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D.C. Circuit Foreign Sovereign Immunities Act Enforcement Update (September 2022)

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Gibson Dunn's D.C. Circuit Foreign Sovereign Immunities Act Enforcement Update summarizes recent decisions within the D.C. Circuit that are relevant to the enforcement of judgments and arbitral awards against foreign states.

This edition summarizes:

(1) the D.C. Circuit's decision in *Estate of Levin v. Wells Fargo Bank, N.A.*, Nos. 21-7036, 21-7041, 21-7044, 21-7052, 21-7053, 2022 WL 3364493, addressing the attachment of electronic fund transfers ("EFTs") by victims of state-sponsored terrorism;

(2) the district court's decision in *Chiejina v. Federal Republic of Nigeria*, No. 21-2241, 2022 WL 3646377 (D.D.C.), addressing the proper framework that applies when a foreign state opposes enforcement of an arbitral award by disputing the existence of a valid arbitration agreement between the parties; and

(3) the district court's decisions in *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, No. 19-0683, 2022 WL 3576193 (D.D.C.) and *Tethyan Copper Co. PTY Ltd. v. Islamic Republic of Pakistan*, No. 19-2424, 2022 WL 715215 (D.D.C.), addressing the enforcement of arbitral awards issued pursuant to the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

D.C. Circuit Opens The Door For Victims Of Terrorism To Attach Blocked Assets Of State Sponsors Of Terrorism

On August 16, 2022, the D.C. Circuit broke with the Second Circuit and issued a significant decision for victims of terrorism in *Estate of Levin v. Wells Fargo Bank, N.A.*, Nos. 21-7036, 21-7041, 21-7044, 21-7052, 21-7053, 2022 WL 3364493. Ruling in favor of terrorism victims represented by **Matt McGill** (argued) and **Jessica Wagner** of Gibson Dunn, the court unanimously reversed the district court's dissolution of orders of attachment on nearly $10 million in blocked Iranian funds. The decision opens the door for victims of terrorism to attach blocked funds of state sponsors of terrorism under the Terrorism Risk Insurance Act ("TRIA") more generally.

Background

Victims of terrorism often struggle to collect on judgments against state sponsors of terrorism. Even when those states' funds surface in U.S. financial institutions and are blocked by sanctions laws, sovereign immunity can place them beyond the reach of judgment creditors. To address these enforcement challenges, Congress enacted TRIA, codified at 28 U.S.C. § 1610 Note. This law ensures that when funds of state sponsors of terrorism are blocked by sanctions, those funds remain available for "execution or

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Matthew D. McGill

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Jeff Liu

attachment" by plaintiffs holding judgments against those states—"[n]otwithstanding any other provision of law." TRIA, § 201(a).

In order for blocked funds to fall within the protection of TRIA, they must be "blocked assets of" the relevant state or its agency or instrumentality. TRIA, § 201(a). The Second Circuit, however, has adopted a narrow view of ownership in the context of EFTs, in which funds move quickly from one account to another through a series of intermediary banks. Relying on Article 4A of the Uniform Commercial Code ("UCC"), the Second Circuit has held that the only entity with an ownership interest in funds blocked at an intermediary bank is the entity immediately preceding that bank in the chain of electronic transfers—even if the chain of transfers was initiated by a state sponsor of terrorism. *See Doe v. JPMorgan Chase Bank, N.A.*, 899 F.3d 152 (2d Cir. 2018). Until *Levin*, however, the D.C. Circuit had not decided this issue.

In *Levin*, two groups of terrorism victims—including nearly 90 victims represented by Gibson Dunn (the "Owens victims")—who hold approximately $1 billion in judgments against the Islamic Republic of Iran obtained writs of attachment against funds blocked at Wells Fargo by the Office of Foreign Assets Control ("OFAC") during an attempted EFT initiated by an agent of Iran seeking to purchase an oil tanker. The United States—which had earlier sought forfeiture of the same funds—intervened and moved to quash the writs. Adopting the Second Circuit's approach in *Doe*, the district court granted the government's motion, holding that the funds were not subject to attachment under TRIA because only the bank immediately preceding Wells Fargo in the chain of transfers held an ownership interest.

Decision

The D.C. Circuit unanimously reversed, rejecting the Second Circuit's reliance on UCC Article 4A in favor of a broader rule grounded in tracing principles. The court explained—as Gibson Dunn had argued on behalf of the Owens victims—that "[w]hile [Article 4A] seeks to minimize disruptions in electronic funds transfers, OFAC's blocking does the opposite—its purpose is to disrupt terrorist [EFTs]." Given this mismatch, the court concluded that Article 4A is a poor fit for determining ownership of blocked EFTs. Instead, the court held that ownership should be determined according to tracing principles: under TRIA, "terrorist victims may attach OFAC blocked electronic funds transfers if those funds can be traced to a terrorist owner," and "no intermediary or upstream bank asserts an interest as an innocent third party."

Judge Pillard filed a concurrence arguing that a tracing rule—which accounts for the funds' path through the financial system—does not, on its own, accomplish the statutorily required showing of ownership. Judge Pillard would have adopted, "instead of or in addition to tracing," the common law rule of agency that the Owens victims proposed, which would have treated banks as agents rather than owners when they effectuate EFTs originated by state sponsors of terrorism.

The D.C. Circuit's decision has significant implications for judgment enforcement actions brought by victims of terrorism. It clears the way for victims to attach blocked funds that would have been unreachable under the Second Circuit's rule, and effectuates Congress' intent to make blocked funds of state sponsors of terrorism available—"notwithstanding any other provision of law"—to victims holding judgments against those states. By creating a circuit split, moreover, the decision may provide an avenue for terrorism victims to challenge the prevailing standard in the Second Circuit.

D.D.C. Reaffirms Arbitrability Disputes Do Not Implicate U.S. Courts' Jurisdiction

On August 23, 2022, a district court in the D.C. Circuit issued a decision reaffirming that arbitrability disputes do not implicate subject-matter jurisdiction under the arbitration exception of the Foreign Sovereign Immunities Act ("FSIA"). *See Chiejina v. Federal Republic of Nigeria*, No. 21-2241, 2022 WL 3646377 (D.D.C. Aug. 23, 2022). In *Chiejina*,

Nigeria opposed confirmation of an arbitration award against it on the grounds that one of the petitioners was not a party to the underlying agreement to arbitrate. Consistent with "every case" the district court has decided on this issue, the court determined that arbitrability disputes such as this one implicate the merits of the petition and not the court's subject-matter jurisdiction under the FSIA. The court thus denied Nigeria's motion to dismiss, which means that Nigeria's arbitrability challenge will have to be litigated at the merits stage under a more deferential standard of review, rather than decided *de novo* as an issue of subject-matter jurisdiction.

Background

Petitioners seeking to confirm a foreign arbitral award issued against a foreign state typically must overcome two obstacles. First, under the FSIA, 28 U.S.C. § 1605(a), foreign states are presumptively immune from suit in U.S. court unless one of the FSIA's enumerated exceptions to jurisdictional immunity is satisfied. One such exception, the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), provides for subject-matter jurisdiction in an action against a foreign state to "confirm an award made pursuant to" an arbitration agreement. Second, once jurisdiction is established, the petitioner must establish on the merits that the award is subject to confirmation under the applicable legal framework—typically, either the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") or the ICSID Convention. Both Conventions limit a court's authority to review the merits of the arbitral award or question the determinations of the tribunal that issued it.

To avoid the New York and ICSID Conventions' limits on judicial review, foreign states often attempt to frame their challenges to enforcement of an arbitral award as raising issues of subject-matter jurisdiction under the FSIA, rather than the merits. In particular, in a number of recent cases, foreign states have argued that the FSIA's arbitration exception does not apply—and the state is therefore immune from suit—because there is no valid arbitration agreement between the parties. The D.C. Circuit and the D.D.C. have repeatedly held, however, that issues of "arbitrability"—including the existence of a valid arbitration agreement—go to the merits rather than to subject-matter jurisdiction under the FSIA. *See*, *e.g.*, *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877-78 (D.C. Cir. 2021); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015).

In *Chiejina*, petitioners are seeking to confirm and enforce under the New York Convention a $2.9 million award, plus interest, issued against the Federal Republic of Nigeria. Like the defendants in *Stileks*, *Chevron*, and *Tethyan*, Nigeria moved to dismiss for lack of subject-matter jurisdiction, arguing that the FSIA's arbitration exception did not apply because one of the petitioners was not a party to the relevant arbitration agreement. Nigeria also argued that the court lacked personal jurisdiction because the petitioners failed to properly effect service of process consistent with the FSIA's service provision, 28 U.S.C. § 1608(e).

Decision

The district court rejected Nigeria's challenge to subject-matter jurisdiction, explaining that under the D.C. Circuit's decisions in *Stileks* and *Chevron*, arbitrability "is a question that goes to the *merits* of whether the award should be confirmed pursuant to the New York Convention," rather than "a basis on which to conclude that the Court lacks jurisdiction under the FSIA." For that reason, Nigeria could not challenge subject-matter jurisdiction by arguing that petitioners' claims in the arbitration were "not encompassed by the underlying agreement to arbitrate" because one of the petitioners was not a party to that agreement. Instead, the court indicated that it would address arbitrability—including the existence of a valid arbitration agreement between the parties—at the merits stage under the deferential standard for confirmation of foreign arbitral awards under the New York Convention. The decision thus reaffirms the principle that arbitrability is not an issue of subject-matter jurisdiction.

The court also addressed service of process. When a plaintiff enters into a "special arrangement" for service on a foreign state, the FSIA, 28 U.S.C. § 1608(a)(1), requires the plaintiff to attempt service through that arrangement before proceeding with other methods of service. In *Chiejina*, the underlying construction contract at issue in the arbitration included a notice provision specifying a method for serving notices related to the contract. Rather than follow that notice provision, the petitioner served Nigeria through a separate method applicable in the absence of a "special arrangement" between the parties. The court held that service was properly effected on Nigeria because the contractual notice provision applied only to notices that were "'required or authorized' by the Contract itself," not service of process in the lawsuit. In doing so, the court reaffirmed the principle that a notice provision in an underlying contract creates a "special arrangement" for purposes of FSIA service "only where the language is 'all encompassing' rather than 'confined to the contract or agreement at issue.'" *Berkowitz v. Republic of Costa Rica*, 288 F. Supp. 3d. 166, 173 (D.D.C. 2018) (quoting *Orange Middle East & Africa v. Republic of Equatorial Guinea*, No. 1:15-CV-849 2016 WL 2894857, at *4 (D.D.C. May 18, 2016)).

D.D.C. Reaffirms U.S. Courts' Obligation To Enforce ICSID Awards

On August 19, 2022, a district court in the D.C. Circuit issued a decision reaffirming the obligation of U.S. courts to enforce arbitral awards issued pursuant to the ICSID Convention. *See ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, No. 1:19-cv-683, 2022 WL 3576193 (D.D.C. Aug. 19, 2022). Consistent with precedent and federal law, the court held that it had subject-matter jurisdiction under both the arbitration and waiver exceptions of the FSIA on account of Venezuela's decision to join the ICSID Convention. In doing so, the court reaffirmed the principle that a foreign state that joins the ICSID Convention waives immunity to the enforcement of ICSID awards in U.S. court.

Background

The ICSID Convention is a treaty signed by the United States and 164 other nations of the world that provides a comprehensive framework for resolving investment disputes between participating nations and the private investors of other participating nations. The Convention provides for arbitration before an international tribunal and streamlined enforcement procedures for any resulting arbitral award. Each contracting party agrees to "recognize an award rendered pursuant to [the] 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." ICSID Convention, art. 54(1). The United States has implemented this treaty obligation through legislation providing that an ICSID 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." 22 U.S.C. § 1650a(a).

Despite this congressional mandate, foreign states often attempt to oppose enforcement of ICSID awards by challenging the U.S. court's subject-matter jurisdiction under the FSIA. But the D.C. Circuit held in *Tatneft v. Ukraine* that when a foreign state joins a treaty that "contemplate[s] arbitration-enforcement actions in other signatory countries, including the United States"—as the ICSID Convention does—it "waives its immunity from arbitration-enforcement actions" under the FSIA. 771 F. App'x 9, 10 (D.C. Cir. 2019). The Second Circuit has applied this principle in the context of the ICSID Convention, holding that a foreign states "waive[s] its sovereign immunity" from enforcement of an ICSID award "by becoming a party to the ICSID Convention." *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013). These decisions provide an alternative basis—in addition to the arbitration exception at issue in *Chiejina*—for establishing subject-matter jurisdiction in an action to enforce an ICSID award.

Decision

The petitioners in *ConocoPhillips* sought to confirm and enforce an ICSID award issued

against the Bolivarian Republic of Venezuela. When Venezuela failed to timely respond to the enforcement petition, the petitioners sought entry of a default judgment, and the district court granted the motion. Although the motion was not opposed, the district court addressed subject-matter jurisdiction under the FSIA, holding that Venezuela was not immune from suit—and the court therefore had subject-matter jurisdiction—on two grounds: (1) the FSIA's arbitration exception; and (2) the FSIA's waiver exception, 28 U.S.C. § 1605(a)(1), which provides jurisdiction where a foreign state has waived its immunity to suit in U.S. court.

First, the court concluded that when a foreign state agrees to arbitration pursuant to the ICSID Convention, the arbitration exception permits enforcement even if the state subsequently withdraws from the Convention, so long as "the relevant rights and obligations of the parties arose before [the] denunciation took effect." This holding means that a foreign state cannot evade its obligations to parties holding ICSID awards by withdrawing from the ICSID Convention.

Second, the court confirmed that the waiver exception also applied because "Venezuela implicitly waived its sovereign immunity with respect to suits to recognize and enforce ICSID awards by becoming a Contracting State to the ICSID Convention." The court emphasized that "[t]o hold otherwise would be to disrespect Venezuela's choice (at the time) to be a Contracting State, and *it would diminish other Nations' ability to attract investment in the future by committing themselves to resolving investment disputes through arbitration*." The court thus referenced one of the key purposes of the ICSID Convention: By providing investors with a remedy through arbitration and strong guarantees that any resulting award will be subject to enforcement, the Convention helps contracting parties attract foreign investment. *ConocoPhillips* thus strengthens the chorus of decisions recognizing that parties to the ICSID Convention and other arbitration enforcement treaties waive their immunity from enforcement of arbitral awards issued pursuant to those treaties.

D.D.C. Clears The Way For Landmark $6.5 Billion Judgment Enforcing Arbitration Award Against Pakistan

On March 10, 2022, a district court in the D.C. Circuit issued a groundbreaking decision on behalf of Tethyan Copper Company PTY Limited ("Tethyan"), an Australian mining company represented by **Matt McGill**, **Robert Weigel**, **Jason Myatt**, and **Matt Rozen** of Gibson Dunn in its long-running efforts to enforce a $4 billion plus interest arbitration award issued against Pakistan pursuant to the ICSID Convention. *Tethyan Copper Co. PTY Ltd. v. Islamic Republic of Pakistan*, No. 1:19-cv-2424, 2022 WL 715215 (D.D.C. Mar. 10, 2022). In its opinion and accompanying order, the court denied Pakistan's motion to dismiss or, in the alternative, to stay enforcement proceedings, and directed the parties to submit a proposed judgment, clearing the way for the entry, after interest and costs, of a more than $6.5 billion judgment as of this writing, which would be one of the largest judgments ever entered by the D.C. federal district court. The decision reinforces three principles concerning the enforcement of ICSID awards.

First, the decision emphatically rejects the recurring argument that enforcement of such awards should universally be stayed while the losing party tries to vacate or set aside the award in parallel proceedings. Under the ICSID Convention, only an ICSID tribunal or committee—not the courts of any contracting state—may decide whether an award should be set aside, either through revision by the original tribunal pursuant to Article 51 of the Convention, or through annulment by an *ad hoc* committee pursuant to Article 52 of the Convention. Article 54 of the Convention expressly provides that ICSID awards are immediately enforceable as "final judgment[s]" even while revision or annulment proceedings are pending, and it tasks the ICSID tribunal or committee overseeing those proceedings with deciding whether a stay of enforcement is appropriate.

In *TCC*, Pakistan sought both revision and annulment, but the tribunal and committee overseeing those proceedings allowed enforcement to proceed. Pakistan then moved in

the district court to stay the U.S. enforcement proceedings. But the district court rejected that request. The court acknowledged some prior decisions from the same district that had stayed enforcement proceedings pending set aside proceedings. In the court's view, however, the interest in judicial economy and the potential hardship to Tethyan from a stay clearly outweighed any potential hardship to Pakistan from denying a stay. Tethyan had waited over a decade for compensation, and the court concluded that "[a] stay only prolongs justice denied."

Second, the court rejected the state's attempt to relitigate in enforcement proceedings jurisdictional arguments already raised before and rejected by the arbitral tribunal. Specifically, Pakistan had challenged the tribunal's jurisdiction on the ground that there was no valid arbitration agreement, because Pakistan purportedly had not properly consented to arbitration under the ICSID Convention. The tribunal rejected the argument. In the subsequent enforcement proceedings, Pakistan attempted to renew the same objection—that there was no valid arbitration agreement between the parties—as a challenge both to the district court's jurisdiction under the FSIA and its authority to grant full faith and credit to the award. Relying on the above-described principles from the D.C. Circuit's decisions in *Stileks* and *Chevron*, however, the *TCC* court refused to second-guess the tribunal's rulings on arbitrability—including the existence of a valid agreement to arbitrate. The court held that once such issues have been resolved in arbitration, they cannot be revisited through a collateral attack on the tribunal's rulings, whether in the guise of a challenge to jurisdiction under the FSIA or to the merits of the enforcement petition.

Finally, the court's order, directing the parties to promptly meet and confer and submit a proposed judgment, with interest, recognizes that once the court has determined that it has subject-matter jurisdiction to enforce an ICSID award, the award holder is entitled to prompt entry of judgment as soon as interest is calculated. (In an effort to facilitate settlement, the court later granted the parties' joint request for an extension of time to submit a proposed judgment until December 15, 2022.) If followed elsewhere, the court's order may greatly streamline efforts by future litigants to enforce arbitral awards against foreign sovereigns in U.S. courts.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the D.C. Circuit. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Judgment and Arbitral Award Enforcement practice group, or the following:

Matthew D. McGill – Co-Chair, Washington, D.C. (+1 202-887-3680, mmcgill@gibsondunn.com) Robert L. Weigel – Co-Chair, New York (+1 212-351-3845, rweigel@gibsondunn.com) Jason Myatt – New York (+1 212-351-4085, jmyatt@gibsondunn.com) Matthew S. Rozen – Washington, D.C. (+1 202-887-3596, mrozen@gibsondunn.com)

This client update was prepared by Matt McGill, Robert Weigel, Jason Myatt, Matt Rozen, Jessica Wagner, Jeff Liu, Luke Zaro, and Sam Speers.

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