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Canadian mining company strikes gold in US court (Crystallex v Venezuela)

Arbitration analysis: Steven Finizio and Manuel Casas at WilmerHale, consider the US District Court's decision in Crystallex v Venezuela to uphold the $1.2bn damages award and suggest that the case reaffirms the deferential approach to reviewing arbitral awards.

Original news

US federal court grants Crystallex's petition to confirm its arbitral award, LNB News 30/03/2017 16

The US District Court of Columbia has decided to grant Crystallex International Corporation's request to confirm an arbitral award in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

What are the likely practical implications of this decision on the enforcement of the award?

The decision is subject to appeal, but Crystallex otherwise is now in a position to enforce the award against assets that Venezuela has in the US. Crystallex had previously initiated legal proceedings in the US in order to prevent Venezuela and its state-owned companies from transferring some of their most significant assets to other entities, purportedly to avoid having them attached in the event that the award was confirmed by US courts.

What is the background to the decision?

The US District Court for the District of Columbia was asked to confirm or vacate the arbitral award in Crystallex International Corporation v Venezuela, issued in April 2016 under the Additional Facility Rules of the International Center for the Settlement of Investment Disputes (ICSID) by an arbitral tribunal sitting in

Washington, DC. The tribunal held that Venezuela had violated the Canada-Venezuela Bilateral Investment Treaty (BIT). The tribunal held that Venezuela's handling of Crystallex's application for a gold mining permit (and its eventual refusal) meant that the state violated its guarantee to provide Crystallex fair and equitable treatment and unlawfully expropriated the company's rights. Based on those violations of the BIT, the tribunal awarded Crystallex $1.2bn in damages, with interest.

Crystallex requested that the court confirm the award—Venezuela requested that the court vacate the award. Both motions were made under the US Federal Arbitration Act, which incorporates the New York Convention into US domestic law.

What did the US Federal Court decide?

The District Court granted Crystallex's motion to confirm the award and rejected Venezuela's motion to vacate it. The most notable aspects of the decision are the court's application of deferential standard of review and, accordingly, its refusal to conduct a detailed review of the tribunal's approach to calculating damages.

In rejecting Venezuela's request that it apply a de novo standard of review, the court explained that US courts generally apply a deferential standard when reviewing domestic and international arbitral awards. It also explained that, under the US Supreme Court's definition of the deferential standard of review, the court does not 'hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts' and the court 'may not disturb the arbitrators' judgment, even if convinced that serious error infected the panel's award.'

Applying this standard, the court rejected Venezuela's arguments that it should refuse to confirm and should vacate the award.

In particular, Venezuela argued that the arbitral tribunal had acted in excess of its powers under article V(1)(c) of the New York Convention because the tribunal:

- wrongly conflated contractual and treaty claims
- employed an incorrect methodology to calculate damages

Venezuela also argued, pursuant to the Article V(2)(b) of the New York Convention that confirmation of the award would violate the public policy of the United States 'that States have the sovereign right to regulate the environmental impact of industrial activities because Venezuela's conduct toward Crystallex was intended to protect Venezuela's environment'. Finally, independently of the grounds to refuse to confirm the award under the New York Convention, Venezuela argued that the award should be vacated because the award was issued in manifest disregard to the law.

The court found that:

- the arbitral tribunal had not exceeded its powers, as the tribunal had interpreted and applied the Canada-Venezuela BIT
- confirmation of the award would not violate public policy, as holding a state liable for violating a treaty it signed did not offend US public policy, and
- the arbitral tribunal had 'clearly engaged' with the applicable law and thus not disregarded the applicable law

Of all the issues, perhaps the most notable is the court's holding that the tribunal's choice of methodology to calculate damages and its application of that methodology did not exceed its powers.

Venezuela had objected to two of the techniques the tribunal used to calculate damages—the stock market method and the market multiples method.

The tribunal used the so-called ‘stock market’ method to compare Crystallex’s share price at a date before Venezuela announced the expropriation of the mine and at a date after that announcement to assess the impact of the state’s conduct on Crystallex’s stock price. Venezuela argued that this approach violated the Canada-Venezuela BIT, as it allowed the tribunal to assess Crystallex’s value before the expropriation. The court rejected Venezuela’s challenge and held that the arbitral tribunal’s assessment was based on the application of the ‘full reparation’ standard provided for in the BIT.

The ‘market multiples’ method compares the market valuation of similarly placed companies (ie, those holding similar investments, in similar situations). In this case, the tribunal relied on several experts’ valuations of similarly situated mining companies. Venezuela challenged the use of this methodology on the basis that, because Crystallex had never actually operated the mine, the tribunal had relied on projections based on comparable mining projects and Crystallex’s projected gold reserves. In deciding this issue, the court noted that the parties disagreed over which of the projections the tribunal relied on. The court held, however, that, even if the tribunal had erred in its reliance on projections, that amounted to no more than a ‘serious error’ that was insufficient to vacate the tribunal’s award. In rejecting Venezuela’s objection, the court reasoned that, if it were to delve into the specific reasoning used by the tribunal, the whole purpose of arbitration would be defeated.

What affect do these proceedings have on the general profile of third party funding in international arbitration?

While the court did not find serious errors in this case, the court reiterated that under the deferential approach to reviewing arbitral awards, and the limited grounds for refusing to confirm an award under the New York Convention, even serious errors in the damages methodology are not a basis for vacating or refusing to enforce an award under the New York Convention. Given the assets that many other states have located in the US and the court’s reliance on this deferential approach in a case with such a substantial damages award, the decision may be seen as encouraging to parties who seek funding from third party funders. It could also be seen as encouraging to third party funders who are concerned about being able to enforce awards against significant assets that are located outside of the state that is a party to the arbitration.

Interviewed by Jenny Rayner.

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