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US Courts Gain Prominence as 'Anchor' Forum for Enforcing International Arbitration Awards

Contributing Partners

Lea Haber Kuck / New York

Timothy G. Nelson / New York

A growing number of cases in which private parties are seeking enforcement of very large arbitration awards are percolating through the U.S. courts. These awards emanate both from tribunals seated in the United States (where enforcement is usually governed by the Federal Arbitration Act) and from tribunals seated abroad (where enforcement is governed by international treaties, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). In either case, once the U.S. courts confirm an arbitration award, it becomes enforceable as a U.S. judgment and the award creditor is generally able to employ U.S. enforcement and discovery procedures in order to locate, and potentially attach, assets of the award debtor. This is a powerful enforcement weapon for award creditors.

The United States is an attractive venue for award enforcement because of its position in the world economy — and, particularly the role of New York as a preeminent banking and financial center — as well as the enforcement processes available in the U.S. courts. In the past, prevailing parties have been aggressive in deploying U.S. judicial enforcement procedures against financial institutions in an attempt to locate and obtain assets of the losing party — even though the financial institutions themselves have no connection with the underlying dispute. The growing number of "mega" awards currently before the U.S. courts suggests that this trend is likely to continue, if not increase.

Over the last few years, a significant number of large arbitration awards (*i.e.*, awards in the billions or hundreds of millions), often involving foreign governments, have been the subject of enforcement proceedings in the United States. A few examples are:

- In 2020, the holders of an International Centre for Settlement of Investment Disputes (ICSID) treaty award of more than $2 billion against Egypt arising from a failed natural gas project brought proceedings to enforce the award before the U.S. District Court for the District of Columbia (DDC). In June 2020, this enforcement petition was stayed pending the outcome of Egypt's application before an ICSID *ad hoc* committee to annul the award. The annulment application remains pending today, and thus the enforcement petition remains stayed.
- An award over $50 billion rendered in 2014 by a Hague-based tribunal, constituted under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL) and administered by the Permanent Court of Arbitration is currently the subject of an enforcement proceeding before the DDC. The award was rendered under the Energy Charter Treaty and concerned the expropriation of Yukos Oil, in which the claimants held shares. In November 2020, the court ruled that the enforcement petition would be stayed, pending an application by Russia to the Supreme Court of the Netherlands (the seat of the arbitration) to set aside the award. The award creditors are now seeking to appeal the DDC's stay to the U.S. Court of Appeals for the District of Columbia Circuit. That appeal remains pending.

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One Manhattan West
New York, NY 10001
212.735.3000

- A private energy service company's petition to enforce a $6.6 billion London Court of International Arbitration (LCIA) award rendered against the Nigerian Ministry of Energy for unlawful termination of a contract to build a gas processing facility is also pending before the DDC. In December 2020, the court rejected Nigeria's jurisdictional defenses, holding that Nigeria, by ratifying the New York Convention, had waived any defense of sovereign immunity against enforcement. Nigeria is now expected to appeal that ruling to the D.C. Circuit.
- An ICSID Additional Facility treaty award of $1.33 billion in 2016 against Venezuela in favor of Canadian investor Crystallex, Inc., the former owner of an expropriated gold mine, was confirmed by the DDC in 2017. Crystallex then brought further enforcement proceedings in the U.S. District Court for the District of Delaware, and, as a result of various rulings, it is currently seeking to finalize a court order to auction Venezuela's interests in PDV Holding, Inc. (a U.S. company with interests in CITGO) in order to enforce the U.S. judgment.

Legal Battles Over Enforcement

Award enforcement cases can lead to vigorous legal battles among the parties involved, especially where (as in some of the above cases) the award remains subject to set-aside proceedings in the country in which it was rendered and/or annulment proceedings within the ICSID system. In some cases, the courts have been willing to stay enforcement of the award pending the outcome of the proceedings; in others, they have refused to do so — particularly when they find that foreign set-aside/annulment proceedings have been unduly delayed. In still others, the courts have stayed the proceedings only after the losing party posted a bond as security for the award. Where the award debtor is a government entity, foreign sovereign immunity issues also can be significant.

Impact on Third Parties

"Mega" enforcement cases impact third parties — even though they may have had nothing to do with the underlying disputes. Indeed, once an award is confirmed as a U.S. judgment, the award creditor has available to it the full panoply of U.S. judgment enforcement procedures (including third-party discovery). Because award creditors are often well-funded, their enforcement efforts can be far-reaching.

This can present special challenges for international banks and financial institutions, which often receive information subpoenas from award creditors seeking to locate and trace the worldwide assets of an award debtor (*e.g.*, through subpoenas or enforcement notices enforceable in the New York or Delaware federal courts). Such campaigns can give rise to significant disputes over the proper scope of asset discovery subpoenas or freezing orders, particularly when worldwide asset discovery is sought — and/or where the targeted assets are located overseas. Award creditors have, in the past, taken aggressive positions against banks (*e.g.*, seeking discovery and/or attachment of non-U.S. accounts, and/or seeking to have foreign client assets be relocated to the U.S.). Applications such as these, when brought by a well-funded award creditor, can be costly and time-consuming for banks to defend.

Growing Pipeline of Cases

The large, and growing, "pipeline" of substantial arbitration awards being taken to U.S. courts for enforcement, as illustrated in the above examples, can be ascribed to various factors — both general (*e.g.*, long-term global trading patterns, volatility in some energy markets) and specific (*e.g.*, increasing use of investment treaty arbitration as a remedy against asset seizure). These cases are likely to remain a feature of the landscape for some years and will therefore continue to present challenges for litigants, financial institutions and courts alike, as award creditors will continue to seek to attach bank accounts, shareholdings and other assets through judicial proceedings in the United States.