



18th

INTERNATIONAL
ARBITRATION
CONFERENCE

BRASÍLIA • DF • BRAZIL

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*Enforcement of arbitral awards involving direct
and indirect Public Administration Entities*

The American experience

The U.S. and the New York Convention

- The U.S. Congress adopted the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) by amendment as Chapter 2 of **the Federal Arbitration Act (“FAA”)** in 197 (9 U.S.C. §§ 201 *et seq.*).
- The FAA gives federal courts jurisdiction over all actions to confirm, modify, set aside or enforce awards subject to the New York Convention.
- This means that unlike the recognition of foreign judgments, which is a matter left primarily to state law, **the recognition of foreign arbitral awards is an area of exclusive federal subject matter jurisdiction.**

The enforcement process in the U.S.

- U.S. courts distinguish three categories of arbitration awards: a. purely domestic, b. foreign, or c. non-domestic. The New York Convention applies to either “foreign” or “non-domestic” awards.
- Foreign awards are subject only to the Convention, whereas non-domestic awards are subject to both the Convention and domestic law. This will impact on whether a court may refuse to enforce the award under the Convention or whether it may also have the power to set aside the award under domestic law, known as “vacatur.”
- A “foreign” award will always be made abroad, while a “non-domestic” award will usually be made in the U.S. with the legal framework of another country, or decided under U.S. law but either involved entities that are not U.S. citizens or property located abroad.

The enforcement process in the U.S.

- The procedure for enforcing a foreign arbitral award under the New York Convention is found in Section 207 of the FAA. Traditionally it consisted of a two levels/steps process for enforcement: confirmation and execution.
- The party seeking enforcement had to file a Petition for Recognition, Confirmation and Enforcement of a Foreign Arbitral Award along with a Memorandum of Law in Support Thereof with whatever exhibits are necessary to the appropriate U.S. District Court.
- According to Section 203 of the FAA, the Federal District Courts have subject matter jurisdiction over any agreement or award falling under the New York Convention regardless of the amount in the controversy (9 U.S.C. §203).

The enforcement process in the U.S.

- Recently, however, this two step process was questioned by the Second Circuit.
- In *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 2017 U.S. App. (2d Cir. Mar. 2, 2017) (*cert denied*), the U.S. Court of Appeals for the Second Circuit clarified this point. The court's holding was that in order to enforce an award that was issued outside the U.S. (a foreign award) in a U.S. court, the award-creditor need not commence a proceeding to confirm the award.
- The court said that the word “confirm,” as used in FAA § 207, is a misnomer when referring to a foreign arbitral award: “Section 207 uses the term ‘confirm’ to describe the process by which a district court acts under its secondary jurisdiction to recognize and enforce a foreign arbitral award,” but “the proper term for the single-step process in which a federal district court engages when it sits in secondary jurisdiction over a foreign arbitral award is ‘Enforcement,’”

The enforcement process in the U.S.

- The court even: *“encourage litigants and district courts alike to take care to specify explicitly the type of arbitral award the district court is evaluating (domestic, nondomestic, or foreign), whether the district court is sitting in primary or secondary jurisdiction, and, accordingly, whether the action seeks confirmation of a domestic or nondomestic arbitral award under the district court’s primary jurisdiction or enforcement of a foreign arbitral award under its secondary jurisdiction.”*
- Simply put, the court clarified that under the New York Convention an arbitration award is to be “confirmed,” if at all, in the jurisdiction in which it was issued. Elsewhere, the award may be enforced, but an award creditor is not required to seek confirmation of the award.

Enforcement of non-domestic Awards

Action for confirmation under 9 U.S.C. §207.

Issued in U.S. as the agreed place of arbitration.

Subject to FAA chapter 2 because:

- a. it was “made within the legal framework of another country; or
- b. decided under the laws of the U.S., it involves entities that are not U.S. citizens; involves “property located abroad”; envisages performance or enforcement abroad; or has some other reasonable relation with one or more foreign states.

“The process by which a nondomestic arbitral award is reduced to a judgment of the court by a federal court under its primary jurisdiction is called “confirmation.”

“Under its primary jurisdiction in a confirmation proceeding, the district court is, as this court has recognized, ‘free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.’”

Enforcement of foreign Awards

Action for enforcement under 9 U.S.C. §207.

Issued outside the U.S.

Though Section 207 uses the word “confirm”, the Second Circuit clarified that the procedure is called “enforcement”:

“the proper term for the single-step process in which a federal district court engages when it sits in secondary jurisdiction over a foreign arbitral award is ‘Enforcement.’”

No requirement to commence an action to “confirm” the award.

Jurisdiction and foreign sovereign immunity

- As mentioned before, under the FAA, the District Courts have **subject matter jurisdiction** over any award under the New York Convention regardless of the amount in the controversy (9 U.S.C. §203).
- The District Court **must also have personal jurisdiction** over the parties. In the case of foreign sovereigns, the U.S. Courts have personal jurisdiction under the **Foreign Sovereign Immunities Act** (28 U.S. C. § 1330).
- When seeking to enforce an arbitral award against a foreign sovereign, proceeding must be brought in federal court in compliance with FSIA's service of process and venue requirements. In most cases, a proceeding to enforce an ICSID award against a foreign sovereign will have to be filed in the U.S. District Court for the District of Columbia. (28 U.S.C. §1391(f)(4) provides that a civil action may be brought "in the United States District Court for the District of Columbia if the action is brought against a foreign state.")

Jurisdiction and foreign sovereign immunity

ICSID Awards

- **ICSID awards** are different from awards that are subject to the New York Convention, as they **cannot be attacked on the merits nor on grounds applicable to enforcement under the New York Convention**. 28 U.S.C. §1650a. “The Federal Arbitration Act (9 U.S.C. 1, *et seq.*) shall not apply to enforcement of awards rendered pursuant to the convention.”
- However, **that does not exclude the FSIA’s application**. The U.S. Supreme Court has held that **the FSIA is the “sole basis for obtaining jurisdiction over a foreign state in our courts.”** *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, (1989). The federal court’s subject matter jurisdiction arises under the ICSID Convention enabling statute: “An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States.” 28 U.S.C. §1650a.

Jurisdiction and foreign sovereign immunity

ICSID Awards

- In *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96 (2d. Cir. 2017) the plaintiff ignored the FSIA procedures.
- Seeking to enforce an ICSID award against Venezuela for \$1.6 billion, the plaintiff filed an *ex parte* petition in the U.S. District Court for the Southern District of New York to recognize the award and enter judgment upon it. A judge granted the petition, without notice to Venezuela. The procedure was based on the laws of the State of New York (N.Y. C.P.L.R. §5401, *et seq.*)
- The Second Circuit vacated that judgment holding that the requirements of the FSIA had not been met. More so, it explained that those requirements “*serve Congress’s stated goals of promoting comity with other sovereigns and ensuring the United States’ consistency of approach with respect to federal courts’ interactions with foreign sovereigns.*”

Jurisdiction and foreign sovereign immunity

ICSID Awards

- The Second Circuit held that “*the FSIA provides the sole source of jurisdiction (subject matter and personal) for federal courts over actions brought to enforce ICSID awards against foreign sovereigns;... the FSIA's service and venue requirements must be satisfied before federal district courts may enter judgment on such awards; and that [the ICSID Convention enabling statute] does not contemplate ‘recognition’ of an ICSID award as a proceeding separate from ‘enforcement.’*” *Mobil Cerro Negro*, 863 F.3d at 113. (Consistent with the Second Circuit’s *de Gusa* opinion)

“Execution” and foreign immunity

ICSID Awards

- A recent and interesting case in this regard is *Crystallex Int'l Corp. v. Venezuela*, Nos. 18-2797 & 18-3124, Slip Op., (3d Cir. July 29, 2019).
- In 2002, Crystallex contracted with a Venezuelan entity for the exclusive right to extract gold from one of the world's largest deposits in Venezuela. In 2011, Venezuela expropriated the gold mines without compensation. Crystallex filed for ICSID arbitration. In April 2016, Crystallex received an ICSID award of U.S. \$1.2 billion plus interest.
- (Under the two steps process in the U.S.) Crystallex sought to confirm its award as a judgment in the U.S. District Court for the District of Columbia. The DC Court confirmed the award as a judgment, which the DC Circuit affirmed. **Crystallex commenced enforcement proceedings in Delaware, seeking an attachment action against PDVH shares (Citgo's U.S.-based parent company), owned by PDVSA, which Crystallex asserted was the alter ego of Venezuela.**

“Execution” and foreign immunity

ICSID Awards

- The Third Circuit affirmed the district court’s decision of the attachment.
- The court analyzed whether it has subject matter jurisdiction over an alter ego without establishing an independent basis for subject-matter jurisdiction, and it conclude in the affirmative.
- The Third Circuit applied the *Bancec* factors to assess veil piercing as among foreign sovereigns and their agents and instrumentalities.
- The district court’s holding was that Venezuela extensively controlled PDVSA. The court also said that Crystallex need not show a direct link between Venezuela’s control over PDVSA and specific injury or harm to it. Accordingly, an alter ego finding was well-founded and affirmed.

“Execution” and foreign immunity

ICSID Awards

- The next issue was to determine the particular property in the attachment action was not immune under the FSIA (immunity from attachment and execution is specifically governed by Section 1610)
- The court analyzed the issue under the protections for a foreign state, since PDVSA was being reached as an alter ego of Venezuela and not as an agent or instrumentality in its own right. The court found that the property was "*used for a commercial activity in the United States*" and was being executed based upon a judgment entered by U.S. court that confirmed an arbitral award against the foreign state. 28 U.S.C. § 1610(a)(6).

“Execution” and foreign immunity

To be aware when dealing with an instrumentality

- In *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)* the U.S. Supreme Court established a presumption that, under the FSIA, a foreign state's agencies and instrumentalities with separate juridical status could not be deemed automatically liable for the state's acts. The federal appellate courts then developed a five-factor test to determine when this presumption would be overcome.
- The five factors are: (A) the level of economic control over the property by the government of the foreign state; (B) whether the profits of the property go to that government; (C) the degree to which officials of that government manage the property or otherwise control its daily affairs; (D) whether that government is the sole beneficiary in interest of the property; or (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

A case to keep an eye on

- In the case *ConocoPhillips Petrozuata B.V et al v. Bolivarian Republic of Venezuela* (1:19-cv-00683) D.C. Court.
- ConocoPhillips has filed a petition in D.C. federal court asking to enforce an \$8.75 billion ICSID award against Venezuela that arose from a dispute over the country's decision to nationalize three oil projects the company had invested in.
- The petition preemptively states that Venezuela's sovereignty can't act as a shield against the court's authority to enforce the award and argues that "*Venezuela impliedly waived its sovereign immunity with respect to actions to recognize and enforce ICSID awards by becoming a contracting state to the ICSID convention.*"

An oddity: enforcement of an annulled award

- In its decision in *Corporacion Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v Pemex-Exploracion y Produccion*, (2d Cir Aug 2, 2016), the Second Circuit affirmed a district court decision recognizing an arbitral award that had been set aside (annulled) by a court in Mexico, where the arbitration was seated.
- Following an ICC arbitration between Commisa and Pemex in Mexico, Commisa won a \$465 million arbitration award.
- Commisa then initiated proceedings in New York to have the award recognized, so that it could seek recovery against Pemex's assets in the U.S. After the U.S. District Court for the Southern District of New York recognized the award, Pemex moved to vacate that judgment on the basis that the award had been set aside by a Mexican court.

An oddity: enforcement of an annulled award

- Pemex succeeded and following the Mexican Court's annulment decision, the Second Circuit vacated the lower court's judgment and remanded to the S.D.N.Y.
- After further proceedings, the district court again confirmed the award, finding that it should not give deference to the Mexican court's decision to annul the award since it violated fundamental principles of due process and justice, and left Commisa without a forum to hear its claim.
- Pemex appealed that decision, but the Court of Appeals affirmed the district court's decision to confirm the award despite its annulment in Mexico.

An oddity: enforcement of an annulled award

- The court held that the lower court did not abuse its discretion in deciding to enforce the vacated award and noted that a district court may choose to recognize an arbitral award nullified at its seat if enforcement of the judgment would offend domestic public policy.
- The decision noted that although comity is widely applied by U.S. courts to promote international cooperation, it is subject to a narrow public policy exception, which precludes deference where the foreign judgment would “*undermine public confidence in laws and diminish rights of personal liberty and property.*”

An oddity: enforcement of an annulled award

- The court found that the following considerations satisfied the narrow requirements of the public policy exception:
 - (i) Pemex waived its sovereign immunity by agreeing to arbitration under the contracts;
 - (ii) The Mexican Court's retroactive application of Section 98 was repugnant to U.S. notions of justice and disrupted Commisa's contractual expectations;
 - (iii) U.S. courts must ensure that legal claims find a forum; and
 - (iv) Government expropriation without compensation is prohibited and against U.S. policy.

CLOSING OBSERVATIONS



THANK YOU FOR YOUR TIME

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