Key Takeaways

Skadden

Foreign Governments, US Courts and International Arbitration

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On June 23, 2016, Skadden hosted a webinar titled "Foreign Governments, U.S. Courts and International Arbitration." Topics of discussion included the settlement of the Argentine sovereign debt litigation, enforcement of arbitration awards against sovereigns, the *forum non conveniens* doctrine in arbitration award enforcement proceedings and developments in the enforcement of terrorism judgments. Skadden speakers were Timothy G. Nelson, Julie Bédard and Jen Spaziano.

Mr. Nelson, an international litigation and arbitration partner, began by discussing the basic timeline and resolution of the Argentine sovereign debt litigation. He recapped the key dates in the past decade of litigation and reviewed the efforts of those bondholders that had not participated in the 2005 and 2010 exchange offerings to seize Argentina's assets. Mr. Nelson highlighted the features of the Argentine bonds, most notably the *pari passu* (or "equal treatment") clause, which he stated was the pivot that may have ultimately incentivized Argentina to come to the settlement table. Finally, Mr. Nelson noted certain "future trends" in sovereign bonds, specifically collective action clauses, grace periods and modified *pari passu* language.

Ms. Bédard, also an international litigation and arbitration partner, turned to the issue of enforcement of arbitration awards against states. She compared the framework for enforcement under the New York Convention for commercial arbitration awards with that under the International Centre for Settlement of Investment Disputes (ICSID) Convention for investment treaty awards rendered by an ICSID tribunal. She then addressed implied waivers of sovereign immunity under the Foreign Sovereign Immunities Act (FSIA) in the context of arbitration and enforcement of arbitration awards. Ms. Bédard noted that there is split authority in the federal courts regarding the procedural mechanism for enforcement of ICSID awards, which results from differing interpretations of the statute that implements the ICSID Convention in U.S. law. Finally, Ms. Bédard discussed stays of enforcement in ICSID annulment proceedings and the corresponding possibility of requiring the defendant sovereign to post security. Similarly, in proceedings to vacate arbitration awards under the New York Convention, she pointed out that courts may require the party seeking *vacatur* to post a bond and may stay enforcement pending the outcome of set-aside proceedings in the courts at the seat of arbitration.

Mr. Nelson then provided an update on several specific issues relating to enforcement of arbitration awards against sovereigns. First, he discussed the controversy regarding whether the doctrine of *forum non conveniens* can be used to stave off a proceeding to

enforce an arbitration award. Second, he addressed the question of enforcement of an award that has been set aside at the seat of arbitration and highlighted the most recent U.S. cases addressing the issue. Mr. Nelson addressed a recurring question in international practices and that is still being considered by U.S. appellate courts: When an award has been set aside in the place of arbitration, does the award cease to be an award or is it still possible to enforce it in other countries?

Ms. Spaziano, a litigation partner in Washington, D.C., discussed the enforcement of terrorism judgments against sovereigns. She began by pointing out the legislation that enables the enforcement of such judgments, including the terrorism exception to the FSIA, the Terrorism Risk Insurance Act and the Iran Threat Reduction and Syria Human Rights Act of 2012. She then reviewed the recent U.S. Supreme Court decision in *Bank Markazi v. Peterson*, 578 U.S. __, 136 S.Ct. 1310 (2016), in which the Court upheld the Iran Threat Reduction and Syria Human Rights Act, thereby permitting assets of Iran's central bank to be used to satisfy terrorism-related judgments against Iran. Ms. Spaziano further discussed recent developments with respect to terrorism judgments against Cuba and noted that it remains to be seen whether the removal of Cuba from the list of state sponsors of terrorism will affect enforcement of terrorism judgments against Cuba. She noted recent terrorism-related decisions regarding electronic fund transfers, most of which have held that, under relevant state law, transfers that are blocked midstream are subject to attachment only where the state or an instrumentality thereof transmitted the EFT directly to the respondent banks.

Ms. Spaziano noted that there are billions of dollars of judgments against Iran and Cuba that remain unsatisfied. Victims who obtain judgments against sovereigns face practical and legal difficulties. However, Congress has attempted to address some of those challenges through legislation, and courts have been willing to uphold congressional action. Financial institutions "must continue to be vigilant" in complying with and responding to restraining notices and other judgment enforcement-related efforts, she said in closing.