

# Kluwer Arbitration Blog

## Expropriation under the U.S. Foreign Sovereign Immunities Act: Raising the Jurisdictional Bar

Christopher Smith (King & Spalding) · Wednesday, September 13th, 2017 · Young ICCA

### Overview

On May 1, 2017, the United States Supreme Court issued its unanimous decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.* (137 S.Ct. 1312). In its ruling, the Court addressed the expropriation exception to the Foreign Sovereign Immunities Act (the “**FSIA**”). The expropriation exception permits plaintiffs to bring claims in United States federal courts where a foreign state takes property rights in violation of international law through an agency or instrumentality that is engaged in commercial activity in the United States. (28 U.S.C. § 1605(a)(3)).

The dispute arose when Venezuela, in arrears to Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela, S.A. (“**Plaintiffs**”) for oil rigs they were supplying to State companies, nationalized Plaintiffs’ rigs in order to prevent Plaintiffs from withdrawing their business from the country. Plaintiffs sued Venezuela in the U.S. District Court for the District of Columbia. The district court found that it had jurisdiction under the expropriation exception to the FSIA with respect to the U.S.-based parent company, but not the local Venezuelan subsidiary, on the basis that the Venezuelan affiliate did not qualify as a foreign investor under international law. After both parties appealed the decision, the U.S. Court of Appeals for the District of Columbia (the “**D.C. Circuit**”) partially reversed, holding that the exception applied not only to the parent company, but also to the Venezuelan subsidiary. The court reasoned that if the State unreasonably discriminated against the subsidiary on the basis of the parent company’s nationality, such an action could comprise a violation of international law vis-à-vis the Venezuelan subsidiary.

Regarding the standard for determining whether the court had jurisdiction under the exception, the D.C. Circuit held that a plaintiff needed only advance a “nonfrivolous argument” that the defendant State had violated international law. The court described this standard as creating an “exceptionally low bar” to establishing jurisdiction under the exception to the FSIA. This ruling conformed to the D.C. Circuit’s earlier precedents, including in *Agudas Chasidei Chabad of U.S. v. Russian Fed’n.* (528 F.3d 934, 941 (D.C. 2013)). In response to Russia’s argument that the *Agudas Chasidei* plaintiff’s claims suffered from “various legal and factual inadequacies,” the D.C. Circuit held that the plaintiff needed only plead claims that

were not “wholly insubstantial” or “frivolous” in order to ground the court’s jurisdiction under the FSIA.

The Supreme Court rejected the D.C. Circuit’s “nonfrivolous” standard. The Court noted that “whether the rights asserted are rights of a certain kind, namely, rights in ‘property taken in violation of international law,’ is a jurisdictional matter that the court must typically decide at the outset of the case, or as close to the outset as is reasonably possible.” (*Helmerich*, 137 S.Ct. at 1319). The Court discussed at length the policy considerations behind the FSIA, noting that the starting premise is immunity, subject to a limited number of exceptions where foreign states are involved in commerce or hold immovable property in the United States. This approach is meant to conform to the general principles of international law under a “restrictive” theory of sovereign immunity.

The Court found that permitting plaintiffs to bring claims based upon merely “nonfrivolous” allegations of expropriation in violation of international law – even where those arguments might ultimately fail – did not accomplish the objectives of the statute. The Court discussed the fact that in congressional hearings, the U.S. State Department had indicated that the FSIA was drafted in a manner that conformed to the applicable standard under international law. Moreover, in an *amicus* brief in support of Venezuela, the Department of State noted that one of the goals of limiting the exposure of foreign states to litigation in the United States was to increase the likelihood that the United States would receive similar treatment in foreign courts.

Thus, the Supreme Court held that in order for a federal court to have jurisdiction under the FSIA’s expropriation exception, district courts must determine that a taking violates international law. Several commentators have noted that this will likely require district courts to make factual determinations regarding the merits of a dispute in the jurisdictional phase. This point was not lost on Court, which recognized that “merits and jurisdiction will sometimes come intertwined. . . the court must still answer the jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it.” (*Id.*).

## Outlook

Following the Supreme Court’s decision, arbitration practitioners in the United States have generally fallen in one of two camps. The first group argues that the Supreme Court’s decision makes arbitration of international takings disputes under an investment treaty a more attractive alternative, where the jurisdictional hurdles are generally lower than under the *Helmerich* standard. Depending on how district courts apply *Helmerich*, this may indeed be the correct conclusion. Indeed, pushing these disputes into arbitration – and thus out of U.S. courts – would appear to accomplish the policy goals underlying the FSIA that the Supreme Court discussed in its decision.

On the other hand, a second group of practitioners have rightly pointed out that *Helmerich* may lead to accelerated “mini-trials,” complete with jurisdictional discovery. Indeed, it is possible that in pushing district courts to resolve many of the disputed merits issues early on, *Helmerich* will expedite, rather than hinder, expropriation claims in U.S. federal courts. For a plaintiff with a strong case,

especially where extensive discovery is not required to demonstrate a taking, this could lead to a speedier resolution than would be available in arbitration, where expropriation disputes can take years to resolve.

It is still unclear how the federal courts will apply the *Helmerich* standard. In *De Csepel v. Hungary*, the D.C. Circuit was able to avoid this issue, although it did cite the Supreme Court's *Helmerich* decision. (859 F.3d 1094, 1102, 1111-12 (D.C. 2017)). On appeal for the second time, the circuit court stated in *De Csepel* that "the defendant [S]tate bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." (See *id.* at 1100 (internal quotation marks omitted)). The D.C. Circuit did not need to address *Helmerich* directly, however, apparently because its earlier precedent had already determined that "Hungary's seizures of Jewish property during the Holocaust constituted genocide and were therefore takings in violation of international law." (*De Csepel v. Hungary*, 859 F.3d at 1102 (internal citation omitted)). Thus, *De Csepel* had already cleared *Helmerich*'s jurisdictional hurdle. The D.C. Circuit also applied *Helmerich* in *Owens v. Republic of Sudan*. While the circuit court noted that *Helmerich* overruled one basis for the district court's jurisdictional ruling, *Helmerich* did not affect the second basis for the district court's conclusion. (See 864 F.3d 751, 779). Thus, *Owens* did not elaborate on how the district courts should apply the elevated jurisdictional standard.

In this writer's view, it is not a foregone conclusion that *Helmerich* will necessarily make treaty arbitration the more attractive forum for every expropriation case. Expropriation claims can sometimes take years to adjudicate in arbitration. Notably, *Helmerich* does not create an enhanced pleading standard for takings, such as is required for fraud or mistake claims under Rule 9 of the Federal Rules of Civil Procedure. Rather, when confronted with an expropriation claim, district courts will have to engage early on in an analysis of the merits of the dispute, which may require more substantial factual development in an early phase of the litigation, perhaps warranting jurisdictional discovery. Such tools may help plaintiffs to present their cases expeditiously, rather than having to wait for the merits phase of the dispute. Ultimately, time will determine the effect of the *Helmerich* decision in the district courts.

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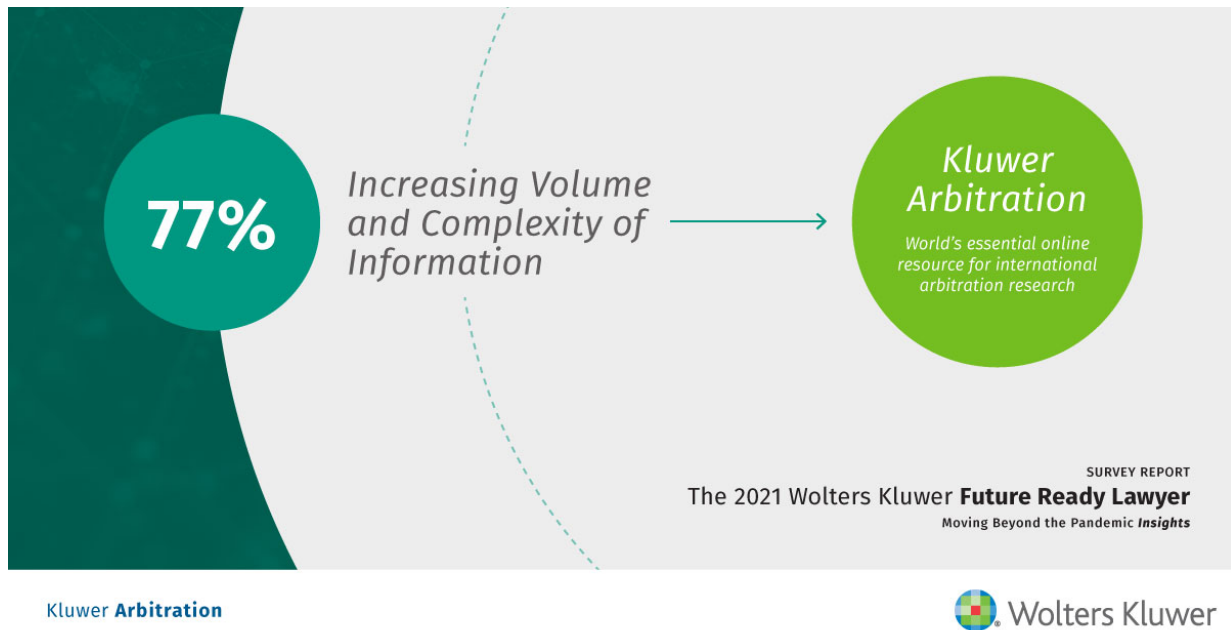
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