



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

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Academic Directors: Ignacio Torterola, Loukas Mistelis\*

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**Case Name and Date:** Crystallex Int'l Corp. v. Petroleos De Venezuela, S.A, et al., 2016 U.S. District Court for the District of Delaware - 30 September 2016.

**Case Report by:** \*\* Timothy Chorba, \*\*\* Editor Diego Luis Alonso Massa

**Summary:** In a decision issued on September 30, 2016, the U.S. District Court for the District of Delaware considered a 12(b)(6) motion to dismiss for failure to state a claim filed by the Defendants PDV Holding, Inc. and CITGO Holding, Inc. Plaintiff Crystallex International Corporation had filed a common law civil conspiracy claim as well as a Delaware Uniform Fraudulent Transfer Act (“DUFTA”), 6 Del. C. § 1301 *et seq.* claim against the Defendants. In its decision, the Court dismissed the Plaintiff’s civil conspiracy claim owing to Delaware law disallowing such a claim to be based on a theory of fraudulent transfer; at the same time, narrowly declined to dismiss the Plaintiff’s DUFTA claim. The Court also addressed additional arguments the Defendants brought in arguing for their Motion to Dismiss: that Plaintiff’s claims were barred under the Foreign Sovereign Immunities Act (“FSIA”) and, alternatively, the Act of State Doctrine. Ultimately, the Court also sided with the Plaintiffs on these arguments as well, denying the motion on either basis. Under DUFTA, however, the Court held that CITGO Holding, Inc. was not a statutory “transferor” and dismissed it from the case.

**Main issues:** Claims under the Delaware Uniform Fraudulent Transfer Act (“DUFTA”); application of the Foreign Sovereign Immunities Act (“FSIA”); Act of State Doctrine.

**Judge:** Chief Judge Leonard Stark, United States District Court for the District of Delaware.

**Plaintiff’s Counsel:** Raymond J. DiCamillo, Jeffrey L. Moywer, and Travis S. Hunter of Richards, Layton, & Finger P.A., Wilmington, DE; Robert L. Weigel, Jason W. Myatt, and Rahim Moloo of Gibson, Dunn & Crutcher LLP, New York, NY.

**Defendant’s Counsel:** Kenneth J. Nachbar of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE; Nathan P. Eirner and Lisa S. Meyer of Eimer Stahl LLP, Chicago, IL.

\* Directors can be reached by email at: [ignacio.tortero@internationalarbitrationcaselaw.com](mailto:ignacio.tortero@internationalarbitrationcaselaw.com) and [loukas.mistelis@internationalarbitrationcaselaw.com](mailto:loukas.mistelis@internationalarbitrationcaselaw.com)

\*\* Timothy Chorba is a 4<sup>th</sup> year JD/MBA student at the Georgetown University Law Center and McDonough School of Business. He is an Executive Senior Editor for the Georgetown Journal of International Law and during the Fall 2016 semester, is participating as a student attorney in Civil Division of the D.C. Law Students in Court Clinic representing tenants facing eviction and other housing related issues. Prior to law school, he served as health educator with the U.S. Peace Corps in Morocco from 2010-2013.

\*\*\* Lawyer, University of Buenos Aires, admitted to practice law in the City of Buenos Aires; Sworn Translator, University of Buenos Aires, Argentina. LLM holder in International Relations – with a specialization in Private International Law – Institut de Hautes Études Internationales, University of Geneva, Switzerland. Mr. Alonso Massa can be contacted at [alonso.arbitrage@icloud.com](mailto:alonso.arbitrage@icloud.com)

## Digest:

### 1. Background

#### 1.1 Parties

The Plaintiff in the case was the Canadian company Crystallex International Corporation, the claimed owner of “certain mining rights and investments.” *Crystallex Int’l Corp. v. Petroleos De Venezuela, S.A, et al.*, 2016 U.S. Dist. LEXIS 134144, at \*1. Defendants were Delaware corporations PDV Holding Inc. and CITGO Holding Inc., subsidiaries of Venezuelan company Petroleos de Venezuela, S.A (“Petroleos”), *id.* at \*1-2, who Plaintiff claimed was central in a series of transactions which amounted to an unlawful expropriation of its mining rights and investments. *Id.*

#### 1.2 Relevant Facts

A central theme of the case was the Defendants’ connection to Petroleos and the country of Venezuela. Plaintiff alleged, in short, that Petroleos was an “*alter ego* of the Venezuelan government,” and had caused the Plaintiff damages stemming from a series of “Transactions” in which PDV Holding had received a dividend from CITGO Holding funded by a recent \$2.8 billion debt issuance. PDVH Holding, in turn, had then transferred the dividend to Petroleos, its own parent.

#### 1.3 Procedural Posture

Plaintiff filed the complaint in the instant case on the U.S. District Court for the District of Delaware. By the time the instant 12(b)(6) motion to dismiss was adjudicated within the decision, the parties had completed briefing on the issues and had also held oral argument on them as well. *See id.* at \*3.

### 2. The District Court’s Analysis

#### 2.1 Standard of Review

The Court first addressed the relevant standard for granting a motion to dismiss under U.S. Federal Rule of Civil Procedure 12(b)(6). *Crystallex Int’l Corp. v. Petroleos De Venezuela, S.A, et al.*, 2016 U.S. Dist. LEXIS 134144, at \*3-4 (D. Del. Sept. 30, 2016). Rule 12(b)(6) provides a basis for dismissing a lawsuit based on a complaint’s “failure to state a claim upon

which relief can be granted.” Fed. R. Civ. Pro 12(b)(6). In articulating the standard, the Court reiterated that “to survive a motion to dismiss, a civil plaintiff must allege facts that raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful).” *Chyrstalex Int’l Corp.*, 2016 U.S. Dist. LEXIS 134144, at \*3-4. (internal citations and quotation marks omitted). It further emphasized that it was “not obligated to accept as true bald assertions, unsupported and unwarranted inferences, or allegations that are self-evidently false.” *Id.* at \*4 (internal citations and quotation marks omitted).

## 2.2 Discussion

### A. Plaintiff’s DUFTA Claim

The Court then addressed the key aspect of DUFTA pertaining to the Plaintiff’s claims, that “a transfer made by a debtor is fraudulent as to a creditor, whether the creditor’s claims arose before or after the transfer was made if the debtor made the transfer or incurred in the obligation with actual intent to hinder any creditor of the debtor.” *Id.* \*4 (quoting 6 Del. C. § 1304(a)(1)) (internal ellipses and alteration marks omitted). The Court focused particularly on two aspects of that portion of DUFTA: first, whether a “transfer”<sup>1</sup> within the meaning of the statute had been consummated and second, whether a “debtor”<sup>2</sup> within the meaning of the statute had been involved. *See id.* at \*4-5 (citing to 6 Del. C. §§ 1301, 1304).

#### i. “Transfer”

In its discussion regarding whether a statutory transfer had occurred, the Court emphasized that “in order for a fraudulent transfer to exist under [DUFTA], there must be some transfer of debtor property involved.” *Id.* at \*5. In addressing that inquiry, the Court examined both the Defendants’ and Plaintiff’s arguments. Defendants’ argument focused on ownership of the “assets” in question. *Id.* at \*5-6. While the Defendants acknowledged that “they [were] wholly-owned direct and indirect subsidiaries of Petróleos,” based on principle of corporate law that a parent company does not have an automatic legal title to its subsidiaries assets “neither Venezuela nor Petróleos ha[d] any ownership interest in CITGO Defendants’ assets” and thus a “transfer” had not occurred. Plaintiff’s argument, on the other hand, focused on the “economic reality” of the transactions in questions and boiled down to the idea that “Petróleos’ extraction of value from its wholly-owned subsidiaries diminishe[d] the value of Petróleos’s equity interest in those subsidiaries,” thus “qualifi[ing] as a ‘transfer’ of a debtor’s property under DUFTA.” *Id.* at \* 7.

Because of the issues raised by Plaintiff’s DUFTA claims at question being a matter of Delaware state law not yet addressed by the Supreme Court of Delaware, the Court clarified its decision making process. Specifically, the Court explained that its role was to “predict how that tribunal would rule” and that in doing so, it was obligated to give “due deference” to lower Delaware court decisions. *Id.* (citing *In re Makowka*, 754 F.3d 143, 148 (3d Cir. 2014)). In particular, the Court looked to two cases that the Parties had cited to in their briefs. *Id.* at \*

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<sup>1</sup> 6 Del. C. §1301(12) defines a statutory “transfer” as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance but excludes, without limitation, any disposition of or parting with property or an interest in property described” in other parts of the statute.

<sup>2</sup> 6 Del. C. §1301(12) defines a statutory “debtor” as “a person who is liable on a claim.”

7-8; *see also* Spring Real Estate, LLC v. Echo/RT Holdings, LLC 2016 Del. Ch. Lexis 46 (Del. Ch. Feb. 18, 2016); Roseton OL, LLC v. Dynegy Holdings Inc., 2011 Del. Ch. LEXIS 113 (Del. Ch. July 18, 2011). In analyzing both cases, the Court found that neither supported the theory that a transfer of “embedded ‘value’” could be deemed a DUFTA “transfer” – in other words the case law suggested that the assets had to be directly owned to qualify. *Cyrstallex Int’l Corp.*, 2016 U.S. Dist. LEXIS 134144, at \*7-9. While the Court implied this worked against the Plaintiff’s claims, it still found that “the Transactions [could] be characterized as more than the mere movement of embedded value or depletion of asset value” in that “they allegedly involve[d] the ultimate extraction of that value by the ‘debtor’ itself.” *Id.* at \*12. Consequently, the Court considered Plaintiff to have properly alleged that a statutory “transfer” had taken place. *Id.* at \*12.

## ii. “Debtor”

The Court then turned to the issue of whether, if a transfer had occurred, that transfer could be construed as having been undertaken “by a debtor.” *Id.* at \*13-14 (quoting 6 Del. C. § 1304(a)(1)). The Court’s analysis parsed the meaning of the statutory phrase, focusing on the nature of transfers encompassed by DUFTA – both direct and indirect ones – as well as how the word “by” should be interpreted. *Id.* at \*14-15. The Court focused on the plain meaning of the statutory language, looking to the dictionaries definitions of “by” being “through the agency or instrumentality of” and “on behalf of.” *Id.* at \*14. Given the deferential standard imposed by 12(b)(6), the Court explained that “[i]n deciding th[e] motion, the Court must accept as true Plaintiff’s allegations of Venezuela’s and/or its *alter ego’s* extensive, if not dominating, involvement in the Transactions,” *id.*, and concluded that the instant complaint had “allege[d] a transfer of a debtor’s property at the debtor’s behest. It therefore properly alleges the existence of a fraudulent transfer under DUFTA.” *Id.* at \*15 (citing to 6 Del. C. § 1304(a)).

## iii. The Proper Defendants

The last aspect of Plaintiff’s DUFTA claims that the Court addressed were whether CITGO Holdings and PDV Holding, Inc. were proper defendants to the case. The rule that the Court cited was that “the only proper defendants in a fraudulent conveyance action...are the transferor and transferees.” *Id.* (quoting *Quadrant Structured Products Co. v. Vertin*, 102 A.3d 155, 203 n.17 (Del. Ch. 2014)). The Court analyzed, in turn, whether either of the two Defendants were properly joined in the suit based on their role in the “Transactions” in question. *Id.* at \*15-19.

The Court came to the quick conclusion that PDV Holding, Inc. was a proper defendant as a “non-debtor transferor.” The Court found that the facts alleged in the Complaint described a fraudulent transfer to which PDV Holding “was a direct party,” having already noted that “all that DUFTA requires is a transfer of the debtor’s property with sufficient involvement of the debtor.” *Id.* The Court consequently declined to dismiss PDV Holding, Inc. from the suit.

The Court was reticent to come to as quick a conclusion regarding the status of CITGO Holding. The Defendants argued that the transactions should be “collapsed,” or in other words treated as a single event, for the purposes of assessing whether a DUFTA claim could be brought against them. The court stressed, however, that “[t]he collapsing doctrine is often used to analyze the motivations for a transfer as opposed to whether (and when) a transfer of

debtor property occurred in the first place,” and did not apply in the circumstances of the case. *Id.* at \*17-18. Consequently, CITGO Holding was found to be a proper Defendant.

The Court ended its DUFTA analysis by summarizing the appropriateness of Plaintiff’s DUFTA claims being brought against either Defendant (ultimately dismissing CITGO Holding from the suit, but noted that it found “Plaintiff’s DUFTA claim strain[ed] the statute’s structure.” *Id.* at \*18. Nonetheless, the Court allowed the action to proceed on Plaintiff’s DUFTA Claims against PDV Holding, Inc., explaining that the Complaint alleges a fraudulent transfer, and DUFTA provides for a range of remedies that may be appropriate. *Id.* at \*18.

## **B. Civil Conspiracy**

The Court then briefly addressed the Plaintiff’s civil conspiracy claim, which Plaintiff had attempted to characterize as “an alternative path to relief against the ...defendants” rather than “an attempt to extend liability to non-transferors or transferees.” *Id.* at \*19 (internal citation omitted). While the Court highlighted disagreed with Plaintiff’s characterization of its civil conspiracy claim, it ultimately held against the Plaintiff as a matter of law. Citing a Delaware Court of Chancery case, the Court explained that it was a “principal that under Delaware law, a conspiracy cannot be predicated on fraudulent transfer,” *id.* at \*19-20 (quoting *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 203 (Del. Ch. 2014), and dismissed the Plaintiff’s civil conspiracy complaint under Rule 12(b)(6). *Id.* at \*20.

## **C. FSIA**

As the Court explained, “FSIA provides [in relevant part] that ‘the property in the United States of a foreign State shall be immune from attachment arrest and execution,’ subject to certain exceptions.” *Id.* at \*20 (citing 28 U.S.C. §§1609-1611). In its FSIA analysis, the Court addressed two main sub-issues regarding whether the statute should be construed to bar the Plaintiff’s claims:

### **i. Whether Plaintiff’s Actions Were Barred by FSIA’s Prejudgment Immunity**

The Defendant argued that because FSIA bars pre-judgment attachments, then because the “Transactions took place prior to entry of any judgment...any liability for those transfers [was] the equivalent of a prejudgment attachment, from which Venezuela [would be] protected by virtue of the FSIA’s prejudgment immunity.” *Id.* at 20. In assessing the Defendants’ arguments, the Court looked both to the its interpretation of the Congressional intent behind the passing of FSIA as well as relevant case law on point. *Id.* at 23-24. With respect to the latter, the Court was succinct in highlighting that “neither the parties nor the Court have identified any case on point.” Primarily, cases cited by the Defendants differed from the instant one in that the relief within *Crystallex* “sought [wa]s not limited to (and will not necessarily even include) the return of sovereign property held abroad.” *Id.* at \*25. Consequently, the Court did “not view Plaintiff’s fraudulent transfer claim as barred by the FSIA, notwithstanding Plaintiff’s attempt to impose liability based on a transfer of funds which would not have been attachable when the Transactions were carried out.”

## ii. Whether FSIA Precluded Plaintiff's Sought-After Remedies

### D. Act of State Doctrine<sup>3</sup>

The Court finally addressed the Defendants' argument that the act of State doctrine should be interpreted to bar Plaintiff's claims. As the Court articulated, "[t]he act of State doctrine's application involves balancing the national interest with the desire of litigants to obtain decisions on the merits of their claims." *Id.* at \*28 (citing to *Env'tl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1058 (3d Cir. 1988)). In the ensuing analysis, emphasis was placed on "case-by-case" nature of applying the doctrine as well as three factors courts look at in doing so: (1) "the nature of the question conduct"; (2) "the effect upon the parties"; and (3) an appraisal of "the sovereign's role." *Id.* at \*29 (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979)).

The Court noted that the Plaintiff had a "significant interest in litigation" and that there was not enough evidence that "the executive branch's ability to conduct foreign affairs" would be hindered significantly enough to outweigh that interest. *Id.* The Court also stressed that it was "not being asked to adjudicate Venezuela's actions with respect to Plaintiff's mining rights," *id.* (citing to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, (1964), but rather "the decisions to move monies in a possible attempt to hinder creditors." *Id.* Of importance as well was the finding that much of the conduct alleged took place within the United States and that statutory guidance provided that "confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine." *Id.* (citing 9 U.S.C.S. § 15).

The Court went on to deny the motion to dismiss with respect to that act of State doctrine argument. *Id.* at \*30. Notably, the court denied the motion without prejudice and suggested that "[s]hould the issue be raised again, the parties should consider providing the Court with evidence of the impact, if any, of the maintenance of this suit on U.S. relations with Venezuela." *Id.*

### Conclusion

In concluding, the Court granted the Defendants' 12(b)(6) motion in part and denying it in part. *See id.* at \*30. The Court additionally dismissed CITGO Holding from the suit, leaving PDV Holding, Inc. as the lone defendant.

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<sup>3</sup> The Act of State Doctrine "provides, subject to exceptions, that United States courts will not judge the validity of official acts of a foreign government carried out within its own territory." Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 1 (1998).