

5-14-2019

Process & Industrial Developments Limited v. Nigeria: Exception Under the FSIA When Award Has Been Set Aside by a Court of the Country “Under the Law of Which” the Award Was Made

Ndifreke Uwem

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Ndifreke Uwem, *Process & Industrial Developments Limited v. Nigeria: Exception Under the FSIA When Award Has Been Set Aside by a Court of the Country “Under the Law of Which” the Award Was Made*, 26 U. Miami Int’l & Comp. L. Rev. 437 (2019)

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PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED V. NIGERIA:
EXCEPTION UNDER THE FSIA WHEN AWARD HAS BEEN SET
ASIDE BY A COURT OF THE COUNTRY “UNDER THE LAW OF
WHICH” THE AWARD WAS MADE

In March 2018, Process & Industrial Developments Limited (P&ID) filed a petition at the United States District Court for the District of Columbia to confirm an arbitral award against the Federal Republic of Nigeria. The proceedings were conducted in three phases – jurisdictional, liability, and damages. The arbitration provision in the underlying contract hardly represented a model of clarity. It provided for the application of the Nigerian arbitration act to any dispute between the parties. On the other hand, it specified London as the “venue” of the proceedings. This posed a problem as to whether Nigeria was the juridical seat of the arbitration, in which case a Nigerian court would be the competent authority to set aside any award rendered by the tribunal. The Nigerian Federal High Court indeed vacated the liability award. At the confirmation stage in the D.C. District Court, the question arose as to whether the arbitration exception under the Foreign Sovereign Immunities Act is applicable in this case, consequently preventing Nigeria from invoking its sovereign immunity against suits in the United States. This note explores the parameters of the arbitration exception under the FSIA. Specifically, this note suggests that the applicable law to the arbitration was Nigerian law based on the language of the provision. As a corollary, A Nigerian court had the competence to set aside any award rendered in the proceedings. I adopt the view that Article V(1)(e) of the New York Convention, in addition to applicable U.S. case law, imply that the Nigerian court's decision was valid. As such, there was no existing award upon which P&ID could base its action to confirm the award. The arbitration exception was not applicable in this case, as the existence of a valid award is a pre-requisite for the application of the exception under the FSIA.

Ndifreke Uwem

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I. INTRODUCTION

Most parties coming to the United States to enforce foreign arbitral awards proceed under the Federal Arbitration Act (“FAA”).¹ The FAA gives U.S. federal courts the power to enforce agreements to arbitrate by compelling arbitration, staying litigation in the federal courts, and confirming and enforcing arbitral awards. Chapter 2 of the FAA gives domestic effect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), thus making the enforcement of foreign arbitral awards under the Convention a matter of federal rather than state law. According to section 203 of the FAA, U.S. federal district courts have original jurisdiction over actions to enforce foreign arbitral awards.

The issuance of an arbitral award is thus not the end of the road to redress. The process of obtaining recognition and attaching assets in aid of execution of an arbitral award in the United States can be a complex process involving multiple sets of statutes and procedural rules. When it involves a foreign state, additional challenges arise. Where there is no voluntary compliance with the award, the winning party will have to decide whether to commence recognition and enforcement proceedings and seek attachment of assets to obtain satisfaction of the award.

The Foreign Sovereign Immunities Act (“FSIA”) grants foreign states immunity from legal actions in the United States unless one of the several exceptions described in sections 1605 to 1607 of the Act applies.² Thus, a foreign state

¹ 9 U.S.C. §§ 1-16, 201-208, 301-307 (2018).

² 28 U.S.C. §§ 1604-1607; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)

may become subject to the jurisdiction of U.S. courts if it waives its claim of immunity, either explicitly or implicitly,³ engaged in commercial activity,⁴ expropriated property in violation of international law,⁵ gained rights to property situated in the United States,⁶ engaged in certain types of tortious activity giving rise to personal injury or death in the United States,⁷ or brought an action to enforce an arbitration agreement or confirm an award pursuant to the agreement where the arbitration takes place in the U.S., or the award is governed by a treaty to which the U.S. is a signatory.⁸ This last exception is often referred to as the arbitration exception. The claimant in *Process and Industrial Developments Limited v. Federal Republic of Nigeria*⁹ filed a petition in the D.C. district court for confirmation of an award rendered in an arbitration proceeding against the respondent, Nigeria. Process and Industrial Development Limited (“P&ID”) invoked, among other things, the arbitration exception in order to circumvent Nigeria’s sovereign immunity against suits in U.S. courts. P&ID submitted before the D.C. district court that, on the basis of this exception, Nigeria has no sovereign immunity defense to confirmation of the award. Nigeria on the other

³ 28 U.S.C. § 1605(a)(1) (2000).

⁴ *Id.* § 1605(a)(2)

⁵ *Id.* § 1605(a)(3)

⁶ *Id.* § 1605(a)(4)

⁷ *Id.* § 1605(a)(5)

⁸ 28 U.S.C. § 1605(a)(6) (this exception was added in 1988 to address actions for enforcement or confirmation of arbitral awards to which a foreign state is a party).

⁹ No. 18-cv-00594-CRC (D.D.C. filed Mar.16, 2018).

hand argued against the application of the arbitration exception asserted by P&ID.¹⁰

This Note argues that in this case, Nigeria is entitled to sovereign immunity under the FSIA because, based on the current position of the law, the arbitration exception does not apply here. Part II discusses the jurisdictional requirements for confirmation of an arbitral award against a sovereign state in the United States, including questions pertaining to subject-matter jurisdiction, due process concerns under the FSIA as well as personal jurisdiction under the arbitration exception of the FSIA. Part III recounts the relevant facts in *P&ID v. Nigeria*, from the pre-arbitration dispute, through the arbitral proceedings resulting in a liability award, to the judicial proceedings for annulment of the award and the further arbitral proceedings to determine the amount of damages. Part IV discusses Nigeria's sovereign immunity vis-à-vis the jurisdiction of the D.C. district court to confirm the award. This Note concludes that P&ID failed to satisfy the legal requirements for application of the arbitration exception to sovereign immunity. Thus, the D.C. district court lacks jurisdiction under the FSIA to confirm the award because the arbitration exception does not apply in this case.

II. JURISDICTIONAL REQUIREMENTS FOR CONFIRMATION OF AN ARBITRAL AWARD AGAINST A SOVEREIGN STATE IN U.S. COURTS.

¹⁰ At the time of this Note, the D.C. district court was yet to rule on the confirmation of the award.

The recognition and enforcement of international arbitral awards in the United States is based primarily on the New York Convention.¹¹ Chapter 2 of the FAA implements the New York Convention in the United States. Section 207 thereof mandates that the court shall confirm the award “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” However, in order for U.S. courts to exercise jurisdiction over a claim, there must be both subject-matter jurisdiction as well as personal jurisdiction.

A. SUBJECT-MATTER JURISDICTION UNDER THE FSIA

Foreign states historically enjoyed absolute immunity in U.S. courts. However, the situation changed in 1952, when the State Department issued a so-called Tate Letter, announcing that it would be adhering to the policy of “restrictive sovereign immunity,”¹² which extends immunity to claims involving foreign states’ public acts and does not extend to suits based on its private commercial conduct. The principles of restrictive immunity were codified in 1976 when

¹¹ There is also the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention) codified in Chapter 3 of the FAA. The Panama Convention typically applies where a majority of the parties to an arbitration agreement are from signatory countries to the Panama Convention and are members of the Organization of American States (OAS). Thus, because Nigeria is neither a signatory to the Panama convention nor a member of the OAS, our primary focus in this Note will be on the New York Convention.

¹² The Tate Letter, from Jack B. Tate, the Acting Legal Advisor of the United States Department of State, to Philip B. Perlman, the Acting United States Attorney General, reprinted in 6 Digest of International Law.

U.S. Congress passed the FSIA. The FSIA was amended in 1988 to include the arbitration exception.¹³ The relevant section of the FSIA provides that:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

- (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if ... (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards...¹⁴

This means that a foreign state with an arbitral award rendered against it is not immune to U.S. enforcement

¹³ 28 U.S.C. § 1605(a)(6), *supra* note 8. Prior to 1988, a claimant could conceivably and did enforce arbitral awards under the waiver exception but the 1988 amendments eliminated any doubts as to the applicability of the waiver exception to the enforcement of arbitral awards.

¹⁴ 28 U.S.C. §§ 1605(a)(1) and 1605(a)(6).

jurisdiction if that award is governed by the New York Convention.

Further, Section 1330(a) of Title 28, provides that:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state..., as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under ...this title or under any applicable international agreement.

Taken together, Sections 1605(a)(6) and 1330(a) provide subject-matter jurisdiction under the FSIA when a party brings an action in a U.S. court to enforce an arbitral award against a foreign state. The Supreme Court has held that the FSIA provides “the sole basis for obtaining jurisdiction over a foreign state” in U.S. courts.¹⁵ But the jurisdictional analysis does not stop there. In addition to subject-matter jurisdiction, the court must also have personal jurisdiction over the sovereign state.

B. DUE PROCESS ISSUES UNDER THE FSIA

Unlike subject-matter jurisdiction under the FSIA which is relatively straight-forward, personal jurisdiction presents a little bit of a concern vis-à-vis the due process requirement of the constitution. In the years since the FSIA was enacted, courts have struggled to identify whether and to

¹⁵ *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428, 434 (1989).

what extent the constitutional aspects of personal jurisdiction apply to foreign states. This debate has its roots in Title 28 of the United States Code, section 1330(b), which states that “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.”¹⁶ Section 1330(a), quoted above, when read together with 1330(b), suggest that “the [FSIA] makes the statutory aspect of personal jurisdiction simple: subject-matter jurisdiction plus service of process equals personal jurisdiction.”¹⁷

This state of affairs gave rise to some confusion, with courts struggling to coordinate the language of section 1330 with common law constitutional principles concerning personal jurisdiction. For example, some courts have relied on section 1330(b) to hold that a party may not assert a lack of personal jurisdiction if one of the exceptions to immunity exists and service of process is proper.¹⁸ Consequently, under these reasoning, there is no need to demonstrate the same sort of “minimum contacts” that are normally required to establish personal jurisdiction as a matter of U.S. constitutional law.¹⁹

¹⁶ 28 U.S.C. § 1330(b).

¹⁷ *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

¹⁸ *See, e.g., Southway v. Cent. Bank of Nigeria*, 994 F. Supp. 1929, 1312 (D. Colo. 1998); *M.B.L. Int’l Contractors v. Trinidad and Tobago*, 725 F. Supp. 52, 56 (D.D.C. 1989); *Marlowe v. Argentine Naval Comm’n*, 604 F. Supp. 703, 710 (D.D.C. 1985), *aff’d on other grounds*, 808 F.2d 120 (D.C. Cir. 1986).

¹⁹ *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (describing the constitutional “minimum contacts” analysis); *see generally* GARY B. BORN

Regarding the FAA, U.S. courts have in the past reviewed the rights of private individuals in actions to enforce arbitral awards and have considered the question of personal jurisdiction therein.²⁰ These cases make clear that subject-matter jurisdiction arises out of the provisions of Article III of the U.S. Constitution which divide power among the branches of government. Personal jurisdiction arises out of a completely separate area, namely the Due Process Clause. The two issues cannot be collapsed into a single analysis.

The Second Circuit recognized this in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,²¹ an early FSIA case. There, the court stated that "the [FSIA] cannot create personal jurisdiction where the Constitution forbids it."²² Many U.S. courts have followed *Texas Trading* and undertaken separate constitutional analyses after evaluating the statutory elements of personal jurisdiction under the FSIA.²³ Although

& DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS: COMMENTARY & MATERIALS 31-33 (1992) (describing the evolution of personal jurisdiction requirements from *Pennoyer v. Neff*, 95 U.S. 714 (1878) to *Int'l Shoe*, 326 U.S. 310 (1945)).

²⁰ See *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 283 F.3d 208, 212 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 101 (2002); *Transatlantic Bulk Shipping v. Saudi Chartering*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985).

²¹ *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) (involving the commercial activity exception under the FSIA), *cert. denied*, 454 U.S. 1148 (1982).

²² *Id.* at 308.

²³ See, e.g., *S & Davis Int'l Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-04 (11th Cir. 2000); *T.H. Davies & Co. v. Republic of Marshall Islands*, 174 F.2d 969, 974 (9th Cir. 1998); *Foremost-McKesson Inc. v. Islamic Republic of Iran*, 759 F. Supp. 855, 860-61 (D.D.C. 1991); *Libyan Am. Oil Co. v.*

courts in other circuits, including the Eleventh and Ninth Circuits as well as the D.C. district court, followed *Texas Trading*, others began to question it on grounds that foreign states may not be “persons” within the meaning of the U.S. Constitution and therefore may not be entitled to the same “minimum contacts” analysis that private parties are entitled to claim.²⁴ This rationale came from the Supreme Court decision in *Argentina v. Weltover*, although ironically the decision assumed, without specifically holding, that a foreign state was a “person” under the Due Process Clause of the U.S. Constitution.²⁵ However, the Court’s opinion reflected a reluctance to extend due process protections to foreign states, should the question ever arise in the future. In so doing, the Court relied heavily on a previous decision holding that individual U.S. states are not “persons” under the Due Process Clause.²⁶

In 1981, when the Second Circuit held in *Texas Trading* that a foreign state was a “person” within the meaning of the U.S. Constitution, it engaged in only a cursory analysis of the subject.²⁷ Because *Texas Trading* is not binding outside of the Second Circuit, the D.C. Circuit was able to do its own analysis of the constitutional status of foreign states in the

Socialist People’s Libyan Arab Jamahiriya, 482 F. Supp. 1175, 1177 (D.D.C. 1980), *vacated without opinion*, 684 F.2d 1032 (D.C. Cir. 1981).

²⁴ See, e.g., *S & Davis Int’l Inc.*, 218 F.3d at 1303; *Creighton Ltd. v. Gov’t of the State of Qatar*, 181 F.3d 118, 124-25 (D.C. Cir. 1999).

²⁵ *Argentina v. Weltover*, 504 U.S. 607, 619 (1992).

²⁶ *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)).

²⁷ *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981) (involving the commercial activity exception under the FSIA), *cert. denied*, 454 U.S. 1148 (1982).

2002 case of *Price v. Socialist People's Libyan Arab Jamahiriya*.²⁸ There, the D.C. Circuit concluded that foreign states are not "persons" as a matter of U.S. constitutional law and are therefore exempt from due process protections of personal jurisdiction.²⁹ According to *Price*, courts faced with actions under the FSIA need not consider the amount and type of contacts between a foreign state and the United States, but instead need only adopt the statutory "subject-matter jurisdiction plus service of process" test described above.³⁰ It was unclear whether *Price*, which arose under section 1605(a)(7) (the terrorism exception) would apply to enforcement actions under section 1605(a)(6) (the arbitration exception) of the FSIA. However, in 2005, the D.C. Circuit demonstrated its willingness to extend the principles of *Price* to actions to enforce foreign arbitral awards in *TMR Energy Ltd. v. State Property Fund of Ukraine*.³¹

C. PERSONAL JURISDICTION UNDER THE ARBITRATION EXCEPTION

i. Earlier Case Law

Majority of available case law discuss the issue of personal jurisdiction under the arbitration exception in combination with the implied waiver exception under section

²⁸ *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).

²⁹ *Id.* at 99.

³⁰ *Id.*; *Supra* note 17.

³¹ *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, (D.C. Cir. 2005).

1605(a)(1).³² The two arguments are very closely linked such that it is sometimes unclear whether the courts will allow a party to argue jurisdiction based only on the arbitration exception. For instance, the plaintiff in *TMR Energy* explicitly denied its reliance on the implied waiver exception in the trial court, choosing instead to focus on the arbitration exception.³³ Nevertheless, the D.C. District Court raised the implied waiver issue *sua sponte*, eventually basing its decision on those grounds despite the defendant's claim that a court may not consider jurisdictional grounds explicitly avoided by the plaintiff.³⁴

Questions often arise as to the existence of personal jurisdiction under the arbitration exception where there is a distinction between a sovereign state itself and an agency of the sovereign state. Two cases have held that subject-matter existed but both are questionable on personal jurisdiction grounds. For instance, *S & Davis International v. Republic of Yemen* involved an arbitral award against a Yemeni corporation that was held to be an agency or instrumentality

³² See *TMR Energy Ltd.*, 411 F.3d 296 (D.C. Cir. 2005); *S & Davis Int'l Inc. v. Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000); *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999); *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993); *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993); *Maritime Ventures Int'l, Inc. v. Caribbean Trading and Fidelity, Ltd.*, 732 F. Supp. 1032 (S.D.N.Y. 1989); *M.B.L. Int'l Contractors v. Trinidad and Tobago*, 725 F. Supp. 52 (D.D.C. 1989) (involving an arbitral award, but argued under the implied waiver exception rather than the arbitration exception).

³³ Brief of Appellant State Property Fund of Ukraine, p.25.

³⁴ *Id.* at 25, 30 (citing *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1187 (2003)).

of the state of Yemen.³⁵ There was some question as to whether the exception could apply against Yemen itself, since it was not a signatory to the arbitration agreement resulting in the award, but the Eleventh Circuit held that the defendant corporation was under the control of the state and therefore section 1605(a)(6) applied.³⁶ The Eleventh Circuit addressed the question of personal jurisdiction separately from that of subject-matter jurisdiction but did not discuss its reasons for undertaking a constitutional due process analysis. Instead, the court avoided the issue of whether a foreign state is a "person" under the U.S. Constitution, preferring to hold that, in any event, the constitutional elements of personal jurisdiction were met in these circumstances.³⁷

Although the Eleventh Circuit's opinion is evenhanded in many respects, it provides an avenue for those who believe that a state's agreement to arbitrate a dispute opens that state up to enforcement proceedings in virtually any country³⁸ by indicating that it is "only 'fair and just' [for a plaintiff] to seek enforcement of the outcome of a good faith agreement to arbitrate."³⁹ The court also held that this sort of enforcement action "comports with the minimum contacts determination that the defendant 'should reasonably

³⁵ *S & Davis Int'l*, 218 F.3d at 1292.

³⁶ *Id.* at 1302.

³⁷ *Id.* at 1303.

³⁸ Karen Halverson, *Is a Foreign State a "Person"? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 179-84 (2001).

³⁹ *S & Davis Int'l*, 218 F.3d at 1304-05 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

anticipate being haled into court' in the forum's jurisdiction."⁴⁰

Creighton Ltd. v. Government of the State of Qatar also involved the successful application of the arbitration exception to the issue of subject-matter jurisdiction, although the primary question here was whether the arbitration exception could be applied retroactively, which was answered in the affirmative.⁴¹ However, the D.C. Circuit separated its discussion of subject-matter jurisdiction from its discussion of personal jurisdiction, stating that "although subsection (a)(6) confers subject matter jurisdiction upon the court, it does not follow that Qatar waived its objection to personal jurisdiction."⁴² Indeed, the D.C. Circuit claimed that "the decisions of which we are aware have held that an implicit waiver of personal jurisdiction in a defendant's agreement to litigate or to arbitrate in a particular jurisdiction is applicable only within that jurisdiction."⁴³ Thus, "[i]t seems ...implausible that Qatar, by agreeing to arbitrate in France, a signatory to a treaty containing a similar reciprocal 'recognition and enforcement' clause, should be deemed thereby to have waived its right to challenge personal jurisdiction in the United States."⁴⁴ This, of course, takes the opposite view of *S & Davis* by suggesting that courts that rely on the arbitration exception must do more than simply establish the existence of an arbitral award before concluding

⁴⁰ *Id.*

⁴¹ *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999). The retroactivity of the FSIA was confirmed by the U.S. Supreme Court in *Austria v. Altmann*, 541 U.S. 677 (2004).

⁴² *Id.* at 126.

⁴³ *Id.* (citations omitted).

⁴⁴ *Id.* at 127.

that personal jurisdiction exists.⁴⁵ Although the D.C. Circuit was influenced by the fact that Qatar was not a signatory to the New York Convention, the case provides a useful analysis of section 1605(a)(6)'s ability to confer personal jurisdiction, as opposed to its ability to confer subject-matter jurisdiction.

ii. TMR Energy

TMR Energy assumes additional importance considering the lack of case law regarding personal jurisdiction and enforcement of arbitral awards under the FSIA. *TMR Energy* followed the holding in *Price* – that foreign states are not entitled to due process protections under the U.S. Constitution. Thus, based on this principle from *Price*, the outcome in *TMR Energy* was somewhat certain. As the D.C. Circuit stated, “[the State Property Fund of Ukraine] – like its principal, the State of Ukraine – is not a ‘person’ for purposes of the due process clause and cannot invoke the minimum contacts test to avoid the personal jurisdiction of the district court.”⁴⁶ Both *TMR Energy* and *Price* relied heavily on the fact that individual U.S. states are not considered “persons” under the Due Process Clause and that it therefore “would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the fabric of that system.”⁴⁷

⁴⁵ *Id.*

⁴⁶ *TMR Energy, Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005).

⁴⁷ *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)). See also *TMR Energy, Ltd.*, 411 F.3d at 300.

III. FACTUAL AND PROCEDURAL BACKGROUND OF *P&ID v. NIGERIA*

A. THE UNDERLYING DISPUTE GIVING RISE TO THE ARBITRATION

The dispute arose out of a Gas Supply and Processing Agreement (the “GSPA”) dated January 11, 2010 between P&ID and the Ministry of Petroleum Resources of the Federal Republic of Nigeria (“Nigeria”).⁴⁸ Under the GSPA, P&ID was to obtain “Wet Gas” for free from Nigeria and convert it into “Lean Gas,” which Nigeria could use to power electric plants.⁴⁹ According to a witness statement submitted by P&ID, P&ID would not charge Nigeria for converting the Wet Gas. Rather, in exchange for the Wet Gas, P&ID would have the right to keep certain by-products – Natural Gas Liquids (“NGLs”) – and sell them on the open market.⁵⁰

Beginning in mid-2006, P&ID began exploring the feasibility of the project and commissioned various studies and engineering plans.⁵¹ This culminated in the execution of the GSPA in 2010. Under the GSPA, P&ID was obligated to build a gas processing facility and Nigeria was to supply the facility with Wet Gas from two oil mining leases operated by Addax Petroleum and Exxon Mobil.⁵²

⁴⁸ *Process and Industrial Dev. Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Final Award, (Jan. 31, 2017) ¶ 2.

⁴⁹ *Id.*

⁵⁰ First Witness Statement of Michael Quinn, Feb. 10, 2014. ¶ 65.

⁵¹ *Id.* at ¶¶ 47-48.

⁵² GSPA §§ 3(a), 3(c).

In March 2011, Addax informed P&ID that it was unwilling to supply the amount of Wet Gas envisioned by the GSPA.⁵³ P&ID attempted to negotiate a compromise, which Addax initially supported but ultimately rejected in June of 2012.⁵⁴ At this point, the project fell apart.

B. THE ARBITRATION PROCEEDINGS RESULTING IN A LIABILITY AWARD

On August 22, 2012, P&ID commenced arbitration against Nigeria. P&ID filed for arbitration pursuant to section 20 of the GSPA, which contains a choice of law clause and an arbitration clause. The relevant part of the arbitration agreement states as follows:

"The Agreement shall be governed by, and construed in accordance with the laws of the Federal Republic of Nigeria."

The Parties agree that if any difference or dispute arises between them concerning the interpretation or performance of this Agreement and if they fail to settle such difference or dispute amicably, then a Party may serve on the other a notice of *arbitration under the rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004) which, except as otherwise provided herein, shall apply to any dispute between such Parties under this Agreement.*

"The venue of the arbitration shall be London, England or otherwise as agreed by the Parties. The arbitration

⁵³ Process and Industrial Dev. Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria, Part Final Award, (Jul. 17, 2015) ¶ 38(a).

⁵⁴ *Id.* at ¶¶ 38(c)-(d).

proceedings and record shall be in the English language”.⁵⁵ (emphasis added).

Pursuant to that agreement, P&ID served notice of the arbitration on Nigeria. The tribunal was then constituted with three arbitrators, two of whom were English and one Nigerian.⁵⁶ The tribunal issued several procedural orders with the heading as “In the Matter of an Arbitration Under the Rules of the Arbitration and Conciliation Act of Nigeria” and issued other directions for parties to comply with provisions of the Nigerian Arbitration Act.⁵⁷

On October 11, 2013, P&ID wrote to Nigeria to “invite you agree” that certain preliminary objections raised by Nigeria be decided “pursuant to Section 31(4) of the Arbitration Act 1996,” the law governing arbitrations in England.⁵⁸ In a letter dated October 14, 2013, Nigeria declined that invitation and responded that it would proceed “as contemplated by the parties under the Nigerian Arbitration and Conciliation Act.”⁵⁹ In a response letter dated October 24, 2013, P&ID acknowledged that the parties had agreed to arbitrate under the Rules of the Nigerian Arbitration Act, but asserted for the first time that it had referenced England’s “Arbitration Act of 1996” because it believed “the juridical seat of this arbitration is London.”⁶⁰

⁵⁵ GSPA § 20.

⁵⁶ *Process & Industrial Dev. Ltd. v. Fed. Republic of Nigeria & Ministry of Petroleum Resources of the Fed. Republic of Nigeria*, Petition to Confirm Arbitration Award ¶ 18, No. 18-594, WL 3359784 (D.D.C. 2018).

⁵⁷ Witness Declaration of Seamus Ronald Andrew in Support of Petition to Confirm Arbitration Award, Mar. 16, 2018, Exhibit 11 at 35-63.

⁵⁸ *Id.* at 44.

⁵⁹ *Id.* at 46.

⁶⁰ *Id.* at 47.

In subsequent procedural orders, the Tribunal began to style the proceedings with reference to both the Nigerian and English arbitration laws: “In the Matter of the Arbitration Act 1996 (England and Wales) and In the Matter of an Arbitration Under the Rules of the Nigerian Arbitration and Conciliation Act 1988.”⁶¹ The Tribunal further divided the proceedings into three parts relating to jurisdiction, liability, and damages. On July 3, 2014, the tribunal issued a decision on jurisdiction. Although the agreement seemed to only reference London, England as a “venue,” the Tribunal applied the English Arbitration Act to conclude that it had jurisdiction.⁶² Thus, the arbitration proceeded to the liability phase, and on July 17, 2015, the Tribunal issued an award on liability. The Tribunal held that the GSPA was valid and authorized, and that Nigeria was liable for breaching it.⁶³

C. THE JUDICIAL PROCEEDINGS TO SET ASIDE THE
LIABILITY AWARD AND THE FURTHER ARBITRATION
RESULTING IN A DAMAGES AWARD

Upon finding Nigeria liable, and before the Tribunal rendered its decision on damages, Nigeria sought judicial assistance to have the arbitration enjoined and the liability award set aside. Nigeria contended that given the parties’ express agreement to arbitrate under the rules of the Nigerian Arbitration and Conciliation Act, a Nigerian court was the competent authority to supervise the arbitration and annul any award

⁶¹ *Id.* at 107.

⁶² *Id.* Exhibit 7 at 36.

⁶³ *Id.* Exhibit 8 at 54, 80.

made pursuant to the agreement. However, Nigeria also applied for annulment in England.

The Commercial Court in London denied Nigeria's application as untimely.⁶⁴ Nigeria then applied to set aside the award before the Federal High Court in Lagos, Nigeria, arguing that the parties had agreed to arbitrate under the Nigerian Arbitration and Conciliation Act and therefore had "effectively agreed that the seat of the arbitration is Nigeria."⁶⁵ Nigeria further argued that London was "only the venue for hearings in the arbitration; a geographically convenient place."⁶⁶ Nigeria also moved to enjoin parties from continuing the arbitral proceedings pending resolution of the set aside motion. On April 20, 2016, the Nigerian court granted the injunction.⁶⁷

P&ID did not participate in the Nigerian court proceedings.⁶⁸ Instead, it asked the Tribunal to determine the seat of the arbitration.⁶⁹ Nigeria opposed the request, arguing that the determination of the seat was not in controversy.⁷⁰ Nigeria asserted that the seat of the arbitration was Nigeria because the GSPA was governed by Nigerian law and because the parties had expressly agreed to arbitrate under the rules of the Nigerian Arbitration and Conciliation Act.⁷¹ On April 26, 2016, the Tribunal concluded that by designating London as the "venue," the parties had selected London as

⁶⁴ *Id.* Exhibit 11 at 154, 162.

⁶⁵ *Id.* at 2-4.

⁶⁶ *Id.*

⁶⁷ *Id.* Exhibit 16 at 44-48.

⁶⁸ *Id.* at 38.

⁶⁹ *Id.* Exhibit 12.

⁷⁰ *Id.* Exhibit 16 at 36.

⁷¹ *Id.* Exhibit 12 at 6.

the only seat of the arbitration, notwithstanding their express agreement to arbitrate under the Nigerian Arbitration Act.⁷² Shortly thereafter, on May 24, 2016, the Nigerian court issued an order setting aside the liability award.⁷³

Despite the Nigerian judgment setting aside the liability award, the Tribunal proceeded to the damages phase. Nigeria participated in the further proceedings but maintained the position that the liability award had been set aside in Nigeria.⁷⁴ On January 31, 2017, the Tribunal issued the damages award.⁷⁵ On March 16, 2018, P&ID filed a Petition at the U.S. District Court for the District of Columbia seeking to confirm the award and alleging that approximately \$9 billion is due on the award.

IV. NIGERIA'S SOVEREIGN IMMUNITY AND THE JURISDICTION OF THE D.C. DISTRICT COURT.

Nigeria is a foreign state as defined in the FSIA.⁷⁶ And the FSIA is the "sole basis" for establishing jurisdiction over a foreign state with respect to any claim for which it is not entitled to sovereign immunity.⁷⁷ A foreign state is entitled to

⁷² *Id.* ¶¶ 1-40.

⁷³ *Id.* Exhibit 13.

⁷⁴ *Id.* Exhibits 14 and 15; *see also* Process & Industrial Dev. Ltd. v. Fed. Republic of Nigeria & Ministry of Petroleum Resources of the Fed. Republic of Nigeria, Petition to Confirm Arbitration Award ¶ 26, No. 18-594, WL 3359784 (D.D.C. 2018).

⁷⁵ *Id.* Exhibit 17.

⁷⁶ 28 U.S.C. § 1603(a).

⁷⁷ *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 203 (D.C. Cir. 2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), and citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983)).

“virtually absolute immunity” from suit unless the “substantive requirements” of any one of the exceptions to immunity are satisfied.⁷⁸ Thus, “[i]f no exception applies, a foreign sovereign’s immunity under the FSIA is complete,” and the district court lacks jurisdiction over the case.⁷⁹

Further, a court is obligated to make the sovereign immunity determination at the outset, and a foreign state is not required to assert its substantive defenses against confirmation of an award until that “threshold determination of FSIA immunity” has been conclusively and authoritatively resolved.⁸⁰

A. APPLICABILITY OF THE ARBITRATION EXCEPTION.

In *Chevron v. Ecuador*, the D.C. Circuit established a three-part test that a petitioner must satisfy for the arbitration exception to apply.⁸¹ The first step is determining that the award is or may be “governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards.”⁸² The New York Convention is such a treaty. A district court must then make two additional findings: (1)

⁷⁸ *Verlinden*, 461 U.S. at 486, 489; *accord* *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312 (2017).

⁷⁹ *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000).

⁸⁰ *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 80 (2d Cir. 2013); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (Posner, J.) (“A foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amendability to suit at the earliest possible opportunity.”). *See also Helmerich & Payne*, 137 S. Ct. at 1317, 1319, 1324.

⁸¹ 795 F.3d at 204.

⁸² *Id.*

the existence of a valid arbitration agreement, and (2) the existence of an enforceable award.⁸³ A “non-frivolous claim involving an arbitration award” is not enough to sustain jurisdiction; the Court must determine that each of these requirements has actually been met.⁸⁴ Although these jurisdictional questions may overlap with a foreign state’s defenses under the New York Convention,⁸⁵ a court must still answer them before it takes jurisdiction.⁸⁶ Because the liability award was set aside by a Nigerian court, P&ID could not claim to have an existing award and therefore could not satisfy all the requirements to abrogate Nigeria’s immunity under the arbitration exception.

In *Chevron*, the D.C. Circuit considered whether a valid arbitration agreement existed for purposes of satisfying the arbitration exception, even though that argument was “largely coextensive” with Ecuador’s defenses “against confirmation of the award under the New York Convention.”⁸⁷ The district court asserted jurisdiction merely because the proceedings involved confirmation of an arbitral award under the New York Convention, but “eschewed” the question of whether a valid arbitration agreement existed for purposes of satisfying the arbitration exception to immunity.⁸⁸ The court of appeals held that “this was error,”

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 207.

⁸⁶ *Id.* at 205.

⁸⁷ 795 F.3d at 207. *See also* New York Convention, art. V(1)(a) (providing that a court may refuse to enforce an award if the respondent proves that the arbitration agreement “is not valid”).

⁸⁸ 795 F.3d at 205 n.3 (reasoning that Ecuador could not have “two bites at the apple of the merits of its dispute,” i.e., one under the FSIA and another

and that the district court had to decide whether the parties had in fact agreed to arbitrate “as part of its jurisdictional analysis.”⁸⁹ Likewise, the “existence of an award” is an issue that the Court “must resolve in order to maintain jurisdiction.”⁹⁰ Thus, if there is “no award to enforce,” then the Court “lacks jurisdiction over the foreign state and the action must be dismissed.”⁹¹

In *P&ID v. Nigeria*, jurisdiction is unavailable under the arbitration exception because there is no award to enforce. The question of whether an award exists, like the question of whether a valid arbitration agreement exists, is “largely coextensive” with one of the grounds for resisting enforcement under the New York Convention.⁹² Under Article V(1)(e), an award “does not exist to be enforced” if it has been “lawfully ‘set aside’ by a competent authority” at the seat of the arbitration, i.e., the primary jurisdiction for annulling the award.⁹³ Article V(1)(e) states, in relevant part:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes . . . proof that . . . [t]he award . . .

under the New York Convention, *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 63 (D.D.C. 2013)).

⁸⁹ 795 F.3d at 205 n.3.

⁹⁰ *Id.* at 204.

⁹¹ *Id.*

⁹² *Id.* at 207.

⁹³ *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 936 (D.C. Cir. 2007) (refusing to enforce an award that had been set aside in Colombia) (citing *Baker Marine (Nigeria) v. Chevron (Nigeria)*, 191 F.3d 194 (2d Cir. 1999) (denying confirmation of an award that had been set aside in Nigeria)).

has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made.⁹⁴

The New York Convention “provides two tests for determining which country has primary jurisdiction over an arbitration award: a country in which an award is made, and a country under the law of which an award is made.”⁹⁵

iii. Nigeria is the Country “under the Law of which” the Award Was Made

The phrase “under the law of which” points to “the procedural law governing the arbitration.”⁹⁶ In *Belize Social Development*, the D.C. Circuit found that a court in London was a competent authority to set aside the award where the parties’ agreement stated that any disputes would be “resolved by arbitration under the London Court of International Arbitration (LCIA) Rules.”⁹⁷ Similarly, in *Baker Marine*, a Nigerian court was considered to be the competent authority to set aside the award under the parties’ arbitration agreement, which provided that any dispute would be “settled by arbitration in accordance with the Arbitration

⁹⁴ New York Convention, art. V(1)(e).

⁹⁵ *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 308 (5th Cir. 2004).

⁹⁶ *Belize Soc. Dev., Ltd. v. Government of Belize*, 668 F.3d 724, 731 (D.C. Cir. 2012) (noting that the phrase “under the law of which” refers to the “procedural law under which the arbitration was conducted”); RESTATEMENT (THIRD) OF INT’L COMMERCIAL ARBITRATION § 5-12 (Am. Law. Inst. 2010) (“RESTATEMENT”). See also RESTATEMENT § 5-12(d) (“For purposes of this Section [Article V(1)(e) of the NY Convention], a Convention award is deemed to be made under the law of the country whose arbitration law governed the arbitral proceedings.”).

⁹⁷ 668 F.3d at 728.

Rules of the United Nations Commission on International Trade Law (UNCITRAL)” and “specified that the arbitration ‘procedure (insofar as not governed by said UNCITRAL rules . . .) shall be governed by the substantive laws of the Federal Republic of Nigeria.’”⁹⁸

Here, P&ID and Nigeria expressly agreed on Nigerian law as the procedural law that would govern the arbitration by agreeing to arbitrate “under the rules of the Nigerian Arbitration and Conciliation Act.”⁹⁹ Thus, under Article V(1)(e) of the New York Convention, a Nigerian court is a “competent authority” with “primary jurisdiction” to annul any award made pursuant to that agreement.¹⁰⁰ That is what the Nigerian court did here when it set aside the liability award.

Further, because the liability award was “lawfully set aside” by a Nigerian court,¹⁰¹ there is no finding of liability on which the damages award can rest.¹⁰² This outcome cannot be

⁹⁸ 191 F.3d at 195 (ellipsis in original).

⁹⁹ GSPA § 20. *Cf. Dixilyn-Field Drilling, Ltd. v. Mobil Oil Corp.*, No. 83 CIV 9308 (LBS), 1984 U.S. Dist. LEXIS 17992, at *2, *4 (S.D.N.Y. Apr. 2, 1984) (compelling arbitration “under Nigerian law” where the arbitration clause stated that any disputes would be settled by arbitration “according to Arbitration Act of Nigeria”).

¹⁰⁰ *TermoRio*, 487 F.3d at 935.

¹⁰¹ *Id.*

¹⁰² *Cf. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 562 (8th Cir. 1990) (affirming annulment of an arbitral award that was rendered in disregard of a contrary liability determination in a prior judicial proceeding, and holding that the liability ruling precluded the losing party from presenting further evidence and “barred” the arbitrator “from reconsidering the issue”). *See also Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 955 (2d Cir. 1964).

avoided because the Tribunal and P&ID chose to ignore the Nigerian court's judgment, and its injunction, and to proceed to the damages phase of the case. In short, the Nigerian judgment left the arbitrators with nothing to decide and the subsequent damages award would consequently be a nullity.

iv. The D.C. Circuit is "obliged to Respect" the Nigerian Court's Judgment Setting Aside the Liability Award.

The D.C. District Court, where the petition for confirmation was filed, is "obliged to respect" the Nigerian judgment.¹⁰³ There is no basis to "second-guess" that judgment,¹⁰⁴ unless P&ID shows that it has been "tainted," or is anything "other than authentic,"¹⁰⁵ or unless enforcing that judgment would offend "fundamental notions of what is decent and just in the State where enforcement is sought."¹⁰⁶

In *TermoRio*, the award had been set aside by a competent court in Colombia, a primary jurisdiction under the New York Convention.¹⁰⁷ Since there was no cause for questioning the Colombian judgment, the D.C. Circuit ruled that the award had been "lawfully set aside."¹⁰⁸ The court of appeals further noted that this was a "peculiarly Colombian affair," insofar as it concerned "a dispute involving Colombian parties over a contract to perform services in

¹⁰³ *TermoRio*, 487 F.3d at 930 (citing *Baker Marine*).

¹⁰⁴ *Id.* at 937.

¹⁰⁵ *Id.* at 935.

¹⁰⁶ *Id.* at 938.

¹⁰⁷ *Id.* at 935.

¹⁰⁸ *Id.*

Colombia which led to a Colombian arbitration decision and Colombian litigation” in accordance with the parties’ agreement “to be bound by Colombian law.”¹⁰⁹ The D.C. Circuit thus concluded that it was “in no position to pronounce the decision of [the Colombian court] wrong.”¹¹⁰

The Second Circuit reached a similar conclusion in *Baker Marine*. There, the court of appeals also affirmed the district court’s decision refusing to enforce an award that had been set aside by a Nigerian court, citing Article V(1)(e) and “principles of comity.”¹¹¹ In rejecting the argument that the judgment of the Nigerian court should be ignored, the Second Circuit reasoned that it was “sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria.”¹¹² It added that the “primary purpose” of the FAA is “ensuring that private agreements to arbitrate are enforced according to their terms.”¹¹³ It further explained that the petitioner had “made no contention that the Nigerian courts acted contrary to Nigerian law.”¹¹⁴ Finally, it held that the Convention’s permissive language under Article V – providing that a court “may” refuse enforcement – did not afford the court any leeway to enforce an award annulled in Nigeria, as the petitioner had “shown no adequate reason for refusing to recognize the judgments of the Nigerian court.”¹¹⁵

¹⁰⁹ *Id.* at 939.

¹¹⁰ *Id.*

¹¹¹ 191 F.3d at 196.

¹¹² *Id.* at 197.

¹¹³ *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

The same analysis applies here. P&ID acknowledged that the Nigerian court granted Nigeria's motion to set aside the liability award.¹¹⁶ Absent substantial evidence that the Nigerian judgment was tainted by any irregularities that would offend the United States' "fundamental notions of what is decent and just," the D.C. District Court is bound to respect, uphold and apply it.¹¹⁷ Moreover, as in *TermoRio* and *Baker Marine*, this case involves a particularly foreign affair: the Nigerian state and a foreign company entered into a contract in Nigeria to perform services in Nigeria, which led to an arbitration award rendered under the arbitration law of Nigeria and then a Nigerian judgment setting aside that award in accordance with the parties' agreement to be bound by the laws of Nigeria. There are zero ties to the United States. Like the D.C. Circuit in *TermoRio*, the D.C. district court in this case should decline any invitation to find error in the judgment of the Nigerian court.

v. The Choice of an Arbitral "Venue" Does Not Affect the Nigerian Court's Judgment.

The parties' choice of a procedural law to govern the arbitration proceedings is the determinative factor in establishing the primary jurisdiction or seat for purposes of the New York Convention.¹¹⁸ The fact that the parties chose London as the "venue" for the arbitration proceedings does

¹¹⁶ See *Process & Industrial Dev. Ltd. v. Fed. Republic of Nigeria & Ministry of Petroleum Resources of the Fed. Republic of Nigeria*, Petition to Confirm Arbitration Award ¶ 26, No. 18-594, WL 3359784 (D.D.C. 2018).

¹¹⁷ *TermoRio*, 487 F.3d at 936, 938.

¹¹⁸ *Karaha Bodas*, 364 F.3d at 309-10.

not affect the Nigerian court's primacy as a competent authority under Article V(1)(e). The selection of a geographic location for the hearings creates a presumption as to the seat of the arbitration only "in the absence of any express statement making another country's procedural law applicable."¹¹⁹ Here, the parties expressly agreed that the arbitration would be conducted "under the rules of the Nigerian Arbitration and Conciliation Act," negating any presumption that they agreed on English procedural law by naming London as the "venue."¹²⁰

Indeed, it is possible for parties to choose one country to be the physical location for the arbitral proceedings, but choose a different country as the "seat" of the arbitration "in the legal sense."¹²¹ Had the parties intended to choose London as the "legal" seat of the arbitration, they would have used the term "seat" or "site," rather than "venue" or any other variation, to avoid ambiguity.¹²² In short, the parties did not agree on English procedural law by designating London

¹¹⁹ *Id.*

¹²⁰ GSPA § 20.

¹²¹ *Karaha Bodas*, 364 F.3d at 292 (finding that the award was "made in" Geneva in accordance with the parties' presumptive agreement that Swiss procedural law applied, notwithstanding the fact that the proceedings "physically occurred in Paris"); RESTATEMENT § 5-12 cmt. b. ("[A]n award will be deemed to have been made at the arbitral seat regardless of where the hearings were actually held or the award was actually prepared or signed.").

¹²² *Id.* at 291 (finding that Switzerland was the "legal" seat where the parties had agreed that "the *site* of the arbitration shall be Geneva") (emphasis added); 2 GARY B. BORN, INT'L COMMERCIAL ARBITRATION 1540 (2d ed. 2014) ("The term 'seat' is distinctly preferable to either 'forum' or 'venue'; these latter terms imply that the designated location will be where meetings or hearings must be conducted . . .").

as the “venue.” Rather, they chose London as the location for the arbitration hearings and meetings.

Even if the selection of London as the “venue” were construed to be an agreement as to the legal seat of the arbitration, that conclusion still does not divest the Nigerian court of jurisdiction to annul the award under Article V(1)(e) of the New York Convention. By its terms, the Convention “suggests the potential for more than one country of primary jurisdiction.”¹²³ For instance, in *Karaha Bodas*, the Fifth Circuit found that a Swiss court was the only competent authority under Article V(1)(e) because the parties had contractually designated the “site of the arbitration as Switzerland,” and had “not otherwise expressly identif[ied] the procedural law that would apply to the arbitration.”¹²⁴ However, the court recognized that the parties could have agreed that “one country [would] be the site of the arbitration but the proceedings [would] be held under the arbitration law of another country,” in which case the courts of both countries could be competent to annul the award.¹²⁵ The court declined to rule on this issue because “both of the New York Convention criteria for the country with primary jurisdiction point[ed] to Switzerland – and only to Switzerland.”¹²⁶

Similarly, in *Belize Social Development*, the D.C. Circuit found that an English court was the only competent authority to set aside the award because the arbitration occurred in London and the parties expressly agreed to the arbitral laws

¹²³ *Karaha Bodas*, 364 F.3d at 308.

¹²⁴ *Id.* at 290.

¹²⁵ *Id.* at 291, 308-09.

¹²⁶ *Id.* at 309.

of England.¹²⁷ In support of that conclusion, the D.C. Circuit cited section 5-12 of the Restatement, which is very clear on the effect of naming one country as the “seat” of the arbitration while at the same time expressly agreeing on the procedural law of another: “In that event, the award will be subject to the primary jurisdiction of authorities in two countries, *both of whom will have competence to set it aside.*”¹²⁸ Thus, even under this interpretation of the arbitration agreement, the Nigerian court retained primary jurisdiction to enjoin the proceedings and annul the liability award. Here, application of Nigerian procedural law forecloses any ruling that the United Kingdom and only the United Kingdom can be the competent jurisdiction to set aside the award.

Nothing that happened in the underlying arbitration or judicial proceedings detracts from this analysis. The Tribunal’s decision suggesting that there could only be one seat for the arbitration, is not binding on the D.C. district court.¹²⁹ That question is one of interpretation of the New York Convention, a treaty to which the United States is a party. As the Fifth Circuit explained in *Karaha Bodas*, there are two tests for identifying a primary jurisdiction under Article V(1)(e) of the New York Convention, and a court in the enforcing state may make its own determination for purposes of refusing enforcement.¹³⁰ Moreover, the Tribunal’s decision, purporting to apply English procedural law and recognizing London as the only seat of the arbitration, is not entitled to deference because it “manifestly disregarded the parties’

¹²⁷ 668 F.3d at 731.

¹²⁸ RESTATEMENT § 5-12 cmt. b. (emphasis added).

¹²⁹ Tribunal’s Procedural Order No. 12.

¹³⁰ 364 F.3d at 308.

agreement [and] the law.”¹³¹ Again, the parties expressly agreed to conduct the arbitration “under the rules of the Nigerian Arbitration and Conciliation Act,” and the GSPA makes no reference whatsoever to English law.¹³²

Nor does Nigeria’s decision to apply for annulment both in England and Nigeria conflict with its rights under the arbitration agreement or the New York Convention. Considering that the parties expressly agreed on Nigerian procedural law, the only relevant decision on annulment is the Nigerian judgment. Nevertheless, even if London were ultimately accepted as one of the seats of the arbitration, the Nigerian court would nevertheless retain “primary jurisdiction” as a competent authority in the country “under the law of which, that award was made.”¹³³ Thus, Nigeria always had a right to seek annulment in the Nigerian courts, and that right did not dissipate when it filed to set aside the liability award in England.

In sum, because the liability award on which the damages award is premised was lawfully set aside by a court in Nigeria, a competent authority under Article V(1)(e), P&ID had no award to enforce and the D.C. district court lacks

¹³¹ *Id.* at 290.

¹³² *See Id.* at 309 (finding that an express agreement on the procedural law rebuts any presumption that a different country’s procedural law applies); *see also Belize Soc. Dev.*, 668 F.3d at 728 (finding that London was competent authority where the parties expressly agreed to “arbitration under the London Court of International Arbitration (LCIA) Rules”); *Baker Marine*, 191 F.3d at 195 (applying Nigerian arbitration law pursuant to the parties’ express agreement); *Dixilyn-Field Drilling*, 1984 U.S. Dist. LEXIS 17992, at *4 (same).

¹³³ *See Karaha Bodas*, 364 F.3d at 308-09; RESTATEMENT § 5-12 cmt. b.

jurisdiction under the arbitration exception, 28 U.S.C. § 1605(a)(6)(B).

V. CONCLUSION

The confirmation and subsequent enforcement of foreign arbitral awards against sovereign states or their instrumentalities is a delicate issue as it can have political repercussions. Courts must therefore exercise utmost caution in exercising jurisdiction over sovereigns. In the United States, the FSIA provides the sole basis upon which U.S. courts may assume jurisdiction in a case that involves a foreign state. As discussed in this Note, some U.S. case law have interpreted several situations where the arbitration exception of the FSIA may be applicable. Most importantly, when the action before a U.S. court involves the confirmation of an award against a sovereign state, that court must, among other things, look to see if that award has been set aside by a court of the seat of the arbitration. If so, then there is no “existing award” to be confirmed by the court. Consequently, the court lacks jurisdiction as the foreign state’s immunity has not been successfully challenged because the arbitration exception does not apply.

Generally, Article V(1)(e) of the New York Convention gives courts the discretion to go ahead and enforce an award that has been set aside at the seat of the arbitration. However, in the United States specifically, this discretion has been construed to only include situations where the decision setting aside such award is “tainted,” or where such a decision “offends fundamental notions of what is decent and just in the State where enforcement is sought.” Absent these circumstances, no other grounds exist currently under U.S.

law for U.S. courts to confirm an award that was vacated at the seat of arbitration.

In *P&ID v. Nigeria*, the Nigerian court vacated the award which was made pursuant to Nigerian law. The Nigerian court was the competent court to exercise such power, being the court that had supervisory jurisdiction over the arbitration. In other words, being the court of the seat of arbitration, the Nigerian court exercised appropriate jurisdictional competence to vacate the award rendered by the tribunal. Because the Nigerian court validly vacated the award, and there was no allegation that the judgment was tainted, or that it offends fundamental notions of what is decent and just in the United States (or any U.S. state where enforcement is sought), then there was no award for P&ID to confirm. Thus, the arbitration exception does not apply, and the D.C. district court cannot not validly exercise jurisdiction over Nigeria.