Welcome shores for arbitral awards?

MoloLamken's Robert Kry examines the state of the law governing enforcement of arbitral awards in the US

The US finds itself in a complicated relationship with international arbitration. The institution has deep roots in this country – the US remains, after all, the home of the International Centre for Settlement of Investment Disputes (ICSID) and the cradle of the New York Convention, the treaty that underpins most enforcement of arbitral awards around the globe. But as the political climate veers in a more nationalist direction, detractors are having their day, as seen most prominently in the debates over whether to eliminate investor-state dispute settlement from the North American Free Trade Agreement. While the US remains a generally hospitable place to enforce foreign arbitral awards, the current environment makes it all the more important to litigate such matters with care and judgment.

Recent case law provides guidance on several topics. Three cases have weighed in on what a court should do when asked to enforce an award that has been set aside by the courts of the country where it was rendered. The New York Convention permits a court to decline enforcement in those circumstances, and US precedent generally requires a court to do so unless the annulment violates US public policy – that is, basic notions of morality and justice. While that standard is exacting, the US Court of Appeals for the Second Circuit in New York recently found it met in *Commisa v Pemex*, enforcing an award against a Mexican state-owned enterprise even though the Mexican courts had set it aside. The Second Circuit deemed the annulment contrary to US public policy because it was based on a statute that Mexico had enacted while the arbitration was underway which retroactively prohibited arbitration of the claims and effectively denied the claimant any judicial forum.

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By contrast, two other cases have refused to enforce annulled awards. In *Getma v Guinea*, the US Court of Appeals for the DC Circuit refused to enforce an award that had been set aside because the arbitrators demanded fees in excess of those permitted by the institution's rules. And in *Thai-Lao Lignite v Laos*, the Second Circuit refused to enforce an award set aside by the Malaysian courts even though the courts had allowed the Lao government to prosecute the set-aside action long after the deadline expired. *Thai-Lao* is particularly notable because the New York courts did not merely refuse to enforce the award; they vacated a judgment of enforcement that had been entered while the award was still extant. All three cases illustrate that enforcement of annulled awards remains possible in the US, but is the exception to the rule. That approach is consistent with the law of most countries, with the notable exception of France, where courts enforce annulled awards as a matter of course.

While the enforcement of annulled awards provides an important point of comparison with other countries, claimants should also be mindful of differences among courts within the US. One issue on which courts have diverged is *forum non conveniens*, a common-law doctrine that permits a court to dismiss a suit if an adequate and more convenient forum exists elsewhere. The DC Circuit has effectively precluded the doctrine in arbitral enforcement cases, reasoning that only a US court can execute against US assets and that foreign courts are therefore necessarily inadequate forums. But the Second Circuit has taken the opposite

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approach, going so far as to hold that an adequate forum may exist in the very country against which the award was rendered – a theory that undermines not only the New York Convention but also the whole point of arbitrating in a neutral forum.

In January last year, the US Supreme Court refused to settle that circuit conflict, denying review of a DC Circuit case, *Belize Social Development v Belize*, that reaffirmed that circuit's more claimant-friendly rule. For the time being, therefore, courts in New York and the District of Columbia will continue to take different approaches on this threshold issue. That state of the law makes it all the more important for claimants to think strategically and consider multiple forums within the US in which to enforce an award. Once one federal court has granted recognition, it is a relatively straightforward matter to register that judgment in other jurisdictions within the US where assets may be found.

One last development that bears mention concerns the enforcement of ICSID awards. Unlike most arbitral awards, which are enforced under the New York Convention, the ICSID Convention contains its own enforcement regime that requires member states to enforce awards as if they were final judgments – foreclosing even the limited defences in the New York Convention. In light of that special regime, New York courts had long allowed claimants to obtain entry of judgment on ICSID awards through streamlined *ex parte* procedures. The Second Circuit put an end to that practice last year in *Mobil Cerro Negro v Venezuela*. Even in ICSID Convention cases, the court held, a foreign sovereign is entitled to service of process and an opportunity to raise threshold procedural objections such as lack of venue. That decision is bad news for claimants and will complicate and delay enforcement of ICSID awards – for no good reason, given the unavailability of substantive defences in such cases.

Despite those complications, the US remains an important jurisdiction for any enforcement strategy – not least because it is often where the debtor's assets may be located. Whatever direction US policy may take toward international arbitration in the coming years, practitioners will need to think through these issues carefully as they seek to enforce an award.

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