

# Client Update

## Second Circuit Rejects *Ex Parte* Enforcement of ICSID Awards Against Foreign States

The United States Court of Appeals for the Second Circuit recently held that award-creditors must provide notice to foreign states in order to enforce ICSID awards, effectively preventing *ex parte* enforcement against sovereigns. This decision overrules prior Southern District of New York decisions and brings the Second Circuit's case law in line with decisions of district courts in other circuits.

### BACKGROUND

The case concerns an ICSID award rendered in favor of ExxonMobil subsidiaries ("Mobil") against Venezuela. The day after the issuance of the award, Mobil sought to enforce the award *ex parte* in the Southern District of New York pursuant to the ICSID enabling statute.<sup>1</sup> The court granted the petition. Venezuela then moved to vacate the judgment, arguing that Mobil had not complied with procedural and venue requirements of the Foreign Sovereign Immunities Act (the "FSIA"). The court denied Venezuela's motion, and Venezuela appealed.

At the time of the appeal, no circuit court had addressed the process for seeking enforcement of ICSID awards. Several courts in the Southern District of New York had allowed *ex parte* enforcement of ICSID awards against foreign states based on summary procedures available under New York law.<sup>2</sup> By contrast, district courts in the District of Columbia and the Eastern District of Virginia had required award-creditors to bring a plenary action and provide notice in compliance with the FSIA.<sup>3</sup>

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<sup>1</sup> 22 U.S.C. § 1650(a).

<sup>2</sup> *Micula v. Gov't of Romania*, No. 15 Misc. 107, 2015 WL 4643180 (S.D.N.Y. Aug. 5, 2015); *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015); *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009).

<sup>3</sup> *Micula v. Gov't of Romania*, 104 F. Supp. 3d 42 (D.D.C. 2015); *Cont'l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747 (E.D. Va. 2012).

## THE SECOND CIRCUIT'S DECISION

The Second Circuit held that the FSIA provides the sole basis for subject-matter jurisdiction in ICSID enforcement actions against foreign states, and further that ICSID award-creditors must comply with the FSIA's procedural and venue requirements, including commencing an action in federal court and serving notice.<sup>4</sup>

In the Court's view, while the ICSID Convention "affords ICSID arbitral awards the status of final state court judgments," it does not "dictate the nature of the proceedings through which ICSID awards will be enforced in the United States."<sup>5</sup> As such, the Court found that requiring compliance with the FSIA is consistent with the ICSID Convention. Because Mobil's *ex parte* proceeding failed to satisfy the FSIA requirements, the Second Circuit vacated the district court's judgment.

## POTENTIAL IMPACT OF THE DECISION ON LITIGANTS

The decision does not detract from the general pro-international arbitration stance of U.S. courts. As noted by the Second Circuit, federal courts must still treat ICSID awards as final and binding judgments, which are not subject to review on substantive grounds. Further, ICSID awards satisfy the waiver and arbitration exceptions to jurisdictional immunity. As such, the FSIA does not bar courts from exercising jurisdiction in ICSID enforcement actions.

However, the decision creates procedural hurdles and potential delay in enforcing ICSID awards against foreign states and state instrumentalities. The FSIA affords foreign states and their instrumentalities 60 days after service of process to respond.<sup>6</sup> This could give them the opportunity to dissipate their assets and make enforcement more difficult. For that reason, certain jurisdictions, such as England and Wales, permit *ex parte* enforcement subject to certain conditions.<sup>7</sup> The decision also creates an asymmetry between foreign states and private award-creditors, as states seeking to enforce ICSID awards for costs against claimants are not subject to the FSIA requirements, and may therefore seek enforcement *ex parte* in U.S. courts.

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<sup>4</sup> *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707, 2017 WL 2945603 (2d Cir. July 11, 2017). The United States had filed an amicus brief on these two issues, in line with the Court's ultimate decision.

<sup>5</sup> *Id.* at \*15.

<sup>6</sup> 28 U.S.C. § 1608(d).

<sup>7</sup> *Gold Reserve v. Venezuela* [2016] EWHC 153 (upholding *ex parte* order granting permission to enforce an ICSID award while stressing the obligation of full and frank disclosure of defenses).

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Please do not hesitate to contact any member of the International Disputes Group at Debevoise (contacts [here](#)) with questions about how this decision may affect you.

**NEW YORK**

Catherine Amirfar  
camirfar@debevoise.com

David W. Rivkin  
dwrivkin@debevoise.com

Donald Francis Donovan  
dfdunovan@debevoise.com

William H. Taft V  
whtaft@debevoise.com

Mark W. Friedman  
mwfriedman@debevoise.com

Christopher K. Tahbaz  
cktahbaz@debevoise.com

Ina C. Popova  
ipopova@debevoise.com

Floriane Lavaud  
flavaud@debevoise.com

Dietmar W. Prager  
dwprager@debevoise.com

Julianne J. Marley  
jjmarley@debevoise.com

Natalie L. Reid  
nlreid@debevoise.com