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4 Takeaways From The Supreme Court's Expropriation Ruling

By **Keith Goldberg**

Law360, New York (May 1, 2017, 8:05 PM EDT) -- In siding with Venezuela in a suit accusing it of illegally seizing drilling rigs belonging to Helmerich & Payne Inc., the U.S. Supreme Court on Monday set a high jurisdictional bar to clear for companies asserting claims of expropriation by a foreign government. Here, attorneys identify four key takeaways from the ruling.

Supreme Court Clears the Air Around Foreign Sovereign Immunity

The high court's 8-0 ruling resolved a circuit split by firmly swatting down the relaxed "frivolousness" standard used by the D.C. Circuit to determine whether a case falls within the expropriation exception of the Foreign Sovereign Immunities Act, which generally shields foreign states from suits by private companies in U.S. courts.

The Supreme Court adopted the more strict view taken by the Second, Fifth, Seventh and Eleventh circuits that a court can only claim jurisdiction in an expropriation case if it determines the allegations describe a taking that, if proven, would violate international law.

"There's been this ambiguity under the FSIA as to how specific the complaint needs to be," said California attorney Alexis Haller, who runs the FSIA Law blog. "The frivolousness standard doesn't make a lot of sense with respect to the sovereign immunity. It makes it easier to pull the foreign country into litigation, which defeats the purpose of sovereign immunity."

In addition to resolving the split, Baker Botts LLP partner Ryan Bull said the high court cemented the longstanding notion that FSIA is designed to protect foreign nations from the entire process of U.S. litigation, as opposed to just protecting them from trial as the D.C. Circuit's ruling suggested.

"The fact that the court came out 8-0 against it is a pretty strong embrace of that concept," Bull said.

FSIA Is a Law of International Relations

In cementing the higher jurisdictional bar for the FSIA expropriation exception, the Supreme Court noted a warning from the solicitor general and the U.S. State Department that adopting the more relaxed frivolous standard could result in reciprocal action by foreign courts that could tie the U.S. up in litigation.

As if to underscore that point, the opinion cited language in the federal government's amicus brief that "at any given time the Department of Justice's Office of Foreign Litigation represents the United States in about 1,000 cases in 100 courts around the world."

"In part, one of the reasons the immunity is so carefully guarded in U.S. courts is because it ensures the U.S. is afforded similar protections with respect to foreign companies and avoids situations allowing the U.S. government to be exposed to suits in foreign countries," Bull said.

When it comes to international law, the golden rule — do unto others as you would have them do unto you — reigns supreme, attorneys say. The Supreme Court recognized that Congress imbued FSIA with that philosophy when they crafted it.

"It is not per se political decision. It's recognition of a longstanding, practical principle of comity among nations," Vinson & Elkins LLP international arbitration counsel Tim Tyler said. "It pays to work well and play with others."

FSIA Waivers Are a Company's Best Friend

With the Supreme Court making it harder for U.S. companies to keep their expropriation claims in a U.S. courtroom, attorneys say firms must resort to ways to protect their interests in expropriation disputes. That starts with seeking a FSIA waiver when negotiating contracts with a foreign nation.

"That's something I preach to my transactional colleagues all the time," said Mike Lennon, a partner in Mayer Brown LLP's litigation and international arbitration practices. "If you get yourself a waiver of sovereign immunity, not only do you preserve your ability to pursue a case on the merits, it makes enforcement go more smoothly."

While a FSIA waiver is the gold standard for companies to protect their interests when operating abroad, they're understandably difficult to secure, unless a company clearly has the commercial upper hand on the nation they're doing business with, attorneys say.

"Sovereigns are pretty loath to give them, and I'm always concerned about the scope of the waiver," Tyler said. "The question is: Are you going to go to the mat on that?"

Companies Should Seek Cover Behind Investment Treaties

Regardless of whether a company can secure a FSIA waiver, attorneys say the Supreme Court's decision highlights the need for a plan B when pursuing expropriation claims against a foreign nation: making sure your interests are covered by investment treaties and their investor-state dispute provisions.

"This will put greater emphasis for energy companies that are doing business abroad on bilateral and multilateral treaties as a way for obtaining jurisdiction over foreign sovereigns for these kinds of claims," Bull said.

There have been several high-profile expropriation battles between U.S. energy firms and sovereign nations that have played out before international arbitration panels in recent years. While the outcomes of those disputes aren't guaranteed, companies at least have the chance to make their case, attorneys say.

“You have to do the upfront legal work and make sure you've incorporated your [operating] structure to make sure you're taking advantage of available treaties, so you can bring your case,” said Willie Wood, the U.S. head of Norton Rose Fulbright's energy and infrastructure practice.

For countries that aren't part of any investment treaties, that's a factor U.S. companies need to consider before deciding to invest, attorneys say.

“You have to evaluate the country's risks, and those risks are balanced against the rewards,” Wood said. “Expropriation has been around forever. If there's no treaty, and the FSIA exception does not apply, how do you get relief?”

Venezuela is represented by Joseph D. Pizzurro and Robert B. Garcia of Curtis Mallet-Prevost Colt & Mosle LLP, and Bruce D. Oakley, Catherine E. Stetson, William L. Monts III and Mary Helen Wimberly of Hogan Lovells.

H&P is represented by David W. Ogden, David W. Bowker, Catherine M.A. Carroll, Blake C. Roberts, Maria L. Banda and Molly M. Jennings of WilmerHale.

The case is Bolivarian Republic of Venezuela et al. v. Helmerich & Payne International Drilling Co. et al., case number 15-423, in the Supreme Court of the United States.

--Editing by Christine Chun and Aaron Pelc.
