment discovery under US law.

This could have significant benefits to parties seeking enforcement against a foreign state because such discovery could be used to locate that state's extraterritorial property.

Specifically, a party seeking enforcement could utilise the judgment to determine what assets the foreign state has, and where such assets are kept or have been moved.

Conclusion

The DC court's determination in *Micula* raises the question of the efficiency of seeking enforcement of an ICSID award in that court. It contrasts with a long-standing line of cases in New York and DC circuit courts allowing the enforcing party to benefit from expedited proceedings to obtain recognition of the award.

Ultimately, the New York approach would appear to lead to a faster and more effective enforcement of the award which is consistent with the stated intent of the ICSID Convention.

It is still to be seen how the DC circuit will address *Micula* in subsequent cases. If it endorses the DC court's approach, parties seeking enforcement of ICSID awards may consider New York to be a more attractive forum for seeking enforcement. ■

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