



United States

North America

AF-CAP INC v CHEVRON OVERSEAS (CONGO) LTD

Execution of a judgment against the property of a foreign sovereign under the US foreign sovereign immunities act

LT Awards; Commercial activities; Enforcement; State immunity; United States

(January 25, 2007) 475 F.3d 1080

Introduction

In *Af-Cap Inc v Chevron Overseas (Congo) Ltd*, the US Court of Appeal for the Ninth Circuit construed the meaning of "used for a commercial activity" under s.1610(a) of the Foreign Sovereign Immunities Act 2006 (FSIA), 28 U.S.C. s.1610(a), which governs the execution of a judgment against the property of a foreign sovereign. In addition to addressing an issue of first impression in the Ninth Circuit, *Af-Cap* is one of the few appellate decisions in any circuit to have addressed the issue. Although *Af-Cap* arose in the context of a judgment following a loan default, it nonetheless sheds light on some of the challenges posed by seeking to enforce and execute on an arbitration award rendered against a foreign sovereign under the FSIA.

Facts

In 1984, Equator Bank loaned US \$6.5 million to the Congo (the present day Republic of the Congo, also known as Brazzaville-Congo) for the construction of a highway. Pursuant to the Loan Agreement executed on December 18, 1984 (the Loan Agreement), the Congo consented to "the execution against any property whatsoever (irrespective of its use or intended use)", based on any action arising out of the Loan Agreement. The Congo also agreed to waive its "[sovereign] immunity from suit, execution, attachment ... or other legal process". The next year, however, the Congo defaulted. The Connecticut Bank of Commerce (CBC), an assignee of Equator Bank, obtained a judgment against the Congo in England, which it converted into a US judgment in New York. CBC subsequently registered the judgment in state courts in Texas and California, and initiated actions to enforce the judgments in each court. The Texas and California state court cases were removed to, respectively, the US District Court for the Western District of Texas and the US District Court for the Northern District of California. The case in the Northern District of California was stayed pending a final decision in the Texas case.

In Texas, CBC pursued a garnishment action against the property of CMS, a third-party oil company that owed tax and royalty obligations to the Congo. In the first of several rulings appealed to the Fifth Circuit, the district court held that the FSIA prohibited garnishment of the tax and royalty obligations. The FSIA provides in relevant part that property in the United States of a foreign sovereign:

"used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State ... if

... the foreign state has waived its immunity from attachment in aid of execution or from execution ..."¹

The district court concluded that the royalty and tax obligations did not "arise" from "a commercial activity in the United States" and that, therefore, the exception to immunity from attachment or execution did not apply. On appeal, however, the Fifth Circuit reversed the district court's decision. The Fifth Circuit held that it did not matter whether the obligations at issue arose from a commercial activity in the United States. Rather, "[w]hat matters is what the property is 'used for,' not how it was generated or produced".² Accordingly, the Fifth Circuit remanded the case to the district court for further factual development with regard to whether the property was "used for a commercial activity".

By this time, Af-Cap Inc (Af-Cap) had become successor in interest to the debt previously held by the CBC. Af-Cap pursued the case on remand to the district court in Texas, which held that the tax and royalty obligations were not used for commercial activities in the United States. In a second appeal to the Fifth Circuit, the Court of Appeal again reversed the judgment of the district court. The Court of Appeal held that the tax and royalty obligations at issue were used for commercial activities in the United States, because some portion of those obligations had been previously used to repay a commercial debt in the United States. Accordingly, the Fifth Circuit held that the tax and royalty obligations were amenable to execution, and remanded the case again to the district court.³

Af-Cap's action in California sought to enforce the judgment against certain tax and royalty obligations owed to the Congo by Chevron Texaco Corp and several affiliated oil companies (collectively, Chevron). The district court held that the obligations at issue were not "used for a commercial activity" and therefore were not amenable to attachment. Af-Cap appealed the district court's judgment to the Ninth Circuit.

Held

The Ninth Circuit affirmed the judgment of the district court. Observing that the meaning of the term "used for" in s.1610(a) of the FSIA is "an issue of first impression in this Circuit", the Ninth Circuit largely adopted the test set forth by the Fifth Circuit in *Af-Cap v Congo*, based on similar reasoning and analysis. The Ninth Circuit stated:

"Like the Fifth Circuit, we conclude that property is 'used for a commercial activity in the United States' when the property at issue is put into action, put into service, availed or employed for a commercial activity, not *in connection* with a commercial activity or *in relation* to a commercial activity."⁴

The Ninth Circuit diverged from the Fifth Circuit's holding in only one respect. The Fifth Circuit had held that a court should consider past commercial uses in determining whether an obligation was "used for commercial activities". However, the Fifth Circuit had also expressed "reservations about defining property use as commercial in nature solely by reference to past single and/or exceptional commercial uses". Instead, the Fifth Circuit stated that the analysis should be "holistic" and:

"include an examination of the uses of the property in the past as well as all facts related to its present use, with an eye toward determining

¹28 U.S.C. s.1610(a)(1).

²*Connecticut Bank of Commerce v Republic of Congo* (2002) 309 F.3d 240 at 251 (5th Cir.).

³*Af-Cap Inc v Republic of Congo* (2004) 383 F.3d 361 at 368 (5th Cir.) (*Af-Cap v Congo*).

⁴*Af-Cap Inc v Chevron Overseas (Congo) Ltd* (2007) 475 F.3d 1080 at 1091 (9th Cir.) (*Af-Cap v Chevron*) (emphasis in original).

whether the commercial use of the property, if any, is so exceptional that it is 'an out of character' use for that particular property."⁵

The Ninth Circuit expressly declined to incorporate the Fifth Circuit's reservations about defining property use as commercial in nature solely by reference to a past single and/or exceptional commercial uses. The Ninth Circuit stated that:

"attempting to quantify the number of commercial uses associated with the property, or to embark upon characterizing property use as exceptional or unexceptional, would unnecessarily complicate the determination to be made under § 1610(a)."⁶

The Ninth Circuit then proceeded to examine each of the obligations at issue, agreeing with the district court that none of them was used for commercial activities in the United States.⁷

Comment

A number of important issues emerge from this case that may be relevant to the enforcement and execution of an arbitration award against a foreign sovereign in US courts. First, both the Fifth Circuit in *Af-Cap v Congo* and the Ninth Circuit in *Af-Cap v Chevron* held that under the FSIA, the exception to immunity from attachment is more narrow than the exception to immunity from jurisdiction. Indeed, s.1605(a)—which sets forth the FSIA's exceptions to immunity from jurisdiction—provides in relevant part that a foreign state shall not be immune from the jurisdiction of US courts when:

"the action is based upon . . . an act performed in the United States *in connection with* a commercial activity of the foreign state elsewhere."⁸

According to both the Fifth and Ninth Circuits, the use of the term "in connection with" in s.1605(a)(2) and the use of the term "used for" in s.1610(a) signify that congress intended it to be more difficult to execute against the property of the foreign sovereign than to obtain jurisdiction over a foreign sovereign.⁹ The distinction regarding execution is important with respect to arbitral awards. Neither the New York Convention nor the Washington Convention provide any waiver of immunity for execution activities, as opposed to recognition and enforcement of the awards as judgments. Accordingly, a party seeking to execute a judgment based on an arbitration award in a US court will still have to clear the hurdles of s.1610(a) of the FSIA.

Secondly, the cases illustrate that a broad waiver in a contract may not by itself suffice to establish a waiver against execution under the FSIA. The waiver at issue in the *Af-Cap* cases was quite broad, yet both the Fifth Circuit and the Ninth Circuit held that, under the FSIA, immunity had to be waived and the property had to be "used for a commercial activity in the United States".

Thirdly, *Af-Cap's* longstanding effort to enforce an obligation on which Congo defaulted more than 20 years ago reinforces how difficult it can be to execute on a judgment against a foreign sovereign. Indeed, the final chapter of the *Af-Cap* saga is not told above. After the Fifth Circuit determined that the obligations at issue were used for a commercial activity in the United States on *Af-Cap's* second appeal to that case, the district court on remand ruled that non-monetary obligations were not properly subject to garnishment under Texas law. Apparently, the obligation of the

⁵*Af-Cap v Congo* 383 F.3d at 369 (footnotes omitted).

⁶*Af-Cap v Chevron* 475 F.3d at 1092.

⁷*Ibid.* at 1091.


⁸28 U.S.C. s.1605(a)(2) (emphasis added).

⁹See *Af-Cap v Chevron* 475 F.3d at 1090; *Af-Cap v Congo* 309 F.3d at 254.

ALEXANDRE DE GRAMONT AND
DAVID K. OSEI
CROWELL & MORING LLP,
WASHINGTON D.C.

**TERMORIO S.A. E.S.P. v
ELECTRANTA S.P.**

***Effect of set aside in situs of
arbitration on enforcement in
secondary jurisdiction
Differences between New
York and Panama conventions***

 ***Enforcement; Foreign awards;
Foreign judgments; International
commercial arbitration; Jurisdiction;
Seat of arbitration; Setting aside;
United States***

Public policy

No.06-7058 (United States Court of
Appeal for the District of Columbia
May 25, 2007)

CMS companies was to pay in kind oil to the Congo. On a third appeal to the Fifth Circuit, the Fifth Circuit agreed with the district court, holding that the non-monetary obligations could not be garnished under Texas law.¹⁰

An ICC arbitration tribunal seated in Colombia issued an award during the year 2000 in the amount of US \$60 million against an agency of the Government of Colombia. The claimant in the arbitration was a private Colombian company and the arbitration and contract that was the subject of the arbitration were governed by Colombian law. The respondent filed a legal action in Colombia to set aside the award, arguing that at the time that the award was issued Colombian law did not permit the ICC to administer an arbitration in that country. The outcome of that action was that the Colombian Council of State set aside the award.

The claimant and a related company filed an action in the US District Court for the District of Columbia alleging breach of contract and asking for substantive relief and enforcement of the award that had been set aside in Colombia. Applying art.5.1(e) of the New York Convention, the lower court dismissed the action for failure to state a claim upon which relief could be granted, and alternatively, under the doctrine of *forum non conveniens*. (The defendants also successfully argued lack of subject matter jurisdiction to hear the breach of contract claim under the Foreign Sovereign Immunities Act.) The claims of the related non-party to the arbitration were dismissed for lack of standing. Plaintiffs appealed the dismissal to the US Court of Appeal for the District of Columbia, which affirmed the dismissal of the request for enforcement of the award for failure to state a claim, considered to be "the only issue of consequence" before the court.

The appellate court noted that the Colombian Council of State was a competent authority in Colombia for setting aside an arbitral award, and that the record did not indicate "that the proceedings before the Consejo de Estado were tainted or that the judgment is other than authentic". Consequently:

"because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of the award under the FAA [Federal Arbitration Act] or the New York Convention."

First, the appellate court addressed the question of the applicable international agreement, noting that both the United States and Colombia had adopted the New York and the Panama Conventions. Although plaintiffs argued that the Panama Convention was applicable because a majority of the parties to the agreement were citizens of Panama Convention countries, the court found that "the relevant provisions [of the Panama Convention] ... are substantively identical for the purposes of this case", and applied the language of the New York Convention. The court did not decide, as the district court had done, whether 9 U.S.C. s.302 incorporated provisions of the New York Convention in situations where the Panama Convention was applicable under US law.

Next, the appellate court considered the validity of a foreign judgment vacating an arbitration award where the issuing court or competent authority is located in the jurisdiction where the arbitration was seated.

¹⁰*Af-Cap Inc v Republic of Congo* (2006) 462 F.3d 417 (5th Cir.).