

# Asset Recovery and Judgment Enforcement: A Focus on 2024 New Trends in the US and UK

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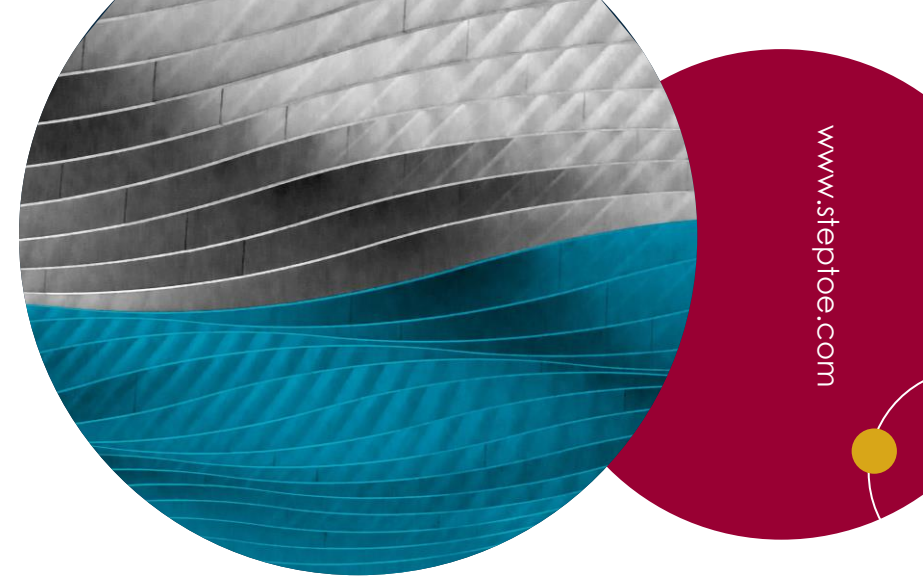
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# OVERVIEW

- Having a Well-Designed Plan & Assess the Merits
- Finding the Assets Before you Start
- Judgment Recognition
- Recognition of Arbitral Awards Priority of Liens
- New Trends:
  - US: Crystallex – Citgo Auction, Venezuela Sanctions, and Implications
  - UK: Injunctions Against Sovereigns and Direct Transfer of Assets to Remedy Fraudulent Transfer
  - Limitations on Cross Border Discovery (Section 1782)
  - US: RICO Action to Enforce Arbitral Awards
- Wrap-up & Questions



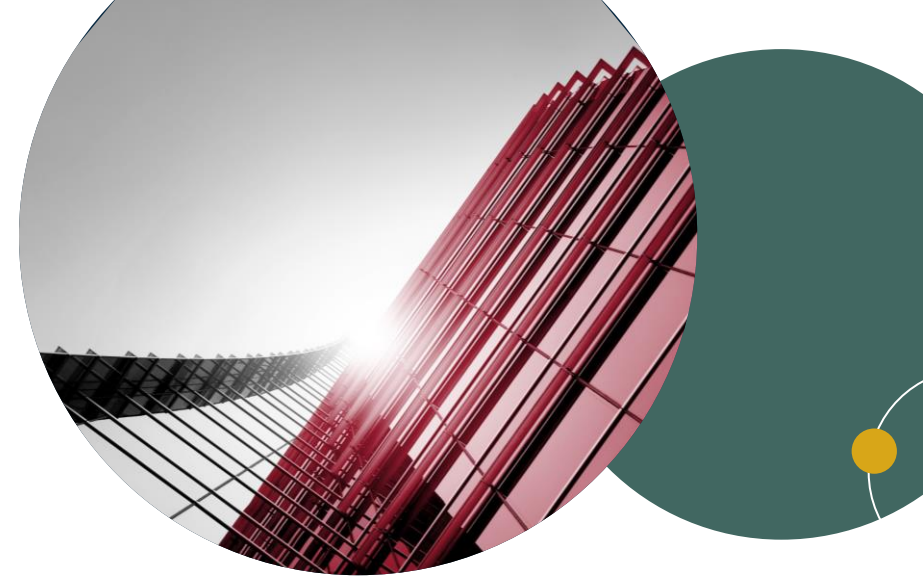
# Having a Well-Designed Plan & Assess the Merits

- Before you begin make sure you have a solid case for recovery before you invest you or your client's money
- Assess the merits & develop a legal strategy
- Investigators and lawyers work hand-in-hand and the best collaboration starts from the beginning
- Special consideration required when dealing with a sovereign debtor



# Find the Assets Before You Start

- Know how a debtor holds their assets/makes their money and where those assets/revenue streams hit jurisdictions that may be more favorable to enforcement
- Asset intelligence begins before filing the case, continues through enforcement
  - Know you can monetize the claim
  - Know where and how you can initiate proceedings
  - Ensure debtor is not dissipating assets in anticipation of award
  - Monitor assets and look for changes in status as enforcement panic sets in



# Finding the Assets Before You Start

## US Prejudgment Remedies

- Attachment
- Disclosure to Aid Attachment
- TRO & Preliminary Injunction
  - A general freezing order on general assets pre-judgment in the United States is not permitted
- Receiver
- Notice of Pendency
- Arbitration – Some jurisdictions (e.g., NY) permit attachments in support of arbitration – including international arbitration – before action is commenced

## UK – England and Wales Prejudgment Remedies

- Freezing Orders
  - The applicant has a cause of action against the respondent;
  - The applicant has a good arguable case;
  - The respondent has assets that exist within the jurisdiction;
  - There is a real risk of dissipation of those assets without the freezing order; and
  - It is just and convenient for the court to exercise its discretion in favor of the grant of the freezing order.

## Finding the Assets Before You Start

- Consider if your debtor has a connection to England
- UK world wide freezing order is among the most powerful creditor tools, as it can get to indirectly owned assets around the world
  - Includes disclosure
  - Potential contempt as a remedy
  - Allows for alternative service methods
- Also consider UK domestic freezing order
- Cautionary factor – remember loser pays and fees can be very high for this
- Uncertain whether injunctive remedies available against sovereign

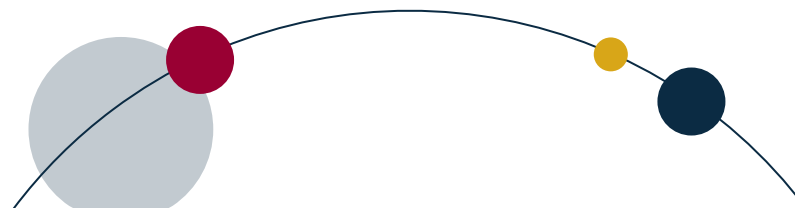


# Recognition of Foreign Judgments in US and Recognition of US Judgments Abroad

- No treaty or convention in force between the US and any other country on reciprocal recognition and enforcement of judgments.
- Recognition in US and abroad is done through a new judicial proceeding and is commonly achieved, though there are certain issues to be mindful of (especially need for judgment court to have been found to have jurisdiction over the debtor)
- Recognition of US Judgments Abroad
  - A stumbling block can be the perception of many foreign states that US money judgments are excessive according to their notions of liability and objections to the extraterritorial jurisdiction asserted by courts in the United States. For example, punitive damages awards are usually not recognized overseas and certain causes of action (like Civil Rico) can be problematic.
  - Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters
    - 33 countries signed (but includes the EU), including US but not ratified, and not in force yet
  - US Default judgments typically not recognized elsewhere
- General standards of enforcing foreign judgments in US and US judgments in foreign countries
  - **Comity:** (1) did the court that issued the judgment have jurisdiction; (2) was the defendant properly notified of the action; (3) fraud; and (4) is the judgment contrary to the public policy

# Judgment Enforcement Tools in the US

- Post-judgment discovery for assets
  - Discovery against recalcitrant debtors is also good to bait them into non-compliance and then seek powerful contempt sanctions
- Federal court = nation-wide service & international requests
- *Ex parte* asset discovery served upon third parties
  - Typically, all discovery has to be served upon the opposing party, the court has the discretion to order otherwise. Federal Rule of Civil Procedure 5(a) provides that "a discovery paper is required to be served on a party, unless the court orders otherwise."
  - Demonstrate that property or evidence is likely to be hidden or destroyed
  - A court may allow a judgment creditor to serve third-party discovery and to not inform the judgment debtor for a number of months
  - Critical that the court's order direct the third party not to inform the judgment debtor of the discovery request for a number of months





# Judgment Enforcement Tools

- Primary means is by a writ of execution
- Follow state law and procedures
- Can enforce against third-parties holding assets of, or debts owed to, the judgment-debtor
  - Turnover orders
  - Writs of garnishment
- “Unless the Court Orders Otherwise”
  - Injunctive relief possible but typically need to show no adequate legal remedy
- Fraudulent Transfers
- Veil Piercing

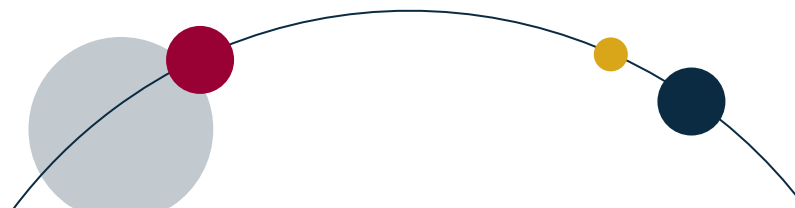


# Special Circumstances: Going Against Sovereigns

- Generally sovereigns enjoy immunity unless an exception applies:
  - Waiver
  - Commercial activity
  - Arbitration award
- Prejudgment remedies require express waiver and can be very challenging
- Post-Judgment enforcement requires Court permission and only commercial assets are available for execution
- Veil piercing against a sovereign: The presumption that the state and commercial entity are distinct can be overcome.
  - Alter ego if : (1) extensively controlled or (2) separate identity “would work fraud or injustice.”
  - 5 factors – the *Bancec* factors:
    - (1) gov. exercises economic control over entity;
    - (2) gov. officials manage entity or its daily affairs;
    - (3) entity’s profits go to the gov.;
    - (4) gov. is the sole beneficiary of entity’s conduct; and
    - (5) whether adherence to separate identities would entitle the foreign state to benefits in US courts while avoiding its obligations
  - See *Amaplat Mauritius Ltd. v. Zimbabwe Mining Dev. Corp.*, No. 22-CV-58 (CRC), 2024 WL 519583, at \*3 (D.D.C. Feb. 9, 2024)

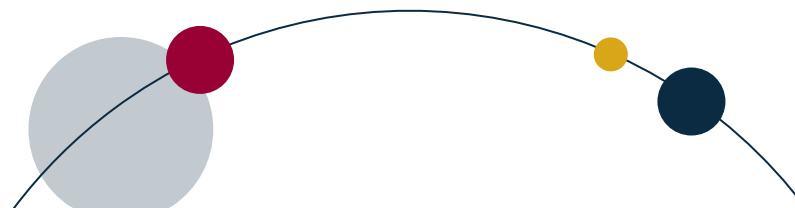
## Recognition of Arbitral Awards

- There are a number of international agreements in force to which the United States is a party on the subject of enforcement of arbitral awards.
  - *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 UST 2517; TIAS 6997; 330 UNTS 3 (New York Convention)
    - *See also* 9 U.S.C. 201-208 (Chapter 2 of Federal Arbitration Act, incorporating NY Convention into US law)
  - *Inter-American Convention on International Commercial Arbitration*, 14 I.L.M. 336 (1975).
- Judgment on a Judgment
  - The statute of limitations for enforcing international arbitration awards (3 years) in the United States is shorter than that for enforcing judgments
  - If the 3-year period has run, a party can turn the arbitral award into a judgment outside the US and then use the longer period to enforce the foreign judgment
    - *See Commissions Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 332 (D.C. Cir. 2014).



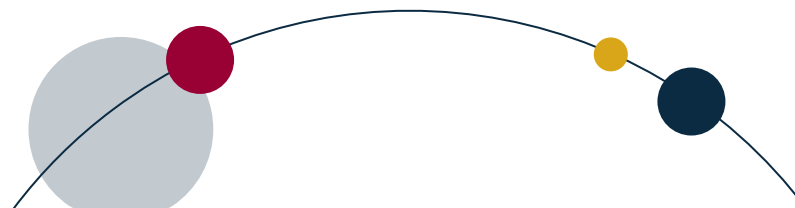
# Three Considerations for Drafting Arbitration Clauses

- Select a particular venue and consent to personal jurisdiction in that forum for enforcing an award
  - Otherwise court will require award-creditors to establish personal jurisdiction and venue over the award-debtor to enforce the award
  - FAA has venue provision, but not always where assets are or in jurisdiction with strong creditor remedies
- Appointing an irrevocable agent to accept service of process for enforcement purposes
  - Avoids service challenges, particularly for foreign sovereigns (private agreements are specifically authorized under the FSIA)
- Contractually agreeing to a post-judgment interest rate
  - Panels often set post-award interest rates that are higher than the federal post-judgment statutory interest rate (The federal rate floats until it is set at the date of judgment and is currently at 5%.)
  - But, courts hold that the FAA requires application of the federal post-judgment statutory rate after an arbitral award is converted to a judgment, unless the parties set their own rates through contract



# Priority of Liens

- First in time is First in Right – Creditors Race
- Real Property – governed by state law but in general a lien is obtained by docketing the judgment
  - Can be time limited
- Personal Property – governed by state law but in general it is either upon the actual seizure of the property or upon delivery of the writ of execution to the sheriff
  - Intangible property, lien will typically attach upon order by Court requiring turnover
- Not only judgment liens at issue – other liens, statutory liens or security interest can compete with judgment liens
- Prejudgment remedies can establish a lien
- Bankruptcy can discharge unperfected liens
- Remains unsettled whether a prejudgment lien can be discharged



# New Trends US: *Crystallex v. Venezuela* (D. Del.) – Citgo Auction, Venezuela Sanctions, and Implications

- A Sale Procedures Order was entered in October, 2022, for auction of Citgo parent company (PDVH)
- The Sales Procedures Order contemplated that other creditors of Venezuela would participate and enforce their judgments out of the proceeds of the sale of PDVSA's stock in PDVH in the order of priority (Dkt. 481.)
- Developments -- October 2022 and April 2024:
  - The issuance of a general OFAC license authorizing the sale process, and noting that OFAC is likely to grant a specific license to the successful bidder, which permitted the sale to go forward without violating US sanctions;
  - The reissuance of the physical share certificates (now in the physical custody of the Special Master);
  - A Third Circuit opinion (and subsequent denial of certiorari) holding that PDVSA is an alter ego of Venezuela;
  - The completion of the first round of non-binding bids; the determination of the Attached Judgment Creditors and their priority order; the service of writs of attachment on the US Marshal, and then on the share certificates in the custody of the Special Master, by the Attached Judgment Creditors; and
  - The final determination of the amount of the Attached Judgments
- The deadline to submit final, binding bids to the Special Master is June 11, 2024, and the sale hearing is presently scheduled for **July 15, 2024**



# New Trends: Limits on Cross Border Discovery – 28 U.S.C. § 1782

- Section 1782 authorizes US courts to order a person who is resident or found in the United States to provide information or documents “for use in a proceeding in a foreign or international tribunal”
- The US Supreme Court has narrowed the application of Section 1782
  - June 2022: S. Ct. held that § 1782 does not apply to the international arbitration tribunals. Only "governmental" or "intergovernmental" adjudicative bodies fall within the scope. Put a clear end to use of Section 1782 in international commercial arbitration.
    - *See ZF Automotive US v. Luxshare, Ltd.*, No. 21-401, 596 U.S. 619 (2022) and *Alixpartners v. Fund for Protection of Investor Rights in Foreign States*, 21-518, 596 U.S. 619 (2022)
- Open Issue: Is Section 1782 discovery available for an ICSID or ICC arbitration?

## Yes

- *In re Iraq Telecom Ltd.*, No. MC 19-175, 2023 WL 2402873 (E.D. Pa. Mar. 8, 2023) (ICC).
- *In re Bureau Veritas*, No. 5:22-MC-80132-EJD, 2022 WL 3563773 (N.D. Cal. Aug. 17, 2022) (ICC).

## No

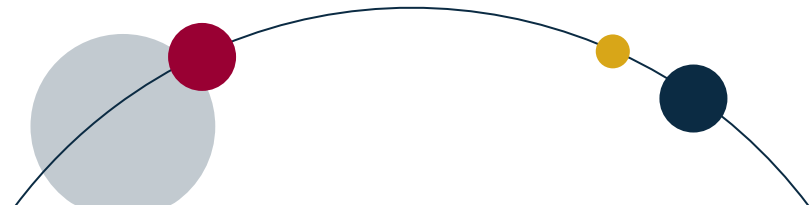
- *In re Alpeine, Ltd.*, No. 21-MC-2547-MKB-RML, 2023 WL 5237336 (E.D.N.Y. Aug. 15, 2023) (ICSID).
- *In re Webuild S.P.A.*, No. 22-MC-140 (LAK), 2022 WL 17807321 (S.D.N.Y. Dec. 19, 2022) (ICSID).
  - Oral argument in Second Circuit held on Nov. 21, 2023; awaiting decision.

# New Trends UK: Freezing Injunctions Against Foreign Sovereigns?

- Can injunctions be granted against a state in the absence of consent?
  - For many years, the courts applied SIA, Section 13 to prohibit injunctions, without much analysis
  - In 2017, Supreme Court held in *Benkharbouche v. Embassy of the Republic of Sudan* (2017), that where immunity under UK law (the SIA) is more expansive than international law it may violate the European Convention on Human Rights (ECHR) Article 6 (the right to a fair trial)
  - In *UK P&I Club v. Republica Bolivariana de Venezuela* (2022), Insurers sought an anti-suit injunction against Venezuela. Insurers relied on *Benkharbouche* and argued to deny injunctive relief would violate ECHR.
    - Court disagreed: "There is no clear and settled view in customary international law regarding orders for injunctions ... against states," and that the UK's approach (SIA Section 13) is not an outlier and thus did not infringe ECHR Article 6. Supreme Court denied review
- So is this argument a non-starter against states? Maybe not. Could be limited only to antisuit injunctions. Judgment enforcement could be different.
- SIA Section 13(2) distinguishes between "(a) relief ... by way of injunction ..." and "(b) ... any process for the enforcement of a judgment or arbitration award ..."; and the "commercial purposes" exception in Section 13(4) applies to the latter
  - Potential argument that injunctions to support the enforcement of an award/judgment fall within the words "any process for the enforcement of a judgment or arbitration award." If so, assets in use for commercial purposes may be subject to freezing injunctions.
  - Indeed, courts can execute against such assets, so why deny freezing them?

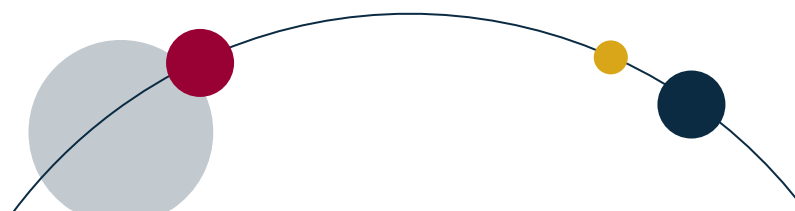
# New Trends UK: National Iranian case—Direct Asset Transfer to Remedy Fraudulent Transfer

- Crescent Gas Corporation (Crescent) awarded over \$2bn against National Iranian Oil Company (NIOC)
  - Crescent sought to enforce the award against a ~100 million GBP property owned by NIOC in the center of London
  - However, NIOC had transferred that property to an Iranian pension fund under state supervision in August 2022, days after receiving the English order registering the partial award
  - The English Court ruled that the purpose of the August transfer had been to shield the property from execution of the partial award
  - This made Crescent a victim of the fraudulent transfer, the court continued, entitling it to relief under the Insolvency Act
  - That relief encompassed any order that would restore the parties' positions that would have existed but for the transaction
  - In a context where Crescent would have been able to enforce the partial award against that asset, the court concluded that there would be justice in *ordering a direct transfer of the property to Crescent*



## New Trends US: RICO Action to Enforce Arbitral Awards

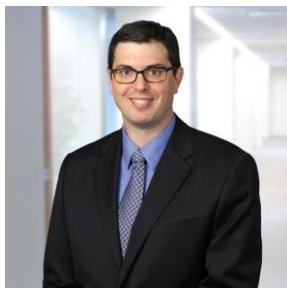
- In June 2023, the US Supreme Court ruled that RICO (US racketeering law) may be used to enforce foreign arbitral awards. *Yegiazaryan v. Smagin*, No. 22-381, 599 U.S. 533 (2023).
  - Facts: London arbitration award for \$84 million, based on fraud in Russia real estate venture. Award confirmed in CA under the NY Convention. Debtor allegedly implemented various methods to hide assets from jurisdiction of CA court. Debtor claimed that the actions “injured” his property—the CA judgment.
- While this decision provides judgment creditors with another tool for relief, pleading and proving a RICO claim will remain difficult
  - Successfully pleading and proving RICO claims can be a challenge, as the plaintiff must show:
    - (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property
  - RICO does not apply to foreign injuries and therefore a plaintiff must demonstrate the injury to its business or property was domestic in nature
- RICO claims are powerful – civil liability under the statute offers treble damages and the awarding of attorneys' fees



# Questions



# Speakers



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Described by clients as a "real international statesman," Steve Davidson handles high-profile arbitrations and complex business litigation across the globe. Steve has been recognized leader in international disputes and judgment enforcement by Global Arbitration Review, Legal 500, and others, including Chambers USA which identified him as a "notable practitioner." Steve serves as lead counsel to Fortune 500 corporations and other large companies abroad in cases involving complicated and sensitive contractual issues and business matters. At Step toe, Steve serves as the leader of the of the Commercial Litigation and International Arbitration practice groups.





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