ALERT MEMORANDUM

Second Circuit Rules That FSIA Provides Sole Basis for Jurisdiction Over Foreign Sovereigns in Actions to Enforce ICSID Awards

July 17, 2017

On July 11, 2017, the Second Circuit Court of Appeals issued *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, holding that the Foreign Sovereign Immunities Act (the "FSIA")[1] is the sole basis for jurisdiction over a foreign state in U.S. court actions to enforce awards issued pursuant to the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").[2] Agreeing with the views expressed by the United States, which submitted an *amicus* brief, the court also ruled that the federal statute implementing the ICSID Convention provides no exception to the FSIA's service and venue requirements in ICSID award enforcement actions. *Mobil Cerro Negro*—the first federal appellate court decision to rule on these issues—is an important precedent reaffirming the primacy of the FSIA and its stated goals of promoting comity with foreign nations and ensuring that U.S. courts follow a consistent approach in actions against sovereigns.

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[1] 28 U.S.C. §§ 1330, 1391(f), 1602-1611 (2017).
[2] *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707, 2017 WL 2945603 (2d Cir. July 11, 2017).

Procedural Background

Following the 2007 expropriation by the Bolivarian Republic of Venezuela ("Venezuela") of interests in certain oil projects owned by a group of ExxonMobil entities ("Mobil"), Mobil commenced arbitration against Venezuela under the ICSID Convention to challenge the expropriation, receiving an award in 2014 of more than $1.6 billion plus interest.[3] Mobil immediately initiated *ex parte* proceedings, which were successful, to recognize the award in the Southern District of New York.[4]

After its counsel received electronic notice of the *ex parte* judgment, Venezuela moved to vacate, arguing that the FSIA was the sole basis for obtaining jurisdiction over a foreign sovereign, and that the FSIA's service and venue requirements were mandatory.[5] The district court, following a line of controversial Southern District precedent,[6] denied the motion, holding that the FSIA does not "require award creditors to pursue recognition of ICSID awards against foreign sovereigns by means of plenary actions in compliance with the FSIA's requirements as to process, personal jurisdiction, and venue," but rather may rely on the ICSID enabling statute found at 22 U.S.C. § 1650a, which, in the court's view, treated the award as a court judgment which authorized the use of New York state law procedures for *ex parte* registration of judgments issued by domestic courts outside of New York.[7]

The Second Circuit Decision

On appeal, the Second Circuit Court of Appeals reversed the district court's order rejecting Venezuela's motion to vacate, and vacated the *ex parte* judgment recognizing the ICSID award against Venezuela.[8] 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" and that "the FSIA's service and venue requirements must be satisfied before federal district courts may enter judgment on such awards."[9] While the court found that subject matter jurisdiction does exist under the FSIA, it held that the statute's service and venue requirements were not satisfied, as a result of which the district court lacked personal jurisdiction over Venezuela.[10]

[3] *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573, 576 (S.D.N.Y. 2015). While Venezuela's appeal was pending, an ICSID *ad hoc* committee reduced the award significantly, from $1,600,042,482 to $188,342,482. *Mobil Cerro Negro Ltd.*, 2017 WL 2945603, at *11.

[4] *Mobil Cerro Negro Ltd.*, 87 F. Supp. 3d at 576.

[5] *Id.* at 586.

[6] *See, e.g.*, *Siag v. Arab Republic of Egypt*, No. M-82 (PKC), 2009 WL 1834562 (S.D.N.Y. June 19, 2009). In the currently pending case *Micula v. Government of Romania*, 2015 WL 4643180 (S.D.N.Y. Aug. 5, 2015), Romania is appealing an *ex parte* judgment, the survival of which is doubtful in light of the Second Circuit's decision in *Mobil Cerro Negro*. *See also EISER Infrastructure Ltd. v. Kingdom of Spain*, No. 17 Civ. 3808 (LAK), slip op. (S.D.N.Y. June 27, 2017) (allowing ICSID award holder to proceed *ex parte*, which sovereign is challenging); *Tidewater Investment SRL et al. v. Bolivarian Republic of Venezuela*, No. 15 Civ. 1960, slip op. (S.D.N.Y. Mar. 18, 2015) (same). Courts in other districts had taken a contrary view, including in *Continental Casualty Co. v. Argentine Republic*, 893 F. Supp. 2d 747 (E.D. Va. 2012), in which our firm represented the Republic of Argentina, which was the first decision to articulate the legal analysis endorsed by the Second Circuit in *Mobil Cerro Negro*. *See also Micula v. Government of Romania*, 104 F. Supp. 3d 42 (D.D.C. 2015) (agreeing with *Continental Casualty*).

[7] *Mobil Cerro Negro Ltd.*, 87 F. Supp. 3d at 586, 602 (citing N.Y. C.P.L.R. §§ 5401-5408 (McKinney 2017)).

[8] *Mobil Cerro Negro Ltd.*, 2017 WL 2945603, at *22. Because the court vacated the judgment, it declined to consider Venezuela's argument that the federal interest rate on judgments should apply rather than the post-judgment interest rate provided for by the award. *Id.*

[9] *Id.* at *12.

[10] *Id.*

On the issue of subject matter jurisdiction, the Second Circuit highlighted the Supreme Court's "emphatic and oft-repeated declaration in *Amerada Hess* that the FSIA is the 'sole basis for obtaining jurisdiction over a foreign state in our courts'" and its emphasis on the "comprehensive" nature of the FSIA.[11] In light of this precedent, the court found that "Section 1650a cannot fairly be read to serve as an independent source of subject matter jurisdiction over a foreign sovereign."[12]

The Second Circuit also addressed "Mobil's argument that FSIA Section 1604's carve-out for 'existing international agreements' includes the [ICSID] Convention."[13] The court stated that "the question is not free from doubt," but ultimately relied on the principle that "international agreements that predate the FSIA"—which include the ICSID Convention—"are excluded from the Act's reach only when they expressly conflict with the Act's immunity provisions."[14] Finding no such express conflict, and relying heavily on the legislative history "that suggests that Congress expected actions under Section 1650a to be governed by sovereign immunity," the Second Circuit held that ICSID award holders are not exempted from complying with the FSIA's jurisdictional requirements.[15]

The Second Circuit next considered whether the FSIA's service and venue requirements are applicable to ICSID award enforcement proceedings. Given that the FSIA explicitly mentions "suits for 'recognition and enforcement of arbitral awards,'" and the statute's lack of any "provision for summary procedures," the Second Circuit held that the FSIA's service and venue requirements must be satisfied before a federal district court may recognize an ICSID award against a foreign sovereign.[16]

The Second Circuit rejected the district court's concerns that requiring compliance with the FSIA would undermine the ICSID Convention and its enabling statute. In analyzing the legislative history, the Second Circuit found that Section 1650a is in fact consistent with the FSIA. As the court noted, a "plenary" action to enforce an ICSID award simply requires commencing an action, service, proper venue, and the sovereign's opportunity to appear and file responsive pleadings. The court reasoned that these basic protections do not entail substantive challenges to the award of the type prohibited under the ICSID Convention and its enabling statute, nor do they deny an ICSID award the "full faith and credit" required by the ICSID enabling statute; indeed, when enforcing state court judgments—the origin of the statutory language—federal courts typically require the filing of an action and notice.[17] In accordance with this reasoning, the Second Circuit ultimately held that "Section 1650a mandates enforcement of ICSID awards in federal court through an action on the award and not through an *ex parte* order."[18]

Conclusion

The Second Circuit described its decision a as "straightforward application" of the FSIA, and an affirmation of the Supreme Court's—and

[11] *Id.* (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989)).
[12] *Id.*
[13] *Id.* at *13.
[14] *Id.*
[15] *Id.* at *14; *see also* H.R. Rep. 94-1487, at 21 (1976) U.S.C.C.A.N. 6604, 6620 ("Like other provisions in the bill, section 1605 is subject to existing international agreements … including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).").
[16] *Id.* at *14-15.
[17] *Id.* at *15-16, 19.
[18] *Id.* at *20.

its own—frequent admonitions that the FSIA is the sole source of jurisdiction over foreign sovereigns.[19] The court's holding, however, does not embrace the FSIA at the expense of the ICSID Convention or its enabling statute. To the contrary, the ruling convincingly demonstrates not only that the ICSID enabling statute is no exception to the FSIA's general dominion over actions involving foreign sovereigns in the United States, but also that its requirements and objectives are consonant with those of the FSIA.

It should be noted that in reaching its conclusions with regard to the requirements applicable to an action to recognize and enforce an ICSID award, the Second Circuit gave considerable weight to the views of the U.S. government.[20] Indeed, after hearing oral argument, the court invited the government to submit an *amicus curiae* brief setting forth its views. In its brief, the United States took the position that the FSIA provides the sole source of subject matter and personal jurisdiction in an ICSID award enforcement action against a sovereign and that ICSID award holders must follow the FSIA's service and venue requirements in such actions. Thus, the *Mobil Cerro Negro* decision precisely tracks the government's view of the relationship between the ICSID Convention and its enabling statute, on the one hand, and the FSIA's jurisdictional and procedural requirements on the other. In finding that *ex parte* proceedings to enforce ICSID awards are not permitted, the Second Circuit also emphasized the FSIA's "stated goals of promoting comity with other nations and ensuring the United States' consistency of approach with respect to federal courts' interactions with foreign sovereigns."[21]

There are a number of important practical consequences of the Second Circuit's decision. *First*, by precluding *ex parte* proceedings to enforce ICSID awards, it prevents holders of these awards from potentially gaining the upper hand against sovereign parties by obtaining judgment before the sovereign state even knows about the enforcement proceedings on, for instance, awards that, as in this case, had actually been substantially annulled.[22] *Second*, since most ICSID awards involve sovereign conduct outside the United States, the Second Circuit's holding that FSIA venue requirements must be followed means that most ICSID enforcement actions will need to be brought in the District of Columbia, which is the default venue for cases against foreign states.[23] Cases brought elsewhere may result in motion practice over venue after the state has been served and has had an opportunity to move to dismiss or transfer the enforcement proceeding.

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[19] *Id.* at *12, *15.

[20] *Id.* at *15 ("[In] interpreting the ICSID Convention and its enabling act, we owe particular deference to the interpretation favored by the United States.").

[21] *Id.* at *1.

[22] In addition, as the *Mobil Cerro Negro* court noted, the "Award's text suggested the ICSID panel's willingness to allow Venezuela to offset its liability under the Award by a significant debt owed it by Mobil in connection with certain payments earlier made to Mobil by the Venezuelan governmental entity PDVSA." *Id.* at *8 n.12. The possibility of such an offset is one of the examples that the Second Circuit gave for the kinds of proper challenges to an award that a sovereign should be able to make, which it might be denied if not given notice.

[23] *See* 28 U.S.C. § 1391(f)(4). Actions against a foreign state may be brought in other districts where "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated." 28 U.S.C. 1391(f)(1).