Mid-year review 2017—arbitration developments in the US

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Arbitration analysis: Steven Finizio, partner at WilmerHale, looks back over the past six months of arbitration in the US and considers what may be coming up in the remainder of 2017.

What have been the most significant arbitration-related case law or legislative developments in the US during the first half of 2017?

Note: the judgments referred to below are not reported by LexisNexis UK.

It has been a quiet year so far with regard to US Supreme Court decisions on arbitration-related issues. There have been, however, several recent cases that reflect the fact that US courts continue to wrestle with the application of concepts such as sovereign immunity, forum non conveniens, personal jurisdiction and comity as they relate to the enforcement of foreign arbitral awards, and, in particular, enforcement of awards against sovereigns. There also have been a number of cases that serve as reminders that, in the US system, many different federal and state courts address issues relating to arbitration, and they can take different and sometimes contradictory approaches. Given the Supreme Court's approach to taking cases, it can take many years for issues to be clarified.

Earlier this year, the Supreme Court declined to consider an appeal in *BCB Holdings v Belize*, which raised the issue of whether the forum non conveniens doctrine was applicable to a US action to enforce a foreign award if a foreign forum has jurisdiction and there are some assets available in the alternative forum. At the moment, lower courts have taken different approaches to this issue, with some decisions suggesting that the forum non conveniens doctrine does not apply to an enforcement action against assets in the US, while other courts have held that an enforcement action can be dismissed on foreign non conveniens grounds. By declining to grant certiorari in that case, the court missed the opportunity to provide some clarity on this issue.

One recent decision by a New York state court highlights the ongoing lack of clarity with regard to the grounds for setting aside arbitral awards. That case, *Daesang Corp. v The NutraSweet Co*, involved an action to set aside an ICC award made in New York. The award was challenged in a New York state court, rather than a federal court. The first instance court held that the award was in 'manifest disregard' of the law and therefore annulled it. Manifest disregard is a common law doctrine and it is not expressly specified as a ground for setting aside an arbitral award in the US Federal Arbitration Act. The US Supreme Court held in its decision in *Hall Street Associates, LLC v Mattel, Inc* in 2008 that the grounds for annulment in the FAA were exclusive, but, two years later, in *Stolt-Nielsen S A v AnimalFeeds Int'l Corp.*, the court side-stepped the question of whether manifest disregard of the law was a viable basis to annul an arbitral award. The *Daesang* case is a reminder that a number of courts, including in New York, still apply the doctrine and that, on rare occasions, it can be successfully invoked.

What have been the most significant developments in arbitral institutions in the US in the same period?

The leading US institutions are continuing to deal with the same issues that other institutions face, including concerns about the make-up of the pool of arbitrators, as well as cost and efficiency issues. This is reflected in the recent revision to the ICDR's rules that include provisions for small cases, streamlining disclosure, and time limits for awards.

I don't think of the International Centre for Settlement of Investment Disputes (ICSID) as a US institution, but it is a US-based institution, and it is in the process of revising its rules. ICSID has identified a number of goals, including to modernise the rules and to address time and costs issues. It has invited comments on potential revisions, and its goal is to publish papers addressing potential changes by early 2018.

What developments are you expecting during the rest of 2017?

Another issue that has divided federal courts has been the process for recognising and enforcing an ICSID award. In *Mobil Cerro Negro v Venezuela*, a US District Court in New York held in 2015 that, under the US Foreign Sovereign

Immunities Act (FSIA), it could enforce an ICSID award through an ex parte process, reasoning that enforcement of ICSID awards was meant to be an expedited process and was not meant to be governed by the procedural requirements of the FSIA. In 2016, in the *Micula v Romania* case, which has resulted in notable decisions in multiple countries, a US District Court in Washington, DC, reached the opposite conclusion, holding that it was required to hold a plenary hearing subject to the service of process and other requirements mandated by FSIA to determine whether to enforce an ICSID award. The *Mobil Cerro Negro* decision was appealed to the US Court of Appeals for the Second Circuit, and a decision on that appeal is expected soon. If the Second Circuit overturns the district court's decision in *Mobil Cerro Negro*, it will help clarify the interpretation of the interplay between the FSIA and enforcement of ICSID awards. If it does not, it may lead to Supreme Court review.

We are still in the early months of a new presidential administration, and it is not yet clear what, if any, impact the new administration will have on arbitration-related issues. During the campaign, the president promised to renegotiate or withdraw from a number of existing or pending trade agreements, including the North Atlantic Free Trade Agreement and the Trans-Pacific Partnership (TPP), both of which provide for international arbitration to resolve disputes. Since coming into office, the president has pulled out of TPP and indicated that he does not want to go forward with finalising the Transatlantic Trade and Investment Partnership with the EU, at least in its current form. It is not clear, however, that this administration is hostile to arbitration, and this president seems to have had some success as a party to arbitrations, but I think we will need to wait and see with this administration.

Note: the Second Circuit Court of Appeals handed down its judgment in Mobil Cerro Negro v Venezuela after this article was submitted–see News Analysis: Enforcement of ICSID awards in the US—takeaways from Second Circuit Court of Appeals (Mobil Cerro Negro v Venezuela).

Interviewed by Jenny Rayner.

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