

Litigators of the Week: Gibson Dunn's Estrada and Weigel Strike Gold in Venezuela Fight

For our winner, we were swayed by a dispute with \$1.4 billion on the line. Gibson, Dunn & Crutcher's Miguel Estrada and Robert Weigel represented a Canadian gold mining company that had its assets seized by the government of Venezuela. Their client wasn't the first company this happened to—but Estrada and Weigel were the first to come up with a viable way for them to collect what they're owed.

By Jenna Greene

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Lit Daily: Tell us a bit about your client and the circumstances leading up to the dispute.

Robert Weigel: **Crystallex** is a Canadian mining company that had been awarded the rights to develop Las Cristinas in Venezuela, a site many believe to be one of the largest undeveloped gold reserve in the world. After Crystallex spent hundreds of millions of dollars developing the site, the Venezuelan government expropriated Crystallex's interests. Crystallex brought an arbitration claim against Venezuela under the investment treaty between Canada and Venezuela.

A team of lawyers at Freshfields did a terrific job and won the arbitration. I was hired, along with a **Gibson Dunn** team including **Rahim Mooloo** and **Jason Myatt**, because of our team's expertise in arbitration-related litigation and enforcement matters.

We started to look at enforcement issues early on and even brought a fraudulent transfer claim before the award was issued. After the award was issued and confirmed in the District of Columbia by a team of lawyers from Freshfields; Hughes Hubbard and **Gibson Dunn**, Miguel was brought in to handle the appeal.

Lit Daily: When Venezuela refused to pay the arbitration award, to what extent was there a template for how to proceed? Did you have to chart a unique path?

Robert Weigel: There is no template as every enforcement action is different. The key is to find the defendant's assets and then to design a strategy to go after them. Substantial investigative efforts are often required to identify assets. The means to seize or otherwise monetize those assets depends on the nature of the asset and its location. For example, the process for going after a bank account in New York or corporate shares in Delaware is different, so one has to build the process as one goes along.



Miguel Estrada

Robert Weigel

Here everyone knew that Venezuela's biggest asset in the United States was **Citgo Petroleum** and that it was the target that we had to figure out how to get. But, we also located a bank account in New York that had tens of millions of dollars in it in Venezuela's name. The account had been the subject of litigation for more than a decade, and the plaintiff in that action had obtained a preliminary injunction preventing Venezuela from dissipating the funds.

But a preliminary injunction doesn't create a lien and after we had the U.S. Marshals serve a writ of execution, which does create a lien, all the parties involved agreed on a division of those funds.

Lit Daily: Chief Judge Leonard Stark in the District of Delaware said the case presented "numerous complex questions, some of which have been addressed by no previous court, and others on which different courts have reached competing conclusions." What were some of the key questions before the court?

Miguel Estrada: Venezuela fought very aggressively practically every legal and factual underpinning of our argument. At the threshold, they strongly disputed subject matter jurisdiction, contending essentially that we could not obtain

an adjudication of the alter ego question in the context on an enforcement proceeding under Rule 69, but only by commencing a new and separate lawsuit against [oil and gas company **Petróleos de Venezuela, S.A.**], undergoing the cumbersome Hague Convention procedures for serving it, and separately defeating its purported sovereign immunity as a government agency of Venezuela.

They argued that the relevant Supreme Court precedent on alter ego provided for heightened burdens of proof. On the facts, they attempted to explain every damning fact in isolation and to put it in the best possible light. They left no stone unturned.

Lit Daily: The court heard oral argument on two separate occasions. What was covered and how did it go?

Miguel Estrada: Because Venezuela attempted to erect so many procedural roadblocks to a decision, the oral arguments covered both procedural issues and the substance of the alter ego question.

The original oral argument took place in court in Delaware and lasted several hours. I covered our response to Venezuela's jurisdictional challenges, and their many arguments based on the Foreign Sovereign Immunities Act, including some basic disagreements on the scope of the controlling Supreme Court decision, *Bancec*. Bob covered the extensive factual case we had developed for our argument on the merits.

I think it is fair to say that Venezuela's jurisdictional and immunity arguments, while meritless, were intricate and supported by reams of largely inapposite case law. This made for a lot of parsing.

Judge Stark was meticulous during the argument in questioning both counsel extensively about doctrinal detail and case law, and it was clear he had taken a lot of time to ponder the issues. He then had a second oral argument by telephone, based on specific questions he had posed to both counsel about their respective positions and particular cases. Essentially, it felt like he was giving both parties a chance to clarify their positions and to try to convince him.

Lit Daily: What were some of the greatest challenges in litigating this case?

Robert Weigel: For me, the major challenge we faced was developing a factual record that was adequate to persuade the court that [*Petróleos de Venezuela, S.A.*] was Venezuela's alter ego without the use of any discovery from Venezuela or PDVSA. Venezuela knew everything about its relationship with PDVSA. We did not.

Our team combed the public record in order to make our case, and we looked at everything from financial disclosures, press releases, and government proclamations to posts on Twitter and YouTube videos showing the President of

Venezuela firing PDVSA employees on national television using a soccer whistle.

The hard work paid off as we were able to locate overwhelming evidence that the government controlled every aspect of PDVSA's existence. As a result, the court found that PDVSA and Venezuela are one and the same.

Lit Daily: Was there a moment or two that stands out to either of you personally during the course of the litigation?

Robert Weigel: It was a delight to argue beside Miguel, who is just so smart and quick on his feet. My favorite point was when Miguel took out his cellphone mid-argument and pulled up an old Supreme Court case he knew from memory and quoted it to Judge Stark to refute an unanticipated argument that the other side had made.

Lit Daily: Did you make any unconventional strategic choices?

Robert Weigel: One of the very first things we did for Crystallex after we were retained was to bring a Delaware Uniform Fraudulent Transfer Action challenging more than \$2.2 billion in dividend payments to PDVSA that were funded by CITGO Holding, Inc.—the holding company between PDV Holding and CITGO Petroleum—taking on billions of dollars of debt for no commercial purpose.

What made the move unconventional is that we filed the action before the arbitral award was issued, arguing that because the transfer occurred while the arbitration was pending it could be undone because it had been made to hinder recovery efforts of a future creditor.

The district court upheld the complaint, but the **Third Circuit** ultimately found, in a split decision, that while Venezuela and PDVSA had worked to hinder and delay creditors, the allegations didn't align with the elements of the statute and remanded the case back to the district court.

Proceedings to amend the complaint to address the Third Circuit's concerns were ultimately stayed pending the decision in this case—but the fraudulent transfer action helped signal to Venezuela that Crystallex was serious about collecting on its award and wouldn't go away quietly. And to this day Crystallex continues to work to satisfy its judgment.

Lit Daily: What happens next?

Miguel Estrada: PDVSA has filed a notice of appeal. In the meantime, Crystallex will advise the court on the execution process and continue to push forward with efforts to attach and ultimately sell the shares.

Lit Daily: What makes this case significant?

Miguel Estrada: Crystallex is now the first of Venezuela's many judgment creditors to successfully reach a significant asset to satisfy the country's obligations.