THE ASSET TRACING AND RECOVERY REVIEW

EIGHTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

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PREFACE

As Warren Buffet famously said, 'only when the tide goes out do you discover who has been swimming naked'. The coronavirus pandemic has offered the global economy another opportunity to prove him right. Not only are new frauds being discovered, but the growing recession will challenge the budgets of victims, regulators and criminal enforcement bodies to bring those responsible to justice and to retrieve the proceeds. Remote interpersonal dealings are increasing the distance between business counterparties in a way that the internet did, and the growth of cryptocurrency transactions continues to do.

It is not possible to predict the trajectory of these developments. While it is now a cliché to speak of the 'new normal', nobody can be actually sure what that normal will be. Some even dispute that it is useful to speak of a normal at all. Nassim Taleb has argued that the financial world is more frequently and radically affected by extreme and unpredictable occurrences (which he calls 'Sigma' or 'Black Swan' events) than we acknowledge. According to Taleb, we live in 'extremistan' and not 'mediocristan'. He has suggested that it is part of our makeup to blind ourselves to the influence of what we cannot predict.

Taleb may be right. For my part, I rather think that he is. But amid all the unpredictability, there are nevertheless some certainties. Society depends upon trust, and there will always be some people who abuse it. So some people will always commit fraud. Globalisation has ensured that major fraud will usually have an international element. Fraud lawyers will therefore have to be internationally minded.

Perhaps most of all, the growing international and technical complexity of fraud will continue to outstrip the ability of any one person to understand or remedy it. One of the heartening things about the legal profession over the past 25 years or so is the growth of an international community of lawyers specialising in fraud and asset tracing work who share knowledge and experience with each other about the events in their fields. This book continues to be a useful contribution to that community.

Robert Hunter
Robert Hunter Consultants
August 2020

Chapter 29

UNITED STATES

Steven K Davidson, Michael J Baratz, Jared R Butcher and Molly Bruder Fox[1]

I OVERVIEW

The United States – and New York in particular – is a major financial centre, generating substantial investment capital. Many of the world's largest banks, law firms and accounting firms maintain offices in New York and elsewhere in the United States. As a result, a host of international business and financial transactions touch the United States and fall within the jurisdiction of its courts.

The focus of this chapter is fraud, but most of the transactions conducted in the United States are not fraudulent. Financial transactions – and the banks and others who facilitate them – are highly regulated by United States law and offer a reasonable level of transparency to participants. There are few barriers to transparency such as banking secrecy laws. Nevertheless, the sheer volume of transactions and the ready availability of funding create opportunities to defraud investors and third parties. In these cases, law enforcement authorities and courts are willing to assist victims.

Fraudulent conduct often violates United States laws and leads law enforcement authorities to launch investigations and assist recovery efforts. In particular, United States capital markets are highly regulated to prevent fraud and ensure the safety of investors. Victims, including those abroad, may also be able to bring civil lawsuits if fraudulent conduct has a sufficient connection to the United States or its citizens.

The United States is a common law jurisdiction with a dual court system. Federal courts have limited jurisdiction authorised by the Constitution and federal statute. Each of the 50 states, plus the national capital, the District of Columbia, also has its own courts of general jurisdiction. Both state and federal courts offer an independent and skilled judiciary, broad discovery and significant mechanisms for enforcing judgments. The common law governing fraud is generally a matter of state law, although it has been incorporated into many federal fraud statutes. Fraud claims are generally heard in state courts unless a federal law applies or the plaintiff can invoke federal court jurisdiction based on the diverse residence of the parties.

United States courts will also assist foreign courts and arbitral tribunals if victims of fraud choose to pursue their claims elsewhere. Claimants in foreign cases will often obtain US discovery and provisional remedies that secure US assets pending the outcome of a foreign

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proceeding. Once a foreign judgment or arbitral award is rendered, United States' courts rarely refuse to enforce it. Thus, victims of fraud – whether proceeding in the United States or another jurisdiction – should avail themselves of the remedies offered by the US legal system.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Criminal remedies

The United States has myriad criminal laws against fraud. Law enforcement may investigate and bring civil or criminal actions against perpetrators. Certain frauds involving areas such as securities, antitrust, banking or organised crime are subject to the jurisdiction of a specialised government agency.

A possible government investigation, however, may not result in a satisfying or timely resolution for fraud victims. Victims of fraud should therefore consider whether they have the resources to conduct their own investigation. Especially where a victim cannot effectively pursue a claim, it may be worth asking law enforcement to investigate. Many fraud investigations are commenced as the result of complaints by private citizens or independent investigators. Under appropriate circumstances, the opportunity exists for victims to leverage the considerable powers of the government to investigate wrongdoing and hold the perpetrators accountable.

Civil remedies

Racketeer Influenced and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides criminal and civil remedies for victims of organised crime and other criminal schemes.[2] RICO claims must meet stringent technical requirements that are beyond the scope of this chapter. Assuming those requirements are met, however, RICO offers victims a chance to recover treble damages through private lawsuits.

Under RICO, defendants who engage in a pattern of racketeering activity or collection of unlawful debts, and who participate in an enterprise that affects interstate or foreign commerce, can be held liable to those who suffer damage to their business or property. Racketeering activity includes a variety of violations of state and federal laws. An enterprise includes any individual, partnership, corporation, association or other legal entity, and any group of individuals associated in fact although not a legal entity.[3]

To be liable, defendants must have one of four specific relationships to the enterprise:

a investing the proceeds of the pattern of racketeering activity into the enterprise;

b having an interest in, or control over, the enterprise through the pattern of racketeering activity;

c participating in the affairs of the enterprise through the pattern of racketeering activity; or

d conspiring to accomplish one of the first three activities.[4]

2 See 8 USC Sections 1961–1968.

3 See *Boyle v. United States*, 556 US 938, 944-45 (2009).

4 See 28 USC Section 1962.

Courts have held that RICO does not apply to conduct outside the United States.[5] There is no bright-line test for determining whether a RICO claim is impermissibly extraterritorial, but courts will look for facts such as whether the claim involves US companies or individuals, and whether it involves conduct in the United States or directed at the United States. For example, the Second Circuit Court of Appeals has held that 'RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate', meaning that when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will also apply to extraterritorial conduct.[6] The US Supreme Court, however, reversed this case in *RJR Nabisco Inc v. The European Community*,[7] holding that to bring a RICO civil action, a plaintiff must 'allege and prove a domestic injury to business or property and [RICO] does not allow recovery for foreign injuries'.[8] This case was brought by the European Community and 26 of its Member States against US tobacco companies alleging money laundering schemes in association with various international organised crime groups. Through the alleged scheme, drug traffickers smuggled narcotics into Europe and sold them for euros that were used to pay for large shipments of RJR cigarettes into Europe. While the Court found that these acts violated RICO, and that RICO's predicate acts applied extraterritorially, the case had to be dismissed because the injury was not domestic. This is a new development in the law. It may be that, as the case law develops in the lower courts, there will be fact patterns that sufficiently allege domestic injury under circumstances where a foreign plaintiff is located abroad. As of now, foreign entities advancing a RICO theory will have to show they suffered an injury to their business or property in the US.

Fiduciary duty claims

US law often imposes fiduciary duties on those – such as corporate directors, trustees, administrators and executors – who occupy a position of trust because of their power over the financial interests of another. Conduct violating that trust may form the basis of a claim for breach of fiduciary duty. However, fiduciary duties are not ordinarily imposed in typical business disputes, and parties to these disputes generally are not obligated to act in each other's best interests. There must be special circumstances establishing a fiduciary relationship between a perpetrator and a victim.

A typical example of this type of claim arises in the event a company is defrauded by its executives and directors. Under United States law, corporate executives and directors owe a fiduciary duty that obligates them to act in the best interest of the company. They are subject to liability if they enrich themselves at the expense of shareholders.

Common law fraud claims

Fraud victims can resort to a variety of common law and statutory fraud claims. The requirements for these claims vary from state to state and statute to statute, but they generally apply where a victim relies to his or her detriment on another's intentional misstatement or

5 See, for example, *Norex Petroleum Ltd v. Access Industries Inc*, 631 F.3d 29 (2d Cir 2010).

6 *European Community v. RJR Nabisco Inc*, 2014 WL 1613878, at *4 (2d Cir 23 April 2014).

7 136 S Ct 2090 (2016).

8 id. at 27.

omission.[9] Fraud claims do not require that the perpetrator have any special relationship with his or her victim, and can entitle a successful plaintiff to both compensatory and punitive damages.

Fraud victims often find that stolen assets have been dissipated by the time they have sufficient information to bring a claim. In such a circumstance, it often makes sense to bring claims against those who assist the perpetrators of the fraud. US courts recognise traditional claims for aiding and abetting fraud and conspiracy to commit fraud. Meanwhile, accomplices may be held liable to the same extent as the principal perpetrators.

In some cases, perpetrators will abuse the corporate form to commit fraud in the hope that the limited liability afforded to corporations under US law will defeat any claims against them directly, leaving victims with recourse only against the corporation itself, which may be insolvent. These circumstances call for application of alter ego and veil-piercing theories of liability. Alter ego allows courts to disregard corporate structures and find that separate legal entities should be treated as one and the same for purposes of particular claims. Similarly, veil piercing allows courts to use their equitable powers to hold an entity's owners liable for the obligations of the entity. The specific facts required to support this theory vary from state to state, but courts typically will consider whether those in control of a corporation did not treat the corporation as a distinct entity and, if they did not, whether the specific facts show fraud or misuse of the corporate form.[10] Thus, a parent company or an individual owner who uses a company to commit fraud may be directly liable to the victims under appropriate circumstances.

These principles were applied in *Motorola Credit Corp v. Uzan*.[11] A New York federal court found that Libananco Holdings (a Cypriot company) was the alter ego of members of the Uzan family in Turkey. The court ruled that any potential recovery by Libananco in a pending international arbitration against Turkey must be used to pay the victims of a fraud perpetrated by the Uzans. The court concluded that claimants Motorola and Nokia presented sufficient evidence to show that Libananco was a corporate alter ego of the Uzan family, and that Libananco's corporate veil could be pierced so as to permit Motorola and Nokia to enforce their fraud judgment against the Uzans. Thus, the court ordered Libananco to turn over any property to the claimants that could be used to make good on the fraud judgment, including any recovery in the arbitration.

Fraudulent conveyances

Where assets have been fraudulently transferred to thwart potential claims, the transfer may be set aside. Many states have enacted fraudulent transfer statutes that allow a creditor to reverse a transfer that was made for less than fair consideration or with an intent to thwart creditors.[12] A showing of fraudulent transfer requires, among other elements, the presence of 'badges of fraud' often found in transactions designed to thwart creditors. Examples include transfers:

a between related parties;
b for less than fair consideration;
c involving entities with inadequate capitalisation;

9 Restatement (Second) of Torts, Section 525.

10 *Mobil Oil Corp v. Linear Films Inc*, 718 F Supp 260, 269 (D Del 1989).

11 739 F Supp 2d 636 (Southern District of New York (SDNY) 2010).

12 NY Debtor & Creditor Law, Section 276.

d involving sham entities;
e that result in the transferor becoming insolvent;
f where the transferor retains possession or control over the transferred assets; and
g in response to pending litigation or other claims.[13]

Other considerations

The chances of successful recovery by victims of fraud are difficult to quantify because they depend on a variety of factors. Chances are best if claims are based on documentary evidence and there are assets available in the United States to satisfy any judgment. US courts will focus heavily on emails and other documents as evidence of fraud. Without a paper trail evidencing the fraud, courts may be sceptical of claims and may dismiss them at an early stage. Meanwhile, assets have often been squandered or hidden away such that nothing may be readily available to satisfy a judgment, even if a fraud claim succeeds. Fraud victims should consider whether the potential recovery merits the risks and expense of a lawsuit.

Other procedural considerations include timing and standing. The time frame within which a fraud claim may be commenced is dictated by statute, with the period in New York being six years after discovery of the fraud.[14] Because fraud is often committed in a manner designed to avoid detection, the statutory time period may be extended depending on when the victim was on notice of the fraudulent conduct.[15]

Once on notice, any victim of fraud ordinarily has standing to bring a lawsuit, with one notable exception. Shareholders who believe that a company's officers or directors have engaged in fraud may be required to ask the company to bring a claim. If the company declines to bring a claim against its officers and directors, then shareholders may be able to sue in their own right.[16]

Finally, the 'American rule' is that a litigant may not collect attorneys' fees, even if a claim results in a favourable judgment. There may be times when fees are available – for example, because they are provided by an applicable agreement or statute – but these cases are the exception. Victims contemplating litigation in the United States should take into account that they are likely to have to pay their own legal fees and costs.

ii Defences to fraud claims

Defences to fraud claims vary with the facts of each case. Claimants should consider whether the perpetrators are subject to personal jurisdiction in the United States, and whether there is an alternative forum with a greater interest in the matter at issue. Personal jurisdiction in a US court may be established if a defendant has continuous and systematic contacts there – such as doing business in the United States – or if the defendant can be served with legal process while located in the United States.[17] Alternatively, jurisdiction may be established

13 *Silverman v. Actrade Capital Inc (In re Actrade Fin Techs Ltd)*, 337 BR 791, 809 (Bankr SDNY 2005); see also Uniform Fraudulent Transfers Act, Section 4(b).

14 NY Civ Prac L & R 213.

15 NY CPLR 203(g).

16 See *Kamen v. Kemper Fin Servs*, 500 US 90 (1991); Fed R Civ P 23.1.

17 See *Burnham v. Superior Court*, 495 US 604, 618 (1990).

if the fraudulent conduct either occurred in the United States or had a direct effect in the United States. This type of jurisdiction is governed by state 'long-arm' statutes, which can vary from state to state.[18]

A related defence is the doctrine of *forum non conveniens*, which holds that a court has discretion to dismiss a claim if there is an adequate alternative forum with a greater connection to the underlying misconduct.[19] Courts consider a variety of factors in making this determination, with no single factor being dispositive. Like the issue of personal jurisdiction, *forum non conveniens* may be raised at the outset of a lawsuit and, if successful, will result in early dismissal. Unlike personal jurisdiction, the doctrine is discretionary, making it harder to successfully appeal an unfavourable ruling.

Fraud claims also are subject to a heightened pleading standard. For example, federal courts require claimants to state with particularity the circumstances constituting fraud, including specific misstatements along with the speaker, time and place.[20] This requirement may pose a problem for a victim of fraud who is unlikely to be informed of the details of the scheme. Nevertheless, failure to plead sufficient details will result in dismissal.

Of course, avoiding early dismissal is just the first step and does not prevent a defendant from establishing defences to the merits of a fraud claim – for example, that the conduct at issue was not fraudulent or was not the cause of the injury to the claimant, or that the claimant willingly participated in the scheme.

One substantive issue that can pose a significant obstacle to fraud claims is whether the claimant fulfilled the duty to investigate the circumstances alleged to constitute the fraud. If a fraudulent misrepresentation involves facts that are known to the victim, or that are obvious to the victim, courts may conclude that the victim's alleged reliance on the misrepresentation was not justified, thereby precluding recovery. The fraud laws vary across the 50 states on this issue. Some require victims to conduct a reasonable investigation whenever they are aware of facts indicating that the perpetrators' representations may be false. Others provide that mere suspicious circumstances do not trigger a duty to investigate, and that a victim may claim justifiable reliance on the misrepresentation even if a reasonable investigation would have uncovered the fraud.

A related obstacle arises in the context of fraud claims based on concealment or non-disclosure of information. If a perpetrator intentionally conceals a material fact and prevents the victim from discovering it, then a fraud claim may be pursued. On the other hand, simply failing to disclose a material fact is actionable only if the perpetrator is under a duty to the victim to exercise reasonable care to disclose the fact in question.[21]

18 For example, NY CPLR 302.

19 See *Piper Aircraft Co v. Reyno*, 454 US 235 (1981); *Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474 (1985).

20 Fed R Civ P 9(b).

21 Restatement (Second) of Torts, Section 551.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

State law governs the procedure for securing assets, either before or after a judgment. Even if the litigation occurs in federal court, the federal rules provide that state law governs enforcement remedies.[22] State laws are not uniform on these remedies. It is useful, however, to consider the example set by New York law because of New York's status as a financial centre and its robust anti-fraud and pro-judgment enforcement regime.

Pre-judgment restraints of assets

Pre-judgment attachment of assets

A claimant may seek pre-judgment attachment in state or federal court in aid of an impending litigation or arbitration even before any claims are filed. New York law expressly permits such an action, and in the federal courts, pre-judgment attachment is available to the extent permissible under state law.[23] The substantive requirements for obtaining pre-judgment attachment are:

a the existence of a cause of action;
b a probability that the plaintiff will succeed on the merits;
c that any award will be rendered ineffectual without relief; and
d the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.[24]

The additional requirements ordinarily necessary for injunctive relief – irreparable harm and the balance of the equities tipping in the applicant's favour – are not required to obtain an attachment, if the attachment is sought in aid of a foreign arbitration.[25] If successful, a pre-judgment attachment order can be used to freeze assets belonging to or controlled by the defendant, so long as the assets are within the jurisdictional reach of the court.

Restraining notices

A restraining notice, when available, such as under New York law, can be a powerful enforcement tool. In contrast with attachment and garnishment orders – which are directed at specific property – a restraining notice is similar to an injunction and broadly restrains assets or debts belonging to the judgment debtor. Upon service of a restraining notice on a third party, all of a defendant's property in the possession or thereafter coming into possession of the third party, as well as all debts then due or thereafter coming due, are subject to the restraining notice.[26] A claimant can use this remedy in conjunction with either a pre-judgment attachment order or a final judgment for the purpose of restraining any assets held by the defendant or third parties.

22 Fed R Civ P 64 & 69.
23 See Fed R Civ P 64.
24 NY CPLR 6212 (a).
25 *SiVault Sys Inc v. Wondernet Ltd*, No. 05 Civ 0890, 2005 WL 681457, *3 (SDNY 2005).
26 NY CPLR 5222.

Garnishment

Garnishment is a mechanism whereby a claimant can enforce the payment of a debt or claim by pursuing assets of a defendant in the possession of third parties. Garnishment is similar to attachment and is used where the assets to be attached are in the possession of someone other than the defendant. The use of garnishment may be particularly effective where a third party owes a debt to the defendant. The debt can be paid to the claimant, with the amount credited toward the outstanding balance of the unpaid claim or debt.

Replevin

Replevin is an infrequently used remedy that a claimant may invoke to recover specific property that has been wrongfully taken by the defendant. Unlike the more common remedy of money damages, replevin seeks the return of the property itself. This remedy may be appropriate in situations where a defendant has wrongfully taken unique, high-value property. To obtain replevin, a claimant must show that the defendant possesses (either actually or constructively) a specific and identifiable item of personal property in which the claimant has a superior right of possession, that right being both immediate and not contingent on a condition precedent.

Sequestration

Sequestration may be available where a corporation fails to satisfy a judgment against it. A claimant may commence an action and obtain a court order sequestering a corporation's property and providing for distribution thereof. All of the corporation's creditors are entitled to share in the distribution. It should be noted that this remedy is only available to claimants with unsatisfied judgments upon proof that other judgment enforcement remedies have been exhausted.

Preliminary injunctions restraining assets

Injunctive relief in the United States is somewhat limited. Most notably, unlike in the United Kingdom and other jurisdictions, the *Mareva* injunction – a general worldwide freezing order – has been expressly prohibited by a five-to-four decision of the United States Supreme Court in *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc*.[27] The Court held that a US federal court lacks the power to issue pre-judgment injunctions freezing a defendant's assets to ensure their availability for a future judgment of money damages unless the claimant can demonstrate a legal or equitable interest in particular property. Thus, to obtain a pre-judgment restraint of a particular asset, a claimant must demonstrate some nexus between the subject funds or assets to be attached or otherwise restrained and the claim. Federal courts are without authority to issue any sort of worldwide freezing order restraining a defendant's assets pending adjudication of a claim. As discussed immediately below, however, post-judgment remedies are far broader and do not require the same level of specificity; a general injunction against the judgment debtor and its assets will suffice.

27 527 US 308 (1999).

Post-judgment enforcement

Writ of execution

A money judgment is enforced by a writ of execution unless the court directs otherwise.[28] A writ of execution is the process by which a court aids a judgment-creditor by seizing a judgment debtor's non-exempt property or assets, up to an amount sufficient to satisfy the judgment. The writ of execution orders a duly authorised officer of the state – a US marshal, a sheriff or other agent acting under the colour of law – to seize real or personal property, sell it and transfer the proceeds (fewer costs).

A writ is available against third parties who are in possession of a debtor's assets. In this circumstance, the debtor must be notified of the creditor's intent to proceed against the assets. A third party who violates a writ, or otherwise assists the debtor to avoid execution thereof, may be held liable to the creditor for the value of any assets that were dissipated or otherwise made unavailable for execution of the writ.

Turnover orders

Post-judgment, turnover orders are particularly useful tools because they can require a judgment debtor to transfer and turn over to the judgment-creditor enough assets to satisfy a judgment regardless of where those assets are located, potentially including assets located outside the United States.[29] Turnover orders can also be directed to third parties, such as banks, who possess the defendant's assets, as long as those third parties are subject to the court's jurisdiction.[30] The New York Court of Appeals has held that a turnover order directed at a third party is effective against specific property, even if that property is located outside New York or the United States.[31] The precise reach of these orders remains an unresolved issue.

Receivers

If a judgment is obtained by the claimant and remains unpaid, a receiver may be appointed by the court to take charge of assets in which the defendant has an interest.[32] This remedy may be appropriate in situations where merely seizing and selling the assets is not workable. For example, a receiver may be appointed to manage distressed assets, collect rents due or arrange for liquidation of assets. In certain circumstances, a receiver can also be appointed before trial to preserve the status quo.

Invoking a court's equitable powers for post-judgment enforcement

Even though a writ of execution is the primary means by which money judgments are enforced in the United States, federal courts have equitable powers to enforce judgments under extraordinary circumstances.[33] Such relief is not common, perhaps because, as one court has observed, the ordinary 'difficulties in enforcing the judgment due to the location of the assets and the uncooperativeness of the judgment debtor are not the types of extraordinary

28 See Fed R Civ P 69.

29 NY CPLR 5225.

30 NY CPLR 5225(b).

31 *Koehler v. Bank of Bermuda Ltd*, 12 NY3d 533 (NY 2009).

32 NY CPLR 5228.

33 See *Motorola Credit Corp v. Uzan*, 288 F Supp 2d 558, 561 (SDNY 2003).

circumstances that warrant departure from the general rule that money judgments are enforced by means of writs of execution rather than by resort to the contempt powers of the courts'.[34]

ii Obtaining evidence

US courts allow broad discovery in litigation. Information that is relevant or that may lead to the discovery of admissible evidence is ordinarily discoverable.[35] Moreover, discovery from third parties is available by subpoena, which can be issued by the claimant's attorney, although third parties are not expected to provide the same broad discovery required of the parties themselves.

Assuming the claimant obtains a judgment, additional discovery, including third-party discovery, is permitted in aid of judgment enforcement.[36] A claimant may seek discovery from the defendant or third parties such as banks (where the defendant may keep cash and other assets). If the defendant is an entity, discovery may include its owners and subsidiaries in an effort to locate assets (or information leading to assets) that could be executed against. Notably, the United States' Supreme Court has held that sovereign immunity does not restrict the normal post-judgment discovery available in United States courts, meaning that broad discovery should be available to claimants even if their judgments involve foreign sovereigns.[37]

Objections to discovery include overbreadth, undue burden or expense, and privilege and privacy concerns. Privilege concerns allow the producing party to withhold documents and information entirely, subject to objection by the requesting party, which may be resolved by the court. Other objections can sometimes be resolved through the parties' negotiation. If not, the requesting party may file a motion to compel production of the documents and information at issue.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Bank fraud and money laundering are crimes in the United States. Depending on the nature of a crime, an investigation could be commenced by federal authorities, state authorities, or both. On occasion, an investigation will result from information provided by a victim or concerned citizen. However, the investigation will be dictated by the law enforcement authorities, who have discretion to decline to file criminal charges. If charges are filed, the authorities may negotiate a plea bargain with the defendant, or they may proceed to a jury trial.

Criminal penalties are provided by statute and may be imposed by a court if the defendant is convicted of the crimes. Penalties may include fines, incarceration, probation and community service. They often do not involve any recovery for victims. If restitution to the victims is an available penalty, it still may not fully compensate the victims for their losses.

34 *Cordius Trust v. Kummerfeld*, No. 99 Civ 3200 (DLC), 2009 WL 3416235 at *7 n8 (SDNY 23 October 2009) (Cote, J) (issuing a quitclaim deed for real property owned by the judgment debtors).

35 Fed R Civ P 26(b)(1).

36 See Fed R Civ P 69(a)(2); NY CPLR 5223.

37 See *Republic of Argentina v. NML Capital Ltd*, 134 S Ct 2250 (2014).

As a result, victims of banking fraud or money laundering may wish to consider bringing a civil lawsuit. Civil claims may proceed in conjunction with criminal charges or in the absence of charges. The burden of proof is lower in civil litigation, meaning that a civil claim may succeed even if criminal charges do not result in a conviction.

ii Insolvency

A wrongdoer's insolvency can pose significant challenges to victims of fraud. An insolvent individual may be judgment-proof; an insolvent entity may enter bankruptcy. The bottom line is that the compensation available to victims may be minimal.

Bankruptcies ordinarily proceed in the US bankruptcy courts. A trustee is appointed and may pursue claims on behalf of creditors, including those with legal claims against the bankrupt party. Transfers of assets made 90 days prior to the bankruptcy filing may be set aside, and the clawback period may extend as far back as one year if the transfer involved an insider.[38] Pro rata distributions of proceeds recovered by the trustee will be made according to the priority of the creditors' claims. Secured creditors are paid first. Unsecured creditors, including judgment-creditors, may be left with no recovery at all.

A special case of fiduciary duty arises where a victim of fraud obtains a judgment against an entity that becomes insolvent while a claim is pending or after a judgment has been obtained. In this circumstance, the law may impose a fiduciary duty in favour of the entity's creditors, including judgment-creditors.[39] This means that the judgment-creditor is to be treated with the same care as a shareholder and may have the same rights to recover against the entity's management for violation of the fiduciary duty. Moreover, a creditor may be able to set aside and recover transfers of assets that either rendered the entity insolvent or occurred after the point of insolvency.

iii Arbitration

United States courts strongly favour arbitration. The Federal Arbitration Act (FAA) establishes 'a liberal federal policy favouring arbitration agreements'.[40] This liberal policy applies to enforcement of not only arbitration agreements, but also awards rendered pursuant to these agreements.

Before an award is even rendered, some jurisdictions – New York, for example – authorise provisional remedies to secure assets for satisfaction of the award.[41] Discovery may also be authorised in aid of arbitration.

After the award is rendered, the FAA provides three avenues for enforcement as a judgment of a US court. For awards rendered in the United States, application for judgment may be made in the United States' district court for the district where the arbitration was conducted.[42]

For international arbitrations, confirmation of an award may be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Assuming the Convention's criteria are satisfied, a judgment may be obtained through a summary

38 11 USC Section 1147(b).

39 See *Geyer v. Ingersoll Publ'ns*, 621 A2d 784, 787 (Del Ch 1992) ('Under Delaware law, creditors of an insolvent corporation are owed fiduciary duties').

40 *Moses H Cone Memorial Hospital v. Mercury Constr Corp*, 460 US 1, 24 (1983).

41 NY CPLR 7502.

42 9 USC, Section 9.

proceeding in any district court having jurisdiction over the defendant.[43] This proceeding is not intended to involve complex factual determinations, and is concerned only with the seven defences to confirmation under the Convention, as well as personal jurisdiction and venue issues.[44] Recent guidance from the US Supreme Court has focused on the question of personal jurisdiction, and a claimant seeking to confirm an award should consider carefully which US court, if any, may have jurisdiction over the award debtor.[45]

A third option is available if an award falls under the auspices of the Inter-American Convention on International Commercial Arbitration. The Inter-American Convention applies where the 'majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States'.[46] The arbitration must arise from a commercial relationship and must not involve only United States citizens.[47] The arbitral award must be confirmed by a United States court to become a final and enforceable judgment. Confirmation is mandatory unless the court finds one of the seven grounds for refusal under the Convention.[48] The court also may vacate or modify the award under the limited circumstances set out by the FAA.[49]

Arbitral award holders should be aware of a trend in US jurisprudence regarding the requirement of personal jurisdiction to enforce an award in US courts. In *Daimler AG v. Bauman*, the US Supreme Court held that a defendant cannot be subject to general personal jurisdiction in a US court unless the defendant has such continuous contact with the forum that the defendant can be considered 'at home' there.[50] This holding arguably makes it more difficult for a US court to assert personal jurisdiction, because the defendant may have substantial contacts in many places but is unlikely to be deemed at home in all of them. Even a substantial, continuous and systematic course of business alone is insufficient to render a defendant at home in a forum.[51] This principle has been applied by some courts in the context of actions to enforce arbitral awards. In *Sonera Holding BV v. Cukurova Holding AS*, the claimant prevailed in an arbitration in Switzerland and brought an action to enforce the arbitral award in the Southern District of New York. The Second Circuit Court of Appeals dismissed the action, finding a lack of sufficient contacts to support personal jurisdiction.[52]

The lesson is that a claimant who obtains a favourable arbitral award in a jurisdiction outside the US should not assume that the award will be enforceable in an action against the defendant in a US court. A claimant should consider whether there is a specific connection between the underlying controversy and the US forum and, if not, whether the defendant has

43 9 USC, Section 207.

44 See *Zeiler v. Deitsch*, 500 F3d 157, 169 (2d Cir 2007).

45 See *Sonera Holding BV v. Cukurova Holding AS*, 750 F3d 221, 225 (2d Cir 2014) (discussing *Daimler AG v. Bauman*, 134 S Ct 746 (2014), and reversing a judgment confirming an arbitral award due to lack of personal jurisdiction).

46 9 USC, Section 305.

47 9 USC Section 202.

48 See *Banco de Seguros del Estado v. Mutual Marine Offices Inc*, 257 F Supp 2d 681, 686 (SDNY 2003).

49 id.; see also 9 USC, Section 10(a) (as to vacatur) and Section 11 (as to modification).

50 134 S Ct 746 (2014).

51 id. at 761.

52 750 F3d 221 (2d Cir 2014).

other contacts (or assets) within the preferred forum to provide another basis for jurisdiction. Ordinarily, jurisdiction will be found if the defendant has assets within the jurisdiction of the US court.

iv Fraud's effect on evidentiary rules and legal privilege

US rules of evidence and procedure recognise a powerful attorney–client privilege that shields legal communications from discovery. This privilege can sometimes hamper a claimant's ability to prove a claim because it prevents discovery of some documents and communications that contain important information.

The privilege is not inviolable, however, and fraud can nullify privilege in some cases. Privilege may be waived where a perpetrator uses counsel's advice or services to accomplish a crime or fraud. This is true even if counsel does not know of the fraud.

In *United States v. Zolin*, the US Supreme Court set out the process for courts to follow when evaluating the fraud exception to privilege.[53] The claimant must make a prima facie showing of fraud, which the Court described as 'a factual basis adequate to support a good faith belief by a reasonable person . . . that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies'.[54] If this showing is made, the court then has discretion to review in camera the privileged documents, and to determine whether the privilege should be nullified and what materials should be produced to the claimant.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Choice of law in fraud claims can be complicated, especially where the conduct at issue occurred in multiple jurisdictions. In the United States, the issue is governed by state law, and the applicable legal principles can vary significantly from state to state.

The first question is whether there is a contract or other document governing the relationship between the parties, and if so, whether it contains a choice of law provision. US courts will enforce contractual choice of law clauses, and may interpret those clauses to encompass tort claims as well as contract claims. This is often the case when the parties have engaged in a commercial transaction that in turn gives rise to the fraud, and the applicable agreements contain a broad provision controlling all claims arising from or related to the parties' business dealings. Victims of fraud should consider whether they have entered into any contracts containing choice of law clauses.

The particular language is important. A provision stating that a contract is governed by a certain state's law may not be enough to encompass fraud claims and other tort claims.[55] By contrast, in *Turtur v. Rothschild Registry International Inc*, it was held that a fraud claim was subject to a contractual choice-of-law provision because the parties had agreed to apply New York law to 'any controversy or claim arising out of or relating to' their contract.[56]

53 491 US 554 (1989).

54 id. at 572.

55 See *Knieriemen v. Bache Halsey Stuart Shields Inc*, 74 AD2d 290, 427 NYS2d 10 (App Div 1st Dep't 1980), overruled on other grounds, *Rescildo v. RH Macy's*, 187 AD2d 112, 594 NYS2d 139 (App Div 1st Dep't 1993).

56 26 F3d 304, 309-10 (2d Cir 1994).

In the absence of a contractual choice of law, a court will identify the jurisdictions that have an interest in the matter at issue. The first question is whether the result will differ depending on which jurisdiction's law applies. In the absence of a different result, if there is no conflict, there will be no need to perform a choice-of-law analysis. If a conflict is found, a court will apply the conflict of laws principles of the jurisdiction where the court is located. Several different governing principles have been applied to fraud claims in this situation. Currently, the majority view is that the law to be applied is the law of the jurisdiction with the most significant relationship to the fraud claim, as determined by analysis of all the facts and circumstances surrounding a case.[57] In this analysis, 'the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort'.[58]

ii Collection of evidence in support of proceedings abroad

US federal district courts have the power to order discovery for use in a foreign legal proceeding.[59] The district court must find that the party from whom discovery is sought can be found in the district where the application is made; that the discovery will be used in a proceeding before a foreign or international tribunal; and that the party applying for discovery is an interested person in the foreign proceeding.[60]

A person is found wherever he or she maintains a residence, even if only on a temporary or part-time basis; or wherever he or she is personally served with the discovery requests. Entities are found wherever they maintain corporate headquarters or conduct continuous activities.[61]

Proceedings before a foreign or international tribunal include proceedings in foreign courts, as well as administrative proceedings and government investigations.[62] The proceeding must be within reasonable contemplation but is not required to be pending or imminent.[63] There is some dispute whether a private foreign arbitration qualifies as a proceeding for which discovery may be ordered. The United States Court of Appeals for the Second Circuit recently reaffirmed its view that Section 1782(a) does not extend to private international commercial arbitrations.[64] The Second Circuit revisited its prior view about the scope of Section 1782 in light of a subsequent decision of the Supreme Court – see *Intel Corp v. Advanced Micro Devices, Inc*[65] – but concluded 'nothing in the Supreme Court's *Intel* decision alters our prior conclusion . . .'[66] The Sixth Circuit, however, held that a federal district court may order discovery for use in a foreign private arbitration.[67] The Sixth Circuit held that

57 Restatement (Second) of the Law of Conflicts, Section 148.

58 *AroChem Int'l Inc v. Buirkle*, 968 F.2d 266, 270 (2d Cir 1992).

59 28 USC Section 1782.

60 See *Intel Corp v. Advanced Micro Devices*, 542 US 241, 248-49 (2003).

61 See *In re Edelman*, 295 F3d 171, 179 (2d Cir 2002); In re Godfrey, 526 F Supp 2d 417, 422 (SDNY 2007).

62 *Intel Corp v. Advanced Micro Devices Inc*, 542 US 241, 258 (2004).

63 Intel Corp, 542 US at 259.

64 *In Re Guo*, No. 19-781, 2020 WL 3816098, at *1 (2d Cir. July 8, 2020), as amended (July 9, 2020); see also *National Broadcasting Co., Inc. v. Bear Stearns & Co, Inc*, 165 F.3d 184 (2d Cir. 1999).

65 542 U.S. 241, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004)

66 *In Re Guo*, No. 19-781, 2020 WL 3816098, at *1.

67 *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F. 3d 710, 714 (6th Cir. 2019).

private international arbitration is a 'foreign tribunal for purposes of that statute. The Sixth Circuit's decision creates a circuit split between it and the Second and Fifth Circuits[68] – a split that the United States Supreme Court may be interested in resolving, given its *Intel* opinion.

The same Second Circuit court, however, found that Section 1782 authorises discovery for use in a foreign criminal investigation conducted by a foreign investigating magistrate.[69] The discovery was requested for use in a Swiss criminal investigation, which the court found to be 'exactly the type of proceeding' that Section 1782 was intended to reach.[70]

The final requirement of an interested person is a term of art that includes litigants, investigating magistrates, administrative and arbitral tribunals, quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts.[71]

Discovery under Section 1782 includes both deposition testimony and document production.[72] It may be obtained by first filing an application and supporting memorandum and affidavit with the federal district court (or courts) where the subjects of the discovery are located. If the application is granted, the applicant may serve requests for documents and depositions. A federal district court may allow broad discovery, and the fact that the discovery may be broader than the discovery authorised by the foreign forum – or may not be admissible evidence in the foreign forum – is typically not relevant. The ultimate decision whether to order discovery is within the discretion of the federal district court.[73]

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

In contrast to their broad authority to order discovery, United States courts have a more limited ability to secure assets or proceeds of fraud in aid of a foreign proceeding. If a defendant is subject to personal jurisdiction, pre-judgment remedies will then be available in support of the litigation. However, it is not always clear whether an attachment may be issued in aid of a foreign lawsuit. Some state attachment statutes can be read to permit this, but the case law on this issue is not well developed.

In the context of arbitration, by contrast, some states explicitly allow attachments in aid of foreign arbitrations, New York being one of them.[74] In the matter of *Mobil Cerro Negro Ltd v. PDVSA Cerro Negro SA*, for example, the claimant, a subsidiary of ExxonMobil, successfully obtained a pre-award attachment of more than US$300 million in New York bank accounts, pending resolution of an arbitration before the International Chamber of Commerce seeking compensation from the government of Venezuela and its state-owned oil company for the illegal expropriation of the claimant's interest in a joint venture to exploit oil reserves in Venezuela's Orinoco Belt.[75] This is just one example of the willingness of US courts to freeze assets in aid of arbitration.

68 See *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999)

69 *In re Application for an Order Pursuant to 28 USC § 1782 to Conduct Discovery for Use in Foreign Proceedings,* 773 F3d 456 (2d Cir 2014).

70 id. at 461.

71 id.

72 See *Intel Corp*, 542 US at 249.

73 id. at 265.

74 NY CPLR 7502.

75 See Order Confirming Attachment, *Mobil Cerro Negro Ltd v. PDVSA Cerro Negro SA*, No. 07 Civ 11590 (DAB) (SDNY 3 January 2008). The authors of this chapter were counsel of record for the claimant in this action.

iv Enforcement of judgments granted abroad in relation to fraud claims

US courts take a liberal approach in recognising and enforcing foreign judgments. The judgment debtor, however, does have some ability to challenge a foreign judgment. Recognition and enforcement of foreign judgments is a matter of comity, and is governed by state law. Some states have codified the process, generally following some version of the Uniform Enforcement of Foreign Judgments Act. Others rely on the common law, which is described in *Hilton v. Guyot*,[76] and the Restatement of Foreign Relations Law Sections 481 and 482.

Ordinarily, a foreign judgment to be recognised originates from a civil proceeding, but it also may be possible for foreign criminal court judgments to be recognised and enforced to the extent they award compensation for actual damages suffered. In a matter of first impression, one New York appellate court held that 'the courts of this state must recognize a foreign country judgment issued by a [Czech] criminal court awarding a sum of money as compensation for damages sustained by the victim of a fraudulent scheme'.[77] The court reasoned that the judgment was not an unenforceable penalty because the purpose was to compensate the victim for actual damages.[78] Thus, the court allowed the victim to attach the judgment debtor's bank account funds located in New York.

The recognition process should be distinguished from the enforcement process. Most courts require a separate action to recognise a judgment before it may be enforced. The judgment must be final: it must conclusively resolve the dispute between the parties. The court in which recognition is sought must have jurisdiction either over the judgment debtor's assets or over the judgment debtor.[79] Additional mandatory grounds for refusing to recognise a foreign judgment are where the foreign court did not afford basic due process of law to the defendant; where the foreign court lacked jurisdiction over the defendant or the property at issue; or where the foreign court lacked subject matter jurisdiction over the dispute.

US courts recognise several discretionary reasons to refuse enforcement of foreign judgments. Fraud is one of them. Typically, the fraud must be extrinsic fraud such that the judgment debtor was prevented from adequately presenting its case to the foreign court. This could occur, for example, where the judgment-creditor withheld evidence from the foreign court or the court was corrupt.

A US court ordinarily will not refuse to enforce a foreign judgment on the basis of intrinsic fraud, including the veracity of testimony and the authenticity of documents. These matters are dealt with by the foreign court and are not subject to reexamination by US courts.

If successful, a recognised judgment becomes a local judgment enforceable under local law and entitled to full faith and credit in other courts within the United States. As such, the judgment-creditor may invoke any enforcement remedies available under local law, assuming that assets are within the jurisdiction of the court. Presumably, if assets or proceeds of fraud are not located within the United States, there would be little reason to undertake the process of recognising the foreign judgment there.

76 159 US 113 (1895).

77 *Harvardsky Prumyslovy Holding AS-V Likvidaci v. Kozeny*, 117 AD3d 77, 983 NYS2d 240, 241 (1st Dep't 2014).

78 id. at 243.

79 The precise requirements vary from state to state, and some courts may require personal jurisdiction over the judgment debtor as a prerequisite to recognition.

v Hague Convention

The Hague Convention of 30 June 2005 on Choice of Court Agreements (Convention) may make it easier to enforce judgments across multiple jurisdictions. The Convention, which entered into force on 1 October 2015, allows international parties to select a court forum in an agreement (via a forum selection clause or choice of court) to resolve their dispute, and further provides that the parties' choice must be respected by all other applicable courts. Moreover, Article 8 of the Convention requires any judgment entered in that chosen court to be recognised and enforced by all other courts in countries that are members of the Convention, with only very limited grounds for objection. Currently, the Convention is only effective between the European Union, Mexico and Singapore; the United States and Ukraine have signed (but not ratified) it, and other countries may sign on.

If a significant number of countries join, selecting a court forum for the resolution of commercial disputes could become more appealing in light of some of the benefits the Convention provides – namely, access to more robust interim measures and discovery procedures that courts often offer, while securing a level of certainty that the subsequent judgment will be enforceable across multiple jurisdictions. This is particularly true for the United States, which has not previously been a member of any treaty regarding the enforcement of court judgments. It remains to be seen whether the Convention will achieve success and be ratified by additional countries.

VI CURRENT DEVELOPMENTS

i The automatic stay provision under FRCP 62 extended to 30 days

Effective 1 December 2018, judgment-creditors are stayed from executing judgment for 30 days, an increase from 14 days under the formal rule. The original rule required a 10 business day stay. In 2009, Federal Rule of Civil Procedure (FRCP) 62 was amended to extend the automatic stay to 14 calendar days.

In addition to extending the automatic stay, the new rule gives the party seeking a stay more flexibility in the type of security posted. Previously, under FRCP 62(d), a party could only obtain a stay by a *supersedeas* bond. Under the updated rule, the party seeking a stay may post security in a form acceptable to the court other than a bond. See the Advisory Committee Notes.

While the amendment seems to benefit debtors, the rule change is not all bad news for creditors. Under the new rule, the court has explicit discretion to dissolve the automatic stay or replace it with a court-ordered stay. The Advisory Committee Notes indicate the court may dissolve a stay if there is a 'risk the judgment debtor's assets will be dissipated' or the judgment does not involve payment of money. Thus, the court could order dissolution of the stay and immediate execution of judgment if the circumstances permit.

This rule change seems motivated by the Committee's desire to level the playing field for debtors. Extending the automatic stay to 30 days will resolve the gap between the automatic stay – formerly 14 days – and the time to file most appeals – 30 days after entry of judgment. Now, the appellant will have the full 30 days to file an appeal without concern that the judgment-creditor will enforce the court's judgment. The Advisory Committee Notes explain that the 'revised rule eliminates any need to rely on inherent power to issue a stay during this period'.

ii Helms–Burton Act

In 1996, Congress authorised private rights of action to enforce claims for expropriation by Cuba that occurred during 1959 Cuban Revolution in US federal courts pursuant to the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, better known as the Helms–Burton Act. The claims are against those who, in the words of the Act, traffic in property confiscated by the Cuban government. However, Congress also authorised the President to suspend those rights for successive six-month periods, and every president has done so since the Act went into effect in August 1996. The Trump administration followed suit and continued the suspension until recently, when it shortened the six-month period to 45 days, and then later stated it will permit private actions to be brought. The reason for this change in policy is because the current administration views Cuba as supporting the Maduro regime in Venezuela.[80] This is a significant departure from prior administrations. Private litigants have filed lawsuits against traffickers in Florida and Washington, DC.[81]

The Act has long faced opposition from countries that do business with Cuba, including Canada, Mexico and Member States of the EU. The primary argument made by international opponents of the Act is that Title III provides for extraterritorial reach against companies outside of the US and Cuba in violation of customary international law and provisions of North American Free Trade Agreement, General Agreement on Tariffs and Trade and Global Agricultural Trade System. On 3 October 1996, the EU requested that the World Trade Organization appoint a dispute resolution panel on the Act. Shortly after passage of the Act, the Inter-American Judicial Committee of the Organization of American States issued a non-binding opinion declaring that Title III violates customary international law.[82]

In response to the Act, the EU, Canada and Mexico adopted retaliatory legislation.[83] The two most important functions of these laws are blocking measures and the clawback right of action. Blocking measures prohibit persons subject to the jurisdiction of the state

80 See 'Trump Nears Key Cuba Sanctions Decision Over Support for Maduro', *Bloomberg* (27 February 2019) (Trump administration is using Title III because of Cuba's support for Maduro); 'Trump Symbolically Tightens Embargo on Cuba', Associated Press (4 March 2019) (Title III suspension waiver 'is being presented as retaliation for Cuba's support of . . . Maduro'); 'U.S. to Allow Lawsuits Against Cuban Firms, Foreign Businesses Excluded for Now', CNN (4 March 2019) (State Department said that this holds Cuba accountable for 'propping up' Maduro); 'U.S. Allows Lawsuits Against Cuban Entities but Shields Foreign Firms for Now, Reuters' (4 March 2019) (announcement 'appeared aimed at punishing Havana over its support for . . . Maduro.').

81 Including a case for which the authors are counsel of record: *Exxon Mobil Corp v. Corporación CIMEX SA, et al*, No. 19-cv-1277 (DDC).

82 Opinion of the Inter-American Juridical Committee on Resolution AG/DOC. 3375/96 'Freedom of Trade and Investment in the Hemisphere', OEA/Ser.G, CP/doc.2803/96 (27 August 1996).

83 Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01996R2271-20140220&from=EN (European Union); Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms–Burton Act, 9 October 1996, 36 I.L.M. 111 (Canada); Act to Protect Trade and Investment from Foreign Norms that Violate International Law, Oct. 23, 1996, 36 I.L.M. 133 (Mexico).

from complying with Title III. The clawback provisions give a right of action to persons who have lost Title III lawsuits. The loser of a Title III action will be permitted to recovery from the successful party equal to any amount that the successful party recovered under Title III.[84]

Since at the time of writing the cases were just filed, US courts have not yet issued any rulings or opinions in these cases, but decisions construing the meaning of the Helms–Burton Act will be forthcoming.

iii Enforcement of ICSID awards in the United States

Successful claimants in investor–state arbitrations often face hurdles to actual recovery of their awards, and a recent US District Court decision may pose yet another hurdle involving the ability to enforce the interest due on awards. International Centre for Settlement of Investment Disputes(ICSID) panels often provide for post-award interest, which are important given the potential for lengthy delays in collections if the award debtors refuse to pay. The benefit to patient claimants is supposed to be automatic recognition of their awards in the more-than 160 countries that are ICSID members (including the US), creating a (relatively) straightforward path to judgment and execution to satisfy unpaid awards. However, a recent decision from the US District Court for the District of Columbia now calls into question whether a claimant who seeks recognition of an award in the US risks losing the right to enforce the post-award interest granted by the ICSID tribunal and be left with the statutory post-judgment interest rate once an ICSID award is recognised as a US judgment.

In *OI European Group BV v. Bolivarian Republic of Venezuela*,[85] the court was faced with a fairly typical action to recognise an ICSID award (except for the unusual issue of who was the government: *Maduro v. Guaidó*). The award arose from the expropriation of the claimant's glass factories by the Venezuelan government in 2010. The claimant commenced an ICSID arbitration in 2011, and an award was issued in March 2015 in an amount of US$372.46 million plus costs, expenses and post-award interest (London Interbank Offered Rate (LIBOR) plus 4 per cent).

Venezuela applied for annulment, which consumed another year during which the award was provisionally stayed, although the ICSID tribunal eventually lifted the stay when it became clear that Venezuela was unlikely to comply. The claimant then brought suit in Washington, DC to confirm the award and lost another year attempting to serve process on Venezuela. Even then, after seven years of delay, the claimant was forced to continue to wait when the court granted Venezuela's request for a stay pending a final decision on Venezuela's annulment application, which the tribunal denied in December 2018. In other words, the court determined to grant a stay even though the ICSID tribunal charged with presiding over the annulment application had already determined that a stay was no longer appropriate.

Delays continued in the spring of 2019 largely due to a dispute over whether the Guaidó government or the Maduro government was the proper representative of Venezuela's interests. The court ultimately recognised the Guaidó government (following a DC Circuit decision on the issue), which did not object to recognition of the award but instead argued only that the post-judgment interest rate had to be set at the federal statutory rate for judgments (around 2.3 per cent) instead of the higher award rate (LIBOR plus 4 per cent).

84 Brice Clagett, 'Controversy Over Title III of the Helms–Burton Act', 30 *Geo Wash J Int'l L. & Econ*. 271, 301-02 (1996).

85 *OI European Group BV v. Bolivarian Republic of Venezuela*, No. 16-cv-1533 (DDC).

The court agreed with the Guaidó government and entered judgment on the award but replaced the more favourable award rate of interest with the federal post-judgment interest rate dictated by 28 USC Section 1961. Applying the merger doctrine – a doctrine holding that arbitral awards merge with the judgments that are entered by courts when confirming the awards – the court reasoned that the federal rate applied once judgment was entered on the award. The court found support in the language of the award, which provided for interest until payment without any explicit provision for post-judgment interest. In so doing, the court distinguished a 2015 decision from the Southern District of New York in *Mobil Cerro Negro Ltd v. Bolivarian Republic of Venezuel*a, which held that the award rate (not the federal rate) should continue to apply even after judgment has been entered on an ICSID award.

The DC court's decision is difficult to square with the text and underlying ICSID policy. When Congress passed the enabling legislation implementing the ICSID Convention in the US, it provided that ICSID awards are entitled to special treatment (i.e., '[t]he 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 state court, 22 USC Section 1650a). Moreover, ICSID awards are not subject to the FAA, which specifically 'shall not apply to enforcement of [ICSID] awards', id. It is difficult to see how interest is anything other than a pecuniary obligation – and, therefore, shall be enforced and shall be entitled to full faith and credit. In turn, replacing a pecuniary obligation of an award with a different (and here, lesser) pecuniary obligation does not satisfy the text's requirements to enforce and provide full faith and credit.

The DC court did acknowledge its obligation to afford full faith and credit to the award, but it did not analyse the mandate of the enabling legislation, which explicitly commands that '[t]he pecuniary obligations imposed by such an award shall be enforced', 22 USC Section 1650a(a). The court manifestly did not enforce the interest obligation, instead analogising to state court judgments where post-judgment interest is often set by state statute, which is trumped by federal law. By contrast, the interest provisions of ICSID awards typically are fully litigated by the parties and resolved by the tribunal, and Congress has commanded that the result shall be enforced by the federal courts.

While it may be tempting to look to analogous situations arising under the FAA for precedent when dealing with ICSID awards, this approach is at odds with the enabling statute in which Congress specifically exempted ICSID awards from the scope of the FAA. Reliance on the merger doctrine or other procedural rules of the FAA is, therefore, not appropriate. ICSID awards – unlike other types of arbitral awards – are to be treated as separate judgments entitled to full faith and credit in US courts.

Additional caution should be used when examining the damages language used by ICSID tribunals when issuing awards. The DC court put great emphasis on the language providing for interest until payment – although the ongoing litigation indicated the award had not been paid, and thus, it was perhaps the award's failure to explicitly provide for post-judgment interest that the court found most instructive. Regardless, practitioners who represent investors in ICSID proceedings may wish to consider more robust language in their requests for relief, including language that clearly provides for interest as a pecuniary obligation that is not to be supplanted by local law and that accrues until the award (or a judgment entered thereon) is satisfied.

US jurisprudence regarding the enforcement of ICSID awards is relatively undeveloped. Thus, the question of interest remains open and unresolved – as do many other questions – notwithstanding the DC court's decision. Nevertheless, seeking initial recognition of ICSID

awards in the US is becoming less attractive in light of this decision and the 2017 appellate decision in the *Mobil Cerro Negro* case.[86] The uncertainty surrounding whether US courts are truly willing to enforce the pecuniary obligations of ICSID awards should be cause for reflection, and successful claimants should consider whether there are realistic enforcement goals to pursue in the US before seeking recognition here.

In *Mobil Cerro Negro Ltd v. Venezuela*, the Second Circuit reversed an uninterrupted line of Southern District of New York decisions that had allowed investors to obtain prompt *ex parte* recognition of ICSID awards as judgments.[87] The *ex parte* procedure had made New York a favourable forum for recognising ICSID awards against foreign sovereigns.

The Second Circuit held, however, that the Foreign Sovereign Immunities Act (FSIA), which was passed in 1976, is the only means by which to obtain jurisdiction over a foreign sovereign. According to the Court, notwithstanding the fact that the ICSID Convention (which entered into force on 14 October 1966) requires automatic enforcement of awards, any investor who wishes to enforce an ICSID award in a New York court must commence a new action and follow the same procedures required by the FSIA for serving process on the foreign sovereign before a judgment can be entered.

ExxonMobil had argued that the ICSID treaty and the statute Congress enacted to implement it, 22 USC Section 1650a (1966), predated the FSIA and continued independently to provide jurisdiction to enforce ICSID awards. The FSIA contains an express carveout for existing international agreements, which ExxonMobil argued applied to the ICSID Convention. Although the Second Circuit stated that 'the question is not free from doubt', it ultimately ruled that under *Argentine Republic v. Amerada Hess Shipping Corp*,[88] the carveout only 'applies when international agreements expressly conflict with the immunity provisions of the FSIA', and that the ICSID Convention does not raise such an express conflict. ExxonMobil argued that the ICSID treaty contemplates summary, virtually automatic recognition with no substantive defences, a process in express conflict with the plenary proceeding required by the Second Circuit under the FSIA, but that argument did not carry the day.

While rejecting the argument that Section 1650a furnishes an independent jurisdictional basis for enforcing ICSID awards against foreign sovereigns, the Second Circuit interpreted Section 1650a to require that ICSID awards be enforced through a plenary action on the award in US district court. The court found this requirement in Section 1650a(a)'s requirement that an ICSID award's pecuniary obligations 'shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a [state court]'. The court rejected ExxonMobil's argument that the 'as if' clause's reference to final state-court judgments simply clarified the statute's reference to the full faith and credit required under Article IV, Section 1 of the Constitution, and instead interpreted the as if clause to require that ICSID awards be enforced in the same manner as state-court judgments in federal court, namely, through a new action on the judgment as a debt. The court turned away ExxonMobil's argument, and the district court's conclusion, that such a rare, cumbersome and resource-consuming procedure was at odds with the ICSID Convention's contemplation

86 *Mobil Cerro Negro*, 863 F.3d 96 (2d. Cir. 2017).

87 Steptoe & Johnson LLP, led by Steven Davidson (one of the authors of this chapter), represented the Mobil Cerro Negro entities (ExxonMobil) in the Southern District of New York and before the Court of Appeals for the Second Circuit.

88 *Argentine Republic v. Amerada Hess Shipping Corp*, 488 US 428, 442 (1989).

of the summary recognition of awards, and it disallowed that the district court's previously common use of New York state judgment-enforcement law, which allows for *ex parte* recognition of other state court judgments, was appropriate.

The United States government filed an *amicus* brief siding with Venezuela. Ultimately, the Second Circuit agreed with the United States and Venezuela and ruled against the investor-creditor.

The Second Circuit also did not reach the issue of post-award interest. The Southern District of New York (SDNY) had entered a judgment applying the post-award rate set by the ICSID panel rather than applying the federal statutory post-judgment rate. The issue was fully presented to the Second Circuit, but the panel demurred. The proper interest rate remains an issue for further litigation. ExxonMobil took the position that interest is a pecuniary obligation of the award, and thus must be given full faith and credit in US courts as required by the ICSID statute. Venezuela argued that the federal statutory post-judgment rate applied. On this issue, the United States supported ExxonMobil's position.

As a practical matter, we believe the Second Circuit's decision disadvantages investors who, after participating in lengthy arbitration proceedings and, in many cases, years of post-award proceedings, must then commence a plenary action with service of process in the United States to enforce an award. For example, serving process on a foreign state pursuant to the FSIA can often take three to six months or longer. Once service is accomplished, the foreign state will have 60 days to respond even though it has no substantive defences. In sum, the process for judgment-creditors will take longer– potentially much longer – than what the ICSID treaty contemplated, which is a disadvantage when, as is often the case, there are other creditors competing for priority to execute against a limited pool of assets.

The Second Circuit's ruling overturns what had been a growing and stable body of Southern District precedent governing enforcement of ICSID awards. In light of the ruling, we believe award-creditors should consider whether New York remains a favourable forum to obtain a judgment. While New York provides robust remedies to creditors and can often be the location of non-immune, sovereign assets, award-creditors may want to proceed in Washington, DC first. Under the FSIA, Washington, DC is a default venue against foreign sovereigns, and proceeding there would be free from any venue challenge.

Both the DC District Court case and the Second Circuit case are at odds with the accepted practices of other ICSID Member States, which more closely embody the original intent and understanding of the ICSID Convention. The United Kingdom and France, for instance, offer well-established *ex parte* procedures to ICSID award creditors. Investors may be wise to consider availing themselves of the immediate recognition procedures in the courts of other countries.[89]

The United States Court of Appeals for the Third Circuit affirmed the Delaware District Court's order granting a writ of attachment of shares in the US-based holding company that

89 7 Part 62.21 of the United Kingdom's Rules of Civil Procedure addresses ICSID awards and provides that recognition is governed by certain provisions of Part 74, including Part 74.3. See U.K. R. Civ. P. Part 62.21(2)(c), https://www.justice.gov.uk/courts/procedure-rules/civil. Part 74.3 states that recognition applications 'may be made without notice'. Id. Part 74.3(2)(b). Through exequatur in France, a recognition 'application is submitted *ex parte* to the competent judge'. Sarah Francois-Poncet et al., 'Enforcement of Arbitral Awards against Sovereign States or State Entities-France', in *Enforcement of Arbitral Awards Against Sovereigns* 356 (R. Doak Bishop ed., 2009).

owns Citgo. *Crystallex Int'l Corp v. Venezuela* (Crystallex Op).[90] The Third Circuit decision is the latest in a line of decisions from ICSID to Washington, DC courts, to Delaware involving this case. In 2002, Crystallex contracted with a Venezuelan entity for the exclusive right to extract gold from one of the world's largest deposits in Las Cristinas, Venezuela. In 2011, Venezuela expropriated the gold mines without compensation. Later that year, Crystallex filed for ICSID arbitration and then sought bankruptcy protection in Canada. While the arbitration was pending (and then after the award was announced), Crystallex pursued claims against PDVSA, Citgo and Citgo's holding company, PDVH, for fraudulent transfers under the Delaware Uniform Fraudulent Transfer Act. In those cases – which is different from this current case – the Third Circuit reversed the District Court's decision, holding that a transfer from a non-debtor could not be a fraudulent transfer.[91] In addition, there were serious questions there about whether – under the FSIA – Crystallex could obtain any pre-judgment relief against Venezuela or its state-owned entities. In April 2016, Crystallex received an ICSID award of US$1.2 billion plus interest. Crystallex sought to confirm its award as a judgment in the US District Court for the District of Columbia. The DC District Court confirmed the award as a judgment, which the DC Circuit affirmed. Thereafter, pursuant to 28 USC Section 1963, Crystallex registered its DC judgment in Delaware and commenced enforcement proceedings.

One of Crystallex's first enforcement steps was to seek an attachment action against PDVH shares (Citgo's US-based parent company) owned by PDVSA, which Crystallex asserted was the alter ego of Venezuela. Ultimately, the Delaware District Court agreed in 2018 and issued an order attaching PDVH's shares. On appeal, the Third Circuit affirmed the District Court's decision. The Third Circuit's analysis is thorough and covers several issues. First and foremost, Venezuela argued that simply registering a judgment under 28 USC Section 1963 does not confer jurisdiction against a foreign sovereign. The Third Circuit rejected that argument – the question is whether the court that issued the original judgment had jurisdiction, and if it did, then so too does the court in which a judgment is registered. The Court next analysed whether it has subject matter jurisdiction over an alter ego without establishing an independent basis for subject matter jurisdiction. This could be an issue to watch, since the holding here that jurisdiction can be extended to an alter ego without an independent basis could be in tension with the Supreme Court's decision in *Peacock v. Thomas*.[92] However, the issue is perhaps resolvable here, because federal courts could have an independent basis for jurisdiction over a foreign state's instrumentalities like PDVSA, because the FSIA confers jurisdiction on federal courts over foreign sovereigns if an exception to immunity is satisfied. Meeting an exception to immunity alone may be insufficient, however; it could be that the FSIA also requires service of process, personal jurisdiction and venue: see *Mobil Cerro Negro, Ltd v. Bolivarian Republic of Venezuela*[93] (holding that as against sovereigns, the FSIA requires a plenary action to enforce an arbitral award as a judgment; it cannot be recognised in an *ex parte*, summary procedure). It remains to be seen how the Supreme Court chooses to analyse the issue or whether *Peacock* will be clarified in any potential subsequent proceedings. The Third Circuit then applied the *Bancec* factors,

90 *Crystallex Int'l Corp v. Venezuela*, Nos. 18-2797 & 18-3124, Slip Op, (3d Cir. 29 July 2019) (Crystallex Op)

91 *Crystallex Int'l Corp v. Petroleos de Venezuela, SA*, 879 F.3d 79, 81-82 (3d Cir. 2018).

92 *Peacock v. Thomas*, 516 U.S. 349, 356, 359 & n.7 (1999).

93 *Mobil Cerro Negro, Ltd v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 102-03 (2d Cir. 2017).

which are part of a well-known test established by the Supreme Court to assess veil piercing as among foreign sovereigns and their agents and instrumentalities. Here, the District Court's material finding was that Venezuela extensively controlled PDVSA. The Third Circuit also said that Crystallex need not show a direct link between Venezuela's control over PDVSA and specific injury or harm to it. Accordingly, an alter ego finding was well-founded and affirmed.

Even though PDVSA was an alter ego of Venezuela, Crystallex still had to show that the particular property at issue in the attachment action – the PDVH stock – was not immune under the FSIA. Immunity from attachment and execution is specifically governed by Section 1610 of the FSIA. Even though the FSIA draws a distinction between immunity for a foreign state versus agents and instrumentalities, the Court analysed the issue under the protections for a foreign state, Section 1610(a), since PDVSA was being reached as an alter ego of Venezuela and not as an agent or instrumentality in its own right. The Court found that the property was 'used for a commercial activity in the United States' and was being executed based upon a judgment entered by US court that confirmed an arbitral award against the foreign state. 28 USC Section 1610(a)(6); Crystallex Op at 40-41. The Supreme Court denied Venezuela's petition to hear the case.[94]

A final issue raised in the *Crystallex* dispute is the impact sanctions have on Crystallex's ability to sell the attached shares. It seems almost certain that OFAC would need to approve of any sale, which will be analysed on a case-by-case basis. So far, OFAC has not granted a licence.

iv Separate entity rule

The separate entity rule is a feature of New York law that operates to prevent foreign branches of banks in New York from being subject to enforcement proceedings and orders in New York courts. Under the rule, each branch of a bank is treated as a separate entity in no way responsible for accounts at other branches of the same bank. The practical impact of the rule is to prevent a claimant from attaching assets held at bank branches outside the United States simply by serving a restraining notice or commencing other enforcement proceedings against the bank's New York branch.

The continued force of the separate entity doctrine as applied to monetary transfers within banks is somewhat in question after a recent decision in *Koehler v. Bank of Bermuda Ltd*.[95] In *Koehler*, the New York Court of Appeals ruled that a 'court sitting in New York that has personal jurisdiction over a garnishee bank can order that bank to produce stock certificates located outside of New York'.[96] However, the Court's inquiry in *Koehler* was limited to tangible property, such as stock certificates, and did not consider the separate entity rule or turnover orders directed at cash in a bank account.

Application of *Koehler* resulted in a split among New York state and federal courts, with some reaffirming the separate entity rule and others casting further doubt on its viability. In *Ayyash v. Koleilat*,[97] the claimant won a judgment in a Lebanese court for fraud related to the collapse of a Lebanese bank. After registering the judgment in New York, he sought to discover and freeze the judgment debtor's assets on deposit with various banks that had

94 Cert. denied sub nom. *Venezuela v. Crystallex Int'l Corp*, No. 19-1049, 2020 WL 2515508 (US 18 May 2020)

95 12 NY3d 533, 883 NYS2d 763 (2009).

96 id. at 541.

97 38 Misc 3D 916 (NY Sup Ct 2012).

branches or subsidiaries in New York. He served subpoenas and restraining notices that purported to apply to any branch or office maintained in a foreign country. After objection by the banks, the state trial court in Manhattan denied the claimant's request for asset discovery and reaffirmed the separate entity rule. On appeal, however, the appellate division chose to affirm without invoking the separate entity rule, reasoning that 'denying the enforcement procedures sought by plaintiff' was proper because 'they would likely cause great annoyance and expense' and because of 'principles of international comity'.[98]

By contrast, in *Amaprop Ltd v. Indiabulls Financial Services Ltd*,[99] the federal district court in Manhattan held that a restraining notice served on ICICI Bank was valid and enforceable with respect to all funds and property of the judgment debtor held anywhere in the world, and directed the transfer of the assets to ICICI Bank's New York branch for turnover to the judgment-creditor. The decision was appealed to the Second Circuit Court of Appeals, but the parties settled before an appellate decision was issued. In addition, in *Hamid v. Habib Bank Ltd*, the Chief Judge of the Southern District of New York held that the separate entity doctrine continues to apply, but certified the matter for interlocutory appeal to the Second Circuit.[100] The appeal was dismissed for lack of prosecution.[101]

The issue was addressed again in the long-running dispute between Motorola and Nokia on the one hand, and the Uzan family on the other. In that case, a New York federal court ruled that the separate entity doctrine prevented a restraining order from being effective against deposits held at a foreign branch of a bank doing business in New York.[102] The court ordered release of the restraint but stayed its order to allow the claimants to appeal, which they did, and the Second Circuit Court of Appeals certified the question to the New York Court of Appeals to resolve whether the separate entity rule precludes a judgment-creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank.

In a five-to-two decision in *Motorola Credit Corp v. Standard Chartered Bank*, the New York Court of Appeals upheld the separate entity rule as a well-established feature of New York common law, noting the benefit to financial institutions and the need to mitigate '[t]he risk of competing claims and the possibility of double liability in separate jurisdictions'.[103] The dissent offered a markedly different perspective, opining that 'today's holding is a deviation from current public policy regarding the responsibilities of banks and a step in the wrong direction', and calling the decision a boon to recalcitrant debtors who flout New York judgments at the expense of the rights of judgment-creditors to enforce their judgments.[104]

The *Motorola* decision presents challenges and opportunities for victims of fraud who obtain judgments against the perpetrators. Those who come to New York for its connections to the international banking system and creditor-friendly remedies will find their efforts to be more complicated, at least to the extent that they pursue assets held by banks. On the

98 *Ayyash v. Koleilat*, 981 NYS2d 536 (NY App Div 1st Dep't 2014).

99 No. 10-cv-1853 (SDNY 21 February 2012).

100 11-CV-920 (LAP), 2012 WL 919664 (SDNY 14 March 2012).

101 *Hamid v. Habib Bank Ltd*, No. 12-1481, 2012 WL 4017287 (2d Cir 14 August 2012).

102 See *Motorola Credit Corp v. Uzan*, No. 02-cv-666 (SDNY 1 August 2013).

103 24 NY3d 149, 162 (NY 2014).

104 id. at 164.

other hand, the Court did not overrule the *Koehler* decision, thus preserving the ability of a judgment-creditor to reach assets outside New York, provided that the garnishee is properly subject to jurisdiction in New York.

The *Motorola* dissent is not the first to criticise the separate entity rule as being out of date. In January 2011, the New York Advisory Committee on Civil Practice recommended that the rule be repealed so that service of levies, restraining notices or orders of attachment upon a New York bank branch would apply to any account held by the bank anywhere. The report reasoned that:

> *[T]he now ubiquitous use of computer networks that give all branch offices of a financial institution instantaneous access to central data banks makes the limitation of the separate entity rule obsolete and its continued existence unnecessarily complicates and limits enforcement of judgments and attachments without any mitigating benefit to concepts of fairness or the functioning of the civil justice system.*

Of course, banks are hardly the only entities that do business both in the United States and abroad. Where such an entity is subject to United States jurisdiction (because it does business there) and holds assets or proceeds acquired by fraud, the argument can be made for extending the judicial power to reach those assets, regardless of where they are located.

v Correspondent banks

Another recurring issue is financial institutions' handling of debt service payments made by a debtor that owes unsatisfied judgments. Debt service payments by the judgment debtor are attachable at the originating bank, but the bank may be located in a jurisdiction that lacks robust laws facilitating the enforcement of judgments. Meanwhile, there is a good chance that one of the other banks involved – the correspondent bank or the beneficiary bank – may be located within a more creditor-friendly jurisdiction.

For example, under New York law, funds transferred to a correspondent bank may be attachable. The correspondent bank may elect to either freeze the funds or complete the transaction – either way, the bank is not liable to the judgment-creditor or the judgment debtor for any claim relating to its decision to freeze – or not to freeze – the funds.[105] A correspondent bank located in a creditor-friendly jurisdiction may offer an improved opportunity for a claimant to enforce an unsatisfied judgment against a debtor's funds.

Once the debtor's funds reach the beneficiary bank, they are unlikely to be attachable. However, one court in the Southern District of New York recently considered issuing an injunction to prevent a beneficiary bank from accepting funds. The case settled before the issue was resolved. Thus, it remains to be seen how the courts will decide this issue.

vi Sovereign immunity from post-judgment discovery

On 16 June 2014, the United States Supreme Court issued a pivotal ruling that makes it easier for judgment-creditors to obtain discovery of assets held by foreign sovereigns. In *Republic of Argentina v. NML Capital Ltd*,[106] the Court held that the Foreign Sovereign Immunities Act (FSIA) does not immunise a foreign sovereign judgment debtor from post-judgment discovery

105 See *Palestine Monetary Auth v. Strachman*, 62 AD3d 213, 873 NYS2d 281 (1st Dep't 2009).

106 573 US (2014), No. 12-842 (16 June 2014).

of information concerning its extraterritorial assets. The Court made clear that 'execution immunity' does not protect a sovereign from discovery – instead, only after discovery should a district court determine whether any assets are immune. Thus, the judgment-creditor was allowed to pursue broad, worldwide discovery in aid of execution.

The case arose out of efforts by creditors of Argentina to collect on bonds on which Argentina had defaulted in 2001. Although most bondholders agreed to exchange their bonds for restructured debt after Argentina's 2001 default, several hedge funds bought up defaulted bonds and chose to pursue collection remedies in New York rather than participate in the exchange. The respondent, NML Capital, prevailed in 11 debt-collection actions in the US District Court for the Southern District of New York. It then sought global discovery of Argentina's assets by serving subpoenas on non-party banks, and the District Court granted a motion to compel. The US Court of Appeals for the Second Circuit held that granting the motion to compel did not violate the FSIA. The Supreme Court affirmed, ruling that the FSIA does not immunise a foreign-sovereign judgment debtor from post-judgment discovery of information concerning extraterritorial assets. The Supreme Court reasoned that the FSIA has no 'provision forbidding or limiting discovery in aid of execution of a foreign sovereign judgment debtor's assets'.[107]

In a lone dissent, Justice Ginsburg argued that the majority's decision was overbroad, essentially authorising US courts to become clearing houses for information about any and all property held by a foreign sovereign abroad.[108] The dissent would draw the line of proper discovery at the foreign sovereign's property used for commercial activities in the United States or abroad. Notably, however, even the dissent's formulation of the rule would empower a US court to authorise worldwide asset discovery.

At a minimum, the decision clears the path for creditors to seek asset discovery for purposes of collecting on debts owed by foreign sovereigns. However, the Court's reasoning may have a broader impact on the interpretation of the FSIA. The Court held that the FSIA 'comprehensive[ly]' sets out the scope of foreign sovereign immunity and that 'any sort of immunity defence made by a foreign sovereign in an American court must stand on the Act's text'.[109] Thus, the decision can be understood to reject implied extensions of immunity or interpretations of the FSIA that would expand immunity beyond the strict language of the text. For example, the Court rejected Argentina's effort to invoke a supposed preexisting common law immunity because it is 'obvious that the terms of Section 1609 execution immunity are narrower than the supposed [common-law execution-immunity] rule'.[110]

Again on 16 June, the Court denied Argentina's petition for *certiorari* in a related case, *NML Capital Ltd v. Republic of Argentina*, where the lower courts had issued *pari passu* injunctions requiring Argentina to make rateable payments to holders of its defaulted bonds if it also made payments to holders of its restructured bonds. The denial of *certiorari* leaves in place the pro-judgment-creditor decision of the Second Circuit Court of Appeals, which rejected the argument that the FSIA bars injunctive relief under these circumstances. The case arose out of an attempt by Argentina to pay only the bondholders who had agreed to the restructuring of their bonds, thereby ensuring that the bondholders who elected to sue

107 Slip Op at 8.

108 id. at 1 (Ginsburg, J, dissenting).

109 id. at 6–7.

110 id. at 9.

Argentina would continue to receive no payment. The Second Circuit ruled that Argentina had violated a contractual promise to treat all bondholders equally, and that injunctive relief was, therefore, appropriately granted by the district court.

vii Compelling non-signatories to arbitrate in an international arbitration

In *GE Energy Power Conversion v. Outokumpu Stainless USA, LLC*, the Supreme Court held that the New York Convention does not conflict with domestic equitable estoppel doctrines that permit the enforcement of agreements by non-signatories.[111] GE Energy is a French company that manufactured motors for delivery to the respondent, Outokumpu Stainless USA, the operator of a steel plant in Alabama. Outokumpu installed the motors in its plant, but they later failed. Outokumpu ultimately sued GE Energy in Alabama state court, at which point GE Energy removed the case and filed a motion to compel arbitration. GE Energy prevailed before the district court.[112] However, the 11th Circuit Court of Appeals reversed.[113] The 11th Circuit held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) allows enforcement of an arbitration agreement only by the parties that actually signed the agreement, and since GE Energy was a non-signatory, it could not compel arbitration. The Court also held that allowing GE Energy to rely on state law equitable estoppel doctrines to enforce the arbitration agreement would conflict with the New York Convention's signatory requirement, adding to the split among the circuits on that issue.

On 1 June 2020, the Supreme Court reversed the 11th Circuit Decision. The Supreme Court held that the New York Convention does not conflict with domestic equitable estoppel doctrines that permit the enforcement of agreements by non-signatories. The Court examined the text of the New York Convention and the FAA, Chapter 2 of which implements the Convention, and found that there is no conflict between the Convention and the provisions of the FAA explicitly permitting courts to apply state law doctrines relating to the enforcement of arbitration agreements, 'including the question of who is bound by them'.[114] The Court found the New York Convention is 'simply silent on the issue of nonsignatory enforcement' and 'nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines'.[115] In her concurrence, Justice Sotomayor emphasised that any domestic non-signatory doctrines applied by the lower courts must reflect the fundamental principle of consent to arbitrate that underpins the FAA, but noted that in this case, such doctrines may not come into play as 'Outokumpu appears to have expressly agreed to arbitrate disputes under the relevant contract with subcontractors like GE Energy'.[116] The Court remanded the case, leaving the lower court to decide the question of whether GE Energy can enforce the arbitration agreement under principles of equitable estoppel.

111 *GE Energy Power Conversion France v. Outukumpu Stainless USA, LLC*, No. 18-1048, 590 US ___ (1 June 2020).

112 *Outokumpu Stainless USA LLC v. Converteam SAS*, 2017 WL 401951 (SD Ala., 30 January 2017).

113 *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F. 3d 1316 (2018).

114 Slip. Op at 4.

115 Id. at 6.

116 Sotomayor, J, concurring.

Appendix 1

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