Year in Review: Three Noteworthy Decisions of 2017 under the Foreign Sovereign Immunities Act

In the United States, the Foreign Sovereign Immunities Act (FSIA) governs all actions against foreign states and their agencies or instrumentalities. The FSIA grants immunity from suit to sovereign entities, as well as immunity from execution to their property, with few exceptions. The FSIA also imposes other requirements, including service of process and venue provisions. In 2017, federal courts upheld the FSIA's robust substantive and procedural protections in three decisions from cases in which Curtis, Mallet-Prevost, Colt & Mosle acted as counsel for the sovereign defendants. This article provides an overview of these three noteworthy decisions.

I. U.S. Supreme Court Resolved a Circuit Split in Favor of Foreign States

In this year's leading FSIA case, the U.S. Supreme Court resolved a circuit split on the proper pleading standard under the FSIA's exception to jurisdictional immunity for cases "in which rights in property taken in violation of international law are in issue."[1] That provision comes from what is known as the expropriation exception.[2]

The U.S. Court of Appeals for the D.C. Circuit, consistent with the Ninth Circuit, had adopted "an exceptionally low bar" for satisfying the expropriation exception in certain FSIA cases: a plaintiff only needed to plead a "nonfrivolous" theory of jurisdiction.[3] By contrast, the Second, Fifth, Seventh, and Eleventh Circuits demanded something more; the jurisdictional allegations had to describe an actual taking in violation of international law.[4] The Supreme Court's decision favored the higher standard.

Several years ago, a U.S. Company incorporated a Subsidiary under the laws of a foreign state. The Subsidiary provided drilling services to the foreign state's national oil company under short-term contracts executed and performed entirely outside the United States. After the state-owned company fell behind on payments, the Subsidiary threatened not to renew the contracts "absent an improvement in receivable collections."[5] When the situation did not improve, the Subsidiary disassembled and

---

[1] *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017) (quoting 28 U.S.C. § 1605(a)(3)).

[2] The expropriation exception also requires a commercial nexus with the United States, but the parties had agreed to defer that question for later proceedings and thus the Court did not address that issue.

[3] 137 S. Ct. at 1318. *See also Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 711 (1992).

[4] *See, e.g., Robinson v. Government of Malay.*, 269 F.3d 133 (2d Cir. 2001); *de Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385 (5th Cir. 1985); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Mezerhane v. República Bolivariana de Venez.*, 785 F.3d 545 (11th Cir. 2015).

[5] *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 809 (D.C. Cir. 2015) (internal quotation marks omitted).

stored its highly specialized and rare equipment pending further payments. The Government intervened by seizing the equipment and transferring operations to the state-owned company, which in turn commenced local expropriation proceedings. The U.S. Company and its Subsidiary sued the Government and the state-owned company in federal court for expropriation and breach of contract. The defendants invoked their immunity under the FSIA.[6] On appeal, the D.C. Circuit rejected the breach-of-contract claims but, applying its "forgiving standard," allowed the expropriation claims to proceed.[7]

The Supreme Court agreed to review the decision on the expropriation claims and focused on the proper pleading standard. In a unanimous decision authored by Justice Stephen G. Breyer,[8] the Court reversed the D.C. Circuit and held that a complaint must allege sufficient facts "to make out a legally valid claim" that "rights in property" were indeed "taken in violation of international law" to establish the court's jurisdiction.[9] A plaintiff's "nonfrivolous, but ultimately incorrect, argument" is not enough.[10]

A court must make this determination "as near to the outset of the case as is reasonably possible" to protect the foreign sovereign's immunity.[11] The Court rejected the notion that allowing the "nonfrivolous-argument approach" would "work little harm," because allowing such claims to proceed past the jurisdictional stage "will sometimes mean increased delay, imposing increased burdens of time and expense upon the foreign nation."[12] The Court vacated the D.C. Circuit's decision on the expropriation claims and remanded the case.

II. D.C. Circuit Limited the FSIA's Commercial Activities Exception

In the same case, the Supreme Court declined to review the D.C. Circuit's decision dismissing the contract claims.[13] The D.C. Circuit's ruling, which remains good law, tightened the reach of the FSIA's commercial activities exception.

Because the drilling contracts at issue had been executed and performed entirely abroad, the D.C. Circuit's analysis centered on the so-called "direct effect clause," which strips foreign states of jurisdictional immunity in any case "in which the action is based upon . . . an act outside the territory of the United States in connection with a

[6] *Id.* at 809-10.

[7] *Id.* at 813.

[8] Justice Neil M. Gorsuch took no part in this decision.

[9] 137 S. Ct. at 1316, 1318.

[10] *Id.* at 1316.

[11] *Id.* at 1317.

[12] *Id.* at 1323.

[13] *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 137 S. Ct. 2114 (2017).

commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[14]

The plaintiff argued that jurisdiction was proper because there had been three direct effects in the United States: (i) the drilling contracts required sourcing from U.S.-based manufacturers, (ii) certain past payments under the contracts had been made to a U.S. bank account, and (iii) the breach had stopped a flow of commerce into the United States.[15] Adopting a "broad view of the direct effect test," the district court found a direct effect because the drilling contracts "required the purchase and use of specific parts from specific U.S.-based companies" and the breach resulted in losses under the subcontracts with those third-parties.[16]

The D.C. Circuit reversed and, in a unanimous decision, adopted a narrower view of the direct effect clause. Even assuming that the drilling contracts "required subcontracts with American companies" (an issue that the court side-stepped), it concluded that the formation of subcontracts was not enough without allegations of "*losses* caused by the *termination*" of those agreements.[17] Since the plaintiff had alleged that it had fully performed under the subcontracts, no losses could have resulted from such agreements. Nor could the claim be based on future losses from the plaintiff's inability to renew the subcontracts, because the state-owned company was under no obligation to renew its drilling contracts. Thus, any future losses would be the result of the state-owned company's "contractually permitted decision not to renew," not of its alleged breach, which is the act that must have caused the direct effect.[18]

The allegations of prior payments to U.S. bank accounts were also insufficient. Under Supreme Court precedent, a breach-of-contract causes a direct effect within the meaning of the FSIA if the defendant was contractually obligated to perform in the United States.[19] However, under the drilling contracts, the plaintiff had "no power to demand payment in the United States," rather the state-owned company "could choose" to pay in or outside the United States in its "exclusive discretion."[20] Because the place of performance depended solely on the defendant's judgment, its alleged failure to pay had not caused a direct effect in the United States.

---

[14] 784 F.3d at 816-17 (quoting 28 U.S.C. § 1605(a)(2)).

[15] *Id.* at 817-19.

[16] *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 971 F. Supp. 2d 49, 68 (D.D.C. 2013).

[17] 784 F.3d at 817 (quoting *Cruise Connections Charter Management v. Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010)) (emphasis supplied).

[18] *Id.* at 817-18.

[19] *Id.* at 818 (citing *Republic of Argentina v. Weltover*, 504 U.S. 607, 619 (1992)).

[20] *Id.* (internal quotation marks omitted).

Neither did the defendant's alleged breach cause any interruption in the flow of commerce into the United States. Rather, the commercial influx ended because of the plaintiff's decision to stop doing business with the defendant. And since the defendant was not obligated to renew the short-term contracts, there had been "no guarantee of future business" between the parties beyond those transactions.[21] The defendant was thus entitled to immunity from suit on the contract claims in the United States.

III. Second Circuit Ends *Ex Parte* Recognition and Enforcement of ICSID Awards

In the third significant decision of 2017, the U.S. Court of Appeals for the Second Circuit reaffirmed that the FSIA governs *all* actions against a foreign state, including proceedings to enforce an arbitration award rendered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Treaty"). For more than thirty years, courts in the Southern District of New York had granted applications to convert ICSID awards into enforceable U.S. judgments without requiring compliance with the FSIA's service of process and venue provisions, or even demanding prior notice to the award debtor. That practice had been "endorsed" by the New York City Bar Association but had never been reviewed by a court of appeals.[22] In 2017, the Second Circuit put an end to *ex parte* recognition and enforcement of ICSID awards.

In that case, the plaintiffs had obtained an ICSID award against a foreign state. The next day, they asked an emergency judge in the Southern District to recognize the award and convert it into an enforceable federal judgment on an *ex parte* basis pursuant to 22 U.S.C. § 1650a, the federal statute implementing the ICSID Treaty's enforcement provisions. That statute vests "exclusive jurisdiction" over the enforcement of ICSID awards in the federal courts and requires them to proceed "as if the award were a final judgment of a court of general jurisdiction of one of the several States."[23] The emergency judge granted the petition the same day and entered judgment on the award.

The foreign state defendant was never served or notified of the proceedings. Instead, it learned of the judgment when its counsel received a letter via e-mail and then promptly moved to vacate the judgment as void for lack of subject matter and personal jurisdiction under the FSIA. The district court denied the motion, concluding that the emergency judge had subject matter jurisdiction to recognize and enter a judgment on the award on an *ex parte* basis under the ICSID implementing statute, as well as the FSIA's waiver, arbitration and treaty exceptions. The court held that personal jurisdiction was not necessary because the foreign state had participated in the ICSID

[21] *Id.* at 818-19.

[22] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 107 n.10 (2d Cir. 2017).

[23] 22 U.S.C. § 1650a.

Treaty and the existence of a "gap" in the ICSID enabling statute permitted a federal court to rely on New York State's summary procedures for recognizing judgments from other states.[24]

The Second Circuit reversed the district court's decision and affirmed the FSIA's primacy in actions against a foreign state and its agencies and instrumentalities. The court specifically held that the FSIA's jurisdictional and procedural requirements are the exclusive provisions for converting an ICSID award into an enforceable federal judgment against foreign states. The ICSID implementing statute did not provide an independent jurisdictional basis for such proceedings. Further, the court reviewed the history and text of the ICSID Treaty, the ICSID implementing statute and the FSIA, and found no tension between the FSIA's procedures and the United States' obligations under the ICSID Treaty especially since the United States had insisted on the inclusion of language in the treaty that would authorize federal courts to treat an ICSID award "as if it were a final judgment of the courts of a constituent state."[25] Before enforcing state court judgments, federal courts require the commencement of a plenary action with service on the judgment debtor.[26]

The court thus concluded that ICSID award-creditors must file "a federal action on the award against the sovereign, serving the sovereign with process in compliance with the FSIA, and meeting the FSIA's venue requirements before seeking entry of a federal judgment."[27] In light of these considerations, the court vacated the judgment and remanded the case with instructions to dismiss the *ex parte* petition.[28]

These three decisions capped a winning year for Curtis on behalf of its sovereign clients.

About Curtis

Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 17 offices in the United States, Latin America, Europe, the Middle East and Asia. Curtis represents a wide range of clients, including multinational corporations and financial institutions, governments and state-owned companies, money managers, sovereign wealth funds, family-owned businesses, individuals and entrepreneurs.

For more information about Curtis, please visit www.curtis.com.

---

[24] 863 F.3d at 99. Because the defendant had simultaneously applied for annulment of the award before an ICSID Annulment Committee, which triggered a provisional stay of enforcement under the ICSID Treaty, the district court also suspended enforcement until ICSID lifted its provisional stay.

[25] *Id.* at 117.

[26] *Id.* at 122-23.

[27] *Id.* at 100.

[28] *Id.* at 125.

Attorney advertising. The material contained in this Client Alert is only a general review of the subjects covered and does not constitute legal advice. No legal or business decision should be based on its contents.

Please feel free to contact any of the persons listed below if you have any questions on this important development:

Joseph D. Pizzurro
Partner
jpizzurro@curtis.com
New York: +1 212 696 6196

Robert B. Garcia
Partner
robert.garcia@curtis.com
New York: +1 212 696 6052

Kevin A. Meehan
Associate
kmeehan@curtis.com
New York: +1 212 696 6197

Juan O. Perla
Associate
jperla@curtis.com
New York: +1 212 696 6084