

Recent Cases Show US Deference To Foreign Arbitral Awards

Law360, New York (June 27, 2013, 12:18 PM ET) -- Earlier this year, Argentina announced its intention to withdraw from the International Centre for Settlement of Investment Disputes (“ICSID”), making it the fourth Latin American country to do so and signaling a growing resistance to the obligations imposed by the international arbitration regime — namely, treating ICSID awards as binding and immediately enforceable in any signatory state.

Alongside the public denunciations, certain signatory states have directly challenged ICSID’s authority by raising various and novel defenses to the confirmation and enforcement of ICSID awards in other signatory states, particularly in the U.S.

Despite this trend, recent federal court decisions illustrate the U.S. judiciary’s resolve to uphold ICSID awards and resist sovereign attempts to evade pecuniary obligations imposed by ICSID awards.

The ICSID Convention and the U.S. Federal Implementing Statute

Resort to the ICSID system is voluntary and requires consent by both investors and signatory states to the ICSID Convention — but once consent is given, the obligations under the convention become mandatory and the outcomes of the arbitration binding. It is this feature that is perhaps the most defining of the ICSID system: National courts may not intervene in an ICSID proceeding and awards are binding and enforceable in all signatory states.

Indeed, when drafting the convention, its authors repeatedly emphasized the binding nature of the arbitral award, believing it to be essential in instilling party confidence in the neutrality and efficacy of the process. As Aaron Broches, the “father” of the ICSID Convention, explained, drafters of the convention sought to create “a complete, exclusive and closed jurisdictional system, insulated from national law’ with respect to the arbitration proceedings, awards, and review of award.” Christina Binder et al., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) at 323.

The convention’s provisions concerning the binding force and finality of ICSID awards appear in Chapter IV, Section 6 of the Convention, Articles 53 and 54:

- Article 53(1) provides that ICSID awards: “shall be binding on all parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”;
- and Article 54(1) imposes upon State signatories the obligation to “recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”

The remedies referenced in Article 53(1) are limited to annulment, revision or interpretation of an award and can be obtained only through ICSID. Convention, Arts. 50-52. That is, only an ICSID tribunal may review or interpret the award, and only a specially constituted annulment committee may annul the award. No setting aside or other review of ICSID awards is permitted by national courts.

As noted, signatory states are obligated, under Article 54(1), to codify their obligations under the convention through national legislation. In the U.S., the federal implementing statute is located in 22 U.S.C. § 1650a(a), which provides:

The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.

The latter caveat, that the Federal Arbitration Act does not apply to ICSID awards, serves to further strengthen the enforceability of ICSID awards as it means that defenses available under the FAA are not available to parties seeking to challenge enforcement of an ICSID award.

Together with the convention's binding force and enforcement provisions, the implementing statute should render an ICSID award nearly impervious to challenge in U.S. courts. This, after all, was the idea behind the convention in the first place: to create a comprehensive, self-sufficient system of international arbitration in the area of investment disputes free from national interference and in which the "tribunal's award would be directly enforceable within the territories of the States parties." E. Lauterpacht, 'Foreword' to C. Schreuer, *The ICSID Convention: A Commentary* (2001) p. xi.

Duke and Blue Ridge

Notwithstanding the former, in recent years, certain states have nonetheless attempted, albeit unsuccessfully, to raise defenses to the confirmation or enforcement of ICSID awards. Two recent opinions, issued within two weeks of each other, illustrate the federal courts' unwillingness to allow states to circumvent the mandatory enforcement provisions of the convention and the implementing statute: (1) In *Duke Energy Int'l. v. Republic of Peru*, No. 1:11-cv-01602 (JEB) (D.D.C. Nov. 19, 2012), the D.C. District Court rebuffed Peru's attempt to avoid payment of interest applicable under an ICSID award; (2) and in *Blue Ridge Investments LLC v. Republic of Argentina*, No. 10 CIV. 153 PGG (S.D.N.Y. Sept. 30, 2012), the Southern District of New York likewise rejected Argentina's asserted defenses to confirmation of an ICSID award.

Duke Energy Int'l. v. Republic of Peru

In *Duke*, Duke Energy International, an investor in Peru, petitioned the D.C. District Court to confirm an underlying ICSID award that had been granted in its favor. The petition to confirm related to the amount of interest Peru owed Duke under the award. Having lost the ICSID arbitration, Peru paid Duke the principal amount it owed and a certain sum of interest. However, prior to issuance of the ICSID award, but after the closing of arguments, the Peruvian Tax Authority amended the Peruvian tax code, changing the applicable interest rate. Peru claimed it need only pay Duke the interest rate as it existed before the amendment; Duke argued in its petition to confirm that it was owed an additional \$2 million under the adjusted interest rate. Peru moved to dismiss.

At issue in the *Duke* case was a phrase in the award requiring Peru to pay Duke a principal amount plus "simple interest calculated thereon ... using the actual interest rate(s) stipulated for that period by [the Peruvian Tax Authority] for refunds to tax payers." In its motion to dismiss, Peru argued first that Duke had failed to state a claim, based on Peru's contention that it had fully paid its obligation. In the alternative, Peru argued that the award was ambiguous and should be remanded to the tribunal for

clarification. Finally, Peru fought the petition on grounds of forum non conveniens, arguing that the Peruvian courts were better suited to determine which interest rate applied: the new rate under the amended tax code, or the previous rate.

On Sept. 14, 2012, D.C. District Judge James Boasberg denied Peru's motion. The court easily rejected Peru's first defense, failure to state a claim, finding that a claim for unpaid interest was valid and that Duke had "giv[en] [Peru] fair notice of what the claim is and the grounds upon which it rests." *Duke Energy Int'l Peru Investments No. 1 Ltd. v. Republic of Peru*, CIV.A. 11-1602 JEB, at *3 (D.D.C. Sept. 14, 2012) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The court also rejected Peru's request for remand, concluding that Peru had not met the threshold for the "exceptional" remedy of remand, "a procedure to avoid if possible, given the interest in prompt and final arbitration." *Id.* In rejecting Peru's request for remand, the court noted that the D.C. Circuit "has strongly cautioned against remanding arbitral awards, finding that in the "balance between ... rooting out possible error and ... assuring that judgment be swift and economical ... the latter must generally prevail." *Id.* (citing *Sargent v. Paine Webber Jackson & Curtis Inc.*, 882 F.2d 529, 533 (D.C. Cir. 1989)).

Substantively, the court held that the award was "clear on its face" and thus required no interpretation by the court or by a tribunal. Furthermore, embracing the judiciary's general deference to arbitration, the court warned that a remand based on ambiguity "requires something more substantial than a disagreement between the parties. ... Rather, the award must be so ambiguous that a court is unable to discern how to enforce it, with the arbitrator's intent hopelessly difficult to determine." *Id.* at *4. Finally, in view of its determination that the award was unambiguous and required neither judicial nor arbitral clarification, the court declined to consider Peru's argument under the doctrine of forum non conveniens.

Having rejected Peru's motion to dismiss, the court found itself in somewhat uncharted territory. Judge Boasberg held a status conference in which it invited the parties to propose how next to proceed. Duke argued that the court should simply confirm the award, while Peru requested a final chance to brief Peruvian law. Judge Boasberg opted to permit Peru a "limited opportunity" to present any other arguments against confirmation. *Duke Energy Int'l Peru Investments No. 1 Ltd. v. Republic of Peru*, CIV.A. 11-1602 JEB, at *1 (D.D.C. Nov. 19, 2012).

Peru filed a "Motion to Deny Confirmation" in response to which Duke cross-moved for confirmation. Again the court denied Peru's motion, finding that "Peru now seeks what amounts to a second bite at the apple and meets the same fate." *Id.* Indeed, Peru offered no new arguments and largely reiterated those it had brought under its motion to dismiss, namely that the amended tax code did not apply to the award. In its opinion, the court repeated that the "question presented is a narrow one: whether the ICSID Award is sufficiently clear for this court to determine the applicable interest rate." It continued:

If so, this Court is required by statute to give the Award full faith and credit and confirm it accordingly. See 22 U.S.C. § 1650a. The legal standards governing judicial review of arbitration awards are not complicated. As the Court previously noted, such review "is limited by design." Remand is the only relief available, and it is "an exceptional remedy ... 'to avoid if possible, given the interest in prompt and final arbitration.'" Remand is only warranted where the award is "'so ambiguous that a court is unable to discern how to enforce it.'" Although styled as a Motion to Deny Confirmation, then, Peru's Motion is

really just a second motion for remand. Once again, Peru would only be entitled to such remand if this Court were at a loss to determine the arbitrator's meaning. *Id.* at *2.

Once again, the court determined that the award was unambiguous. It thus deemed the ICSID tribunal's ruling binding and conclusive, denied Peru's motion and granted Duke's petition to confirm.

Blue Ridge Investments LLC v. Republic of Argentina

Not two weeks after the D.C. District Court's denial of Peru's motion to dismiss, Judge Paul Gardephe of the Southern District of New York ruled against Argentina on its motion to dismiss a petition for confirmation. In *Blue Ridge*, the investor, CMS Gas Transmission Company, prevailed against Argentina, winning an award of \$133.2 million. Argentina filed an application with ICSID to annul the award but was rebuffed.

The ICSID Annulment Committee "confirmed Argentina's obligation to pay CMS \$133.2 million plus interest in compensation, holding that 'payment by Argentina of the sum awarded is ... obligatory.'" CMS at *1 (citing petitioner's brief). Unlike Peru, Argentina did not pay any portion of the award.

In 2008, *Blue Ridge Investments LLC*, a Delaware company wholly owned by Bank of America Corp., notified Argentina of its purchase and assignment of the award from CMS. *Blue Ridge* thereafter filed a petition to confirm. Argentina moved to dismiss.

Argentina moved to dismiss based on several grounds, including: (1) Argentina was immune pursuant to the Foreign Sovereign Immunities Act ("FSIA"); (2) *Blue Ridge*, as an assignee of the award, lacked standing to bring the petition; and (3) the petition was time-barred under New York's one-year statute of limitations for the enforcement of arbitral awards.

Judge Gardephe ruled against Argentina on each of its arguments. First, the court agreed with *Blue Ridge* that Argentina had waived immunity under two exceptions to the FSIA: 28 U.S.C. § 1605(a)(6), the exception for the confirmation of arbitral awards; and 28 U.S.C. § 1605(a)(1), the exception for explicit or implicit waivers of immunity. Citing Article 54(1) of the convention, the court rejected Argentina's contention that "[c]onsenting to arbitrate before an ICSID tribunal hardly constitutes proof of a foreign state's intent to waive immunity to suit in United States courts' under Section 1605(a)(1)." *Id.* at *2. To the contrary, the court found that consenting to arbitrate before ICSID did just that:

[W]here, as here, a foreign state has chosen to become a Contracting State for purposes of the ICSID Convention—which provides for the automatic recognition and enforcement of awards in Contracting States—that foreign state clearly anticipates the availability of a cause of action in the United States, at least with respect to the recognition and enforcement of an award. *Id.* at *4.

For similar reasons, noting that the Award was governed by the ICSID Convention and was therefore entitled to "full faith and credit" under the federal implementing statute, the court found that Argentina's agreement to submit its dispute to ICSID arbitration constituted a waiver to immunity under Section 1605(a)(6).

The court likewise rejected Argentina's claim that *Blue Ridge* lacked standing to bring the petition. Argentina's argument turned on the meaning of the word 'party' used in Article 54(2) of the Convention:

A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General.

Argentina argued that the term party as used in Article 54(2) was restricted to a “party to the arbitration” and that therefore an assignee could not seek confirmation. The court rejected this assertion, noting in particular that the convention did not define the term and in fact used it differently throughout the convention depending on the context. The court noted that, in most cases, the convention applies descriptive terms to limit the scope of the term party, such as “party to the arbitration” or “party to the dispute.” It thus could not conclude that the term ‘party,’ without a further descriptive, was restricted to a “party to the arbitration.” Id. at *7-10.

Finally, the court agreed with Blue Ridge that, given the implementing statute’s imperative that the award be entitled to “the same full faith and credit as a final judgment of a state court,” New York law on assignments was relevant. Under New York law, an assignee “has the same standing to enforce an arbitration award in this court as its assignor would have.” The court thus concluded Blue Ridge had standing. Id. at *11.

Likewise, it rejected Argentina’s argument that a one-year statute of limitations should apply to the claim, noting that so holding could produce “absurd results” because Argentina had asked for — and obtained — a stay of enforcement for more than one year while it sought to annul the award. Id. at *18, n. 17. Instead, noting that the award was to be treated as a “final judgment[] of a state court,” and not as an arbitral award, the court borrowed the most analogous state statute of limitations, CPLR § 211, which governs money judgments. Id. at *17. Under CPLR § 211, a party may enforce money judgments within 20 years. Id. Thus, Blue Ridge’s petition was not time-barred.

But the fight continues. Like the D.C. District Court, the SDNY did not immediately confirm the petition when it denied Argentina’s motion, meaning confirmation is currently pending. Argentina promptly filed an interlocutory appeal based on FSIA immunity grounds and concurrently moved in the SDNY to certify its remaining claims to the Second Circuit. Blue Ridge has cross-moved in the district court for confirmation and for certification of the appeal as frivolous.

Duke and Blue Ridge exemplify U.S. deference to foreign arbitral awards even in the face of varied challenges to their recognition and enforcement. With their strong language and probing analysis on issues such as interpretation, foreign immunity and remand, they stand as important precedents in upholding the binding force of ICSID awards.

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