New Cases at the U.S. Supreme Court: CVSG Orders Concerning Private International Law, Sovereign Immunity and International Arbitration

As explained in a previous post from a few years back, if the Justices of the United States Supreme Court are considering whether to grant a petition for certiorari and review a decision from the Courts of Appeals, and they think the case raises issues on which the views of the federal government might be relevant—but the government is not a party—they will order a CVSG brief. "CVSG" means "Call for the Views of the Solicitor General." In the past two months, the Court ordered CVSG briefs in two new cases concerning matters of private international law, sovereign immunity and international arbitration.

If the issues are interesting to the Justices of the Supreme Court, and are about to be addressed by the U.S. Executive branch, then they should, *ipso facto*, be interesting to the practicing bar as well. The fact that each of these cases involve claims being made against foreign sovereigns makes them even more interesting for international dispute resolution lawyers steeped in the crossroads of litigation, commercial and investment arbitration. Below is a brief review of these two cases and the interesting issues being raised.

The first case is *Belize Social Development Ltd. v. Government of Belize*. It involves the relatively uncommon juxtaposition of arbitration award enforcement and the doctrine of *forum non conveniens*. In that case, a private company had a contractual dispute with the government of Belize, and obtained an arbitration award of $38 million. It then sought to confirm the award in the United States. Belize defended on numerous grounds, including by arguing that the arbitration exception to the Foreign Sovereign Immunities Act did not apply because the contract was entered without proper legal authority in Belize, and by asserting that the New York Convention does not mandate recognition and enforcement where, as here, the dispute was not purely a "commercial" one, but rather

promised favorable tax treatments. These defenses were dismissed by the D.C. Circuit; Ted Folkman has discussed that decision on Letters Blogatory.

The other unsuccessful defense raised by the debtor is now the subject of a petition for certiorari before the Supreme Court. The basic question is whether a party may dismiss a petition to recognize and enforce an arbitration award under the doctrine of *forum non conveniens*. The District Circuit held that a foreign forum is *per se* inadequate—and thus ineligible as a *forum conveniens*—because the focus of a recognition and enforcement action (*viz*. U.S.-based assets) cannot be reached by a foreign court. The D.C. Circuit affirmed this holding without any explication. This holding plainly splits from the Second Circuit, which has affirmed the *forum non conveniens* dismissal of recognition and enforcement actions when the alternative forum has some assets of the debtor, and thus offers the possibility of a remedy. This case is complicated by the fact that the Belize Supreme Court has issued an injunction against enforcement proceedings, and the Caribbean Court of Justice has held that the Award convenes public policy.

The decision below and the parties' briefs before the Court can be found here.

The second case is *Helmerich & Payne Int'l Drilling Co. et al v. Bolivarian Republic of Venezuela*. This case concerns the a lawsuit by a U.S. company regarding breaches of contract by PdVSA and the expropriation of its assets in Venezuela. The claims were brought under both the expropriation and commercial activity exceptions to the FSIA; the District Court permitted the claims to proceed under the latter but not the former. The D.C. Circuit flipped those conclusions, allowing the expropriation but not the contract claims to proceed, and remanded the case. Both sides have filed crossing petitions for a writ of certiorari, presenting the following questions.

> *(1) Whether, under the third clause of the Foreign Sovereign Immunities Act of 1976, a breach-of-contract action is "based … upon" any act necessary to establish an element of the claim, including acts of contract formation or performance, or solely those acts that breached the contract;*
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> *(2) whether, under Republic of Argentina v. Weltover, a breaching party's failure to make contractually required payments in the United States causes a "direct effect" in the United States triggering the commercial activity exception where the parties' expectations and course of dealing have established the*

United States as the place of payment, or only where payment in the United States is unconditionally required by contract.

(3) Whether, for purposes of determining if a plaintiff has pleaded that a foreign state has taken property "in violation of international law," the Foreign Sovereign Immunities Act recognizes a discrimination exception to the domestic-takings rule, which holds that a foreign sovereign's taking of the property of its own national is not a violation of international law;

(4) whether, for purposes of determining if a plaintiff has pleaded that "rights in property taken in violation of international law are in issue," the FSIA allows a shareholder to claim property rights in the assets of a still-existing corporation; and

(5) whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.

The decision below and the parties briefs before the Court can be found here and here.

What the Solicitor General says about these issues and whether the Court takes the cases will not be known until the next Term, which begins in October.