ALERT MEMORANDUM

D.C. Circuit Holds That Neither The FSIA's Arbitration Exception Nor Its Waiver Exception Applies To Actions To Enforce Foreign Judgments

July 24, 2025

On July 15, 2025, the United States Court of Appeals for the District of Columbia Circuit held that the arbitration exception and the waiver exception to the Foreign Sovereign Immunities Act do not apply to actions to enforce foreign judgments, even where the foreign judgment itself recognized or enforced an arbitration award.

In *Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd. v. Zimbabwe Mining Development Corporation, et al.*,[1] the D.C. Circuit reinforced the distinction between actions to recognize and enforce foreign arbitration awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and actions to recognize and enforce foreign court money judgments. The D.C. Circuit determined that the arbitration exception, by its plain terms, did not contemplate an action to recognize and enforce a foreign court judgment. For similar reasons, the D.C. Circuit found that a foreign state's signing of the New York Convention and subsequent agreement by it or its instrumentalities to arbitrate a dispute did not constitute an implied agreement to submit to jurisdiction for actions to recognize and enforce foreign judgments, and therefore did not satisfy the waiver exception.

In reaching this conclusion, the D.C. Circuit expressly declined to follow a Second Circuit decision determining that the waiver exception applied to an action recognizing a foreign court judgment confirming an arbitration award.

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[1] *Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd. v. Zimbabwe Mining Development Corporation, et al.*, --- F.4th ----, No. 24-7030, 2025 WL 1934050 (D.C. Cir. July 15, 2025).

Background

Under the Foreign Sovereign Immunities Act (the "FSIA"), foreign sovereigns are presumptively immune from suit in U.S. courts unless one of the exceptions to immunity enumerated in the FSIA applies.[2] U.S. courts lack subject matter jurisdiction over actions against foreign sovereigns unless one of the FSIA's exceptions to sovereign immunity applies.[3]

Under the waiver exception, sovereign immunity is lost where the foreign state either expressly or impliedly waives immunity.[4] The arbitration exception provides that a foreign state is not immune to jurisdiction in the United States where a private party sues under a contract containing an agreement to arbitrate or seeks recognition and enforcement of an arbitration award rendered under the arbitration agreement, when, *inter alia*, the agreement to arbitrate is or may be governed by an international agreement to which the United States is party that calls for the recognition and enforcement of arbitral awards, such as the New York Convention.[5]

Procedural History

In the early 2000s, two Mauritian mining companies, Amaplat Mauritius Ltd. ("Amaplat") and Amari Nickel Holdings Zimbabwe Ltd. ("Amari") formed a joint venture with Zimbabwe Mining Development Corporation ("ZMDC"), majority-owned by the Republic of Zimbabwe, to engage in mining activities in Zimbabwe.[6] The joint venture was formed pursuant to two Memoranda of Understanding ("MOUs") which included a provision requiring any dispute to be resolved by arbitration administered by the International Chamber of Commerce ("ICC").[7]

ZMDC eventually sought to cancel the MOUs, and Amaplat and Amari initiated an ICC arbitration seated in Zambia against ZMDC and the Commissioner of Zimbabwe's Ministry of Mines (the "Commissioner").[8] In 2014, the tribunal issued a final award finding that ZMDC breached the MOUs and ordering ZMDC to pay approximately $50 million to Amaplat and Amari, excluding interest.[9] ZMDC did not pay the arbitration award, and in 2019 Amaplat and Amari obtained a judgment from the High Court of Zambia recognizing the award pursuant to the New York Convention.[10]

In 2022, Amaplat and Amari ("Plaintiffs") initiated an action in the District of Columbia against ZMDC, the Commissioner, and the Republic of Zimbabwe ("Defendants"). By that time, an action to seek recognition and enforcement of the arbitral award in a U.S court was time-barred under the Federal Arbitration Act.[11] Accordingly, Plaintiffs sought instead to recognize and enforce the High Court of Zambia judgment under the District of Columbia Uniform Foreign-Country Money Judgments Recognition Act (the "D.C. Foreign Judgments Recognition Act").[12] Defendants moved to dismiss arguing, *inter alia*, lack of subject matter jurisdiction.[13]

The United States District Court for the District of Columbia granted in part and denied in part Defendants' motion to dismiss. After dismissing the claims against Zimbabwe and ZMDC,[14] the district court considered whether the arbitration or waiver exceptions applied to the Commissioner. The district court concluded that the arbitration exception did not apply, because Plaintiffs' action did not seek to "enforce the MOUs or to confirm the Zambian arbitral award" through the New York Convention, but was an action under the D.C. Foreign Judgments Recognition Act.[15] Acknowledging that this

[2] *See* 28 U.S.C. § 1605.
[3] *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).
[4] 28 U.S.C. § 1605(a)(1).
[5] 28 U.S.C. § 1605(a)(6).
[6] *Amaplat Mauritius Ltd. and Amari Nickel Holdings Zimbabwe Ltd. v. Zimbabwe Mining Development Corporation, et al.*, 663 F. Supp. 3d 11, 16 (D.D.C. 2023).
[7] *Id.* at 16-17.
[8] *Id.* at 17.
[9] *Id.*
[10] *Id.*
[11] *See* 9 U.S.C. § 207.
[12] *Amaplat and Amari,* 663 F. Supp. 3d at 17.
[13] *Id.* at 18.
[14] *Id.* at 20-26 (finding that the Republic of Zimbabwe was not the alter ego of ZMDC, and there was no personal jurisdiction over ZMDC).
[15] *Id.* at 31-32.

"may seem like a fine distinction," the district court relied on precedent "recogniz[ing] the conceptual difference between arbitral awards and foreign court judgments on arbitral awards" to find that the arbitration exception did not apply.[16] The district court found, however, that the waiver exception did apply, because the Commissioner impliedly waived sovereign immunity "by being a New York Convention signatory and agreeing to arbitrate in the territory of another signatory."[17] In so finding, the district court relied on the Second Circuit's decision in *Seetransport*, which held that a foreign sovereign impliedly waived its immunity from "a claim to confirm an arbitral award *and* from a claim to recognize a foreign court judgment confirming the arbitral award."[18] Defendants appealed.

The D.C. Circuit's Decision

The D.C. Circuit reversed the district court's decision, finding that an application of either the arbitration exception or the waiver exception "would require us to conflate two distinct concepts – arbitral awards and foreign court judgments."[19] Because "neither exception applies," the Circuit Court concluded that it "lack[ed] subject matter jurisdiction over this action."[20]

Beginning with the arbitration exception, the D.C. Circuit "agreed with the district court that the arbitration exception is inapplicable," because "there is a basic distinction between actions to confirm foreign arbitral *awards* and actions to domesticate foreign judicial *judgments*."[21] The Court found that the "plain terms" of the arbitration exception required that the action be brought to "enforce an agreement . . . to submit to arbitration" or "to confirm an award made pursuant to such an agreement to arbitrate."[22] Because the arbitration exception "[n]owhere . . . mentions foreign court judgments," the Court declined to "collaps[e] two concepts that we consistently have understood to be distinct."[23] As a result, the Court found that the arbitration exception did not apply to an action brought under the D.C. Foreign Judgments Recognition Act to recognize and enforce a foreign court judgment.[24]

Turning next to the waiver exception, the Court determined "[f]or similar reasons" that "the implied waiver exception also does not apply here."[25] Noting that the waiver exception must be construed "narrowly" and may apply only if there is "strong evidence of the sovereign's intent to waive immunity," the Court found that the New York Convention, which governs the recognition and enforcement of arbitral awards and not foreign judgments, was "insufficient to show Defendants' intent to waive immunity from judgment recognition actions."[26]

In reaching this conclusion, the D.C. Circuit expressly declined to follow the Second Circuit's 1993 decision in the *Seetransport* case.[27] There, the Second Circuit reasoned that the foreign sovereign, having agreed to and in fact having arbitrated a dispute subject to the New York Convention, "logically . . . had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award," including by enforcing judgments that enforce the award.[28] The D.C. Circuit rejected the Second Circuit's reasoning on the basis that the New York Convention and the Federal Arbitration Act implementing it into U.S. law "say[] nothing about recognizing foreign court judgments after having sought recognition and enforcement of the award."[29] The D.C. Circuit accordingly held that a sovereign's assent to the New York Convention and subsequent agreement to arbitrate did not sufficiently demonstrate

[16] *Id.* at 32-33 (quoting *Commissions Import Export S.A. v. Republic of the Congo (Comimpex)*, 757 F.3d 321, 330 (D.C. Cir. 2014)).
[17] *Id.* at 36.
[18] *Amaplat and Amari*, 2025 WL 1934050, at *3 (emphasis in original). *See also Amaplat and Amari*, 663 F. Supp. 3d 11 at 33-36 (citing *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993)).
[19] *Amaplat and Amari*, 2025 WL 1934050, at *1.
[20] *Id.*
[21] *Id.* at *4 (emphases in original).
[22] *Id.* (quoting 28 U.S.C. § 1605(a)(6)).
[23] *Id.*
[24] *Id.* at *5.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Seetransport*, 989 F.2d at 578-79.
[29] *Amaplat and Amari*, 2025 WL at *5.

an intent to waive immunity from judgment recognition actions.[30] The D.C. Circuit rejected Plaintiffs' contention that two prior D. C. Circuit cases referencing the *Seetransport* decision – *Creighton Ltd. v. Government of the State of Qatar* and *Tatneft v. Ukraine* – should change this outcome.[31] Distinguishing these authorities as "both deal[ing] with [enforcement of] arbitral awards" and not foreign court judgments, the Court further observed that it had never before "formally adopted *Seetransport*'s conclusion that signing the New York Convention and agreeing to arbitrate is even sufficient to waive immunity from award actions."[32] The Court instead decided to "once again leave that question for another day," but "resolve[d] that such conduct is insufficient to establish the requisite intent to waive immunity from foreign judgment actions that are not governed by the [New York] Convention."[33]

As a result, the Court held that neither the arbitration exception nor the waiver exception applies to the action under the D.C. Foreign Judgments Act, and therefore remanded to the district court to dismiss for lack of subject matter jurisdiction.[34]

Takeaways

As the default venue for actions against foreign sovereigns,[35] the D.C. Circuit's decision will significantly limit parties' ability to bring actions against foreign sovereigns to enforce foreign judgments that have recognized or enforced arbitration awards under the New York Convention. As a result, foreign award creditors may need to consider whether they should incur the expense of bringing protective actions to seek recognition of their arbitral awards in the United States within the three-year limitations period to do so, even when they do not have prospects of collecting in the United States, to protect against the possibility that recoverable assets might come into the United States within the much longer period available to enforce a domestic court judgment.

In addition, the D.C. Circuit expressly left open the question of whether "signing the New York Convention and agreeing to arbitrate is even sufficient to waive immunity from award actions,"[36] notwithstanding its prior decisions in *Creighton Ltd. v. Government of the State of Qatar* and *Tatneft v. Ukraine* and the decisions of other Circuit courts, including specifically *Seetransport*.[37] Without a sharp and mature circuit split on this issue, however, the U.S. Supreme Court may be disinclined to review it in the near future, having previously denied *certiorari* in the *Tatneft v. Ukraine* case.[38]

The D.C. Circuit's decision does create a clear rift with the Second Circuit with respect to actions to enforce foreign judgments. As the two most significant circuits for enforcement of international awards, particularly concerning sovereigns, this is notable. In the face of relatively little case law on the subject, however, it remains to be seen whether the clarity of the split on this issue alone will suffice to attract the Supreme Court's attention.

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[30] *Id.* at *6.
[31] *Id.* (citing *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999); *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019)).
[32] *Id.* at *7 (internal citation and quotation omitted) (citing cases).
[33] *Id.*
[34] *Id.*
[35] *See* 28 U.S.C. § 1391(f)(4).
[36] *Id.*
[37] *See also, e.g.*, *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000).
[38] *See Ukraine v. Tatneft*, 140 S.Ct. 901 (2020). The D.C. Circuit had previously unanimously denied rehearing *en banc* of the *Tatneft* decision applying the waiver exception. *Tatneft v. Ukraine*, 771 F. App'x 9 (D.C. Cir. 2019), *reh'rg en banc denied* (D.C. Cir. Sept. 16, 2019).