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For more information,
contact:

Randy Mastro
+1 212 827 4019
rmastro@kslaw.com

Samaa Haridi
+1 212 556 2248
sharidi@kslaw.com

Elizabeth Silbert
+1 404 572 3570
esilbert@kslaw.com

Timothy McKenzie
+1 212 556 2288
tmckenzie@kslaw.com

King & Spalding

New York
1185 Avenue of the Americas
New York, NY 10036
Tel: +1 212 556 2100

Atlanta
1180 Peachtree Street, NE
Atlanta, GA 30309
Tel: +1 404 572 4600

The U.S. Supreme Court Agrees to Decide Cases Regarding Whether and When Non-U.S. Plaintiffs May Use RICO to Enforce Foreign Arbitral Awards

On January 13, 2023, the United States Supreme Court agreed to hear two related cases in which it will decide for the first time whether and in what circumstances a foreign (non-U.S.) plaintiff may bring a civil action under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) on the basis of an alleged injury to “intangible property” – including interference with payment of an arbitral award or a court judgment. The Court’s decision in the two cases, *CMB Monaco v. Smagin* and *Yegiazaryan v. Smagin*, may have significant implications for how foreign arbitral awards are enforced in the United States. In particular, the decision could pave the way for non-U.S. individuals and companies to use RICO to obtain enforcement of arbitral awards that have been confirmed in United States courts, opening up an additional way to reach U.S.-based assets. Additionally, as RICO provides for treble damages, the Supreme Court’s decision could potentially enable award creditors to recover far more than the amount of the award if they prevail.

RICO Background

Originally enacted by the U.S. Congress in 1970, RICO establishes criminal penalties for persons involved in patterns of “racketeering activity”, which may include violations of a wide range of federal and state criminal laws including those prohibiting acts of fraud, bribery, money laundering and embezzlement. 18 U.S.C. § 1961(1). RICO also provides a civil cause of action to “[a]ny person injured in his business or property” through racketeering activity. A plaintiff prevailing in a civil RICO action “shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.” 18 U.S.C. § 1964(c).



The Supreme Court previously addressed the applicability of RICO in suits brought by foreign plaintiffs in *RJR Nabisco Inc. v. European Community*, 579 U.S. 325 (2016). In that case, the Court ruled that the presumption against extraterritoriality applied to RICO, and therefore that a foreign plaintiff must allege and prove a “domestic injury” to its business and property – *i.e.*, an injury in the United States – in order to support a RICO action. However, the Supreme Court did not define the circumstances in which an injury to intangible property, including court judgments and arbitral awards, constitutes a “domestic injury.”

Since the *RJR Nabisco* decision, U.S. federal appellate courts have split on this issue. The Court of Appeals for the Seventh Circuit has held that when a foreign plaintiff suffers damage to intangible property, that injury is deemed to occur at the plaintiff’s residency abroad. Therefore, injuries to a foreign plaintiff’s intangible property categorically cannot constitute “domestic injuries” for RICO purposes. See *Armada (Sing.) PTE Ltd. v. Amcol Int’l Corp.*, 885 F.3d 1090, 1091 (7th Cir. 2018). The Court of Appeals for the Third Circuit, however, rejected this bright-line rule, instead favoring a multi-factor balancing test for determining when injury to intangible property constitutes a “domestic injury” for RICO purposes. The factors considered by the Third Circuit included (among others) where the injury arose, the location of the plaintiff’s residence or place of business, where any relevant business agreements were entered into, and the location of activities giving rise to the underlying dispute. See *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694 (3d Cir. 2018). Given this circuit split, the stage was set for the Supreme Court to intervene and clarify this issue in an appropriate case.

Procedural History of the *Smagin* Cases

CMB Monaco v. Smagin and *Yegiazaryan v. Smagin* arise out of a dispute concerning a failed real-estate investment in Russia, and center on Russian national Vitaly Ivanovich Smagin’s attempts to collect on an international arbitral award he obtained against his former business partner, Ashot Yegiazaryan.

In 2010, Smagin initiated an arbitration against Yegiazaryan under the auspices of the London Court of International Arbitration (“LCIA”), alleging that Yegiazaryan had engaged in a pattern of fraud and other wrongdoing. The London-seated tribunal ruled in Smagin’s favor in 2014, awarding him approximately US\$ 85 million in damages. Smagin then brought enforcement proceedings in California, where Yegiazaryan had relocated in 2010. In March 2016, the U.S. District Court for the Central District of California entered an order confirming the LCIA arbitral award.

After several unsuccessful attempts to collect on the award and the California judgment, Smagin commenced a RICO action in the Central District of California in December 2020. Smagin alleged that, after the LCIA award was confirmed in California in March 2016, Yegiazaryan had, with the assistance of CMB Monaco – a Monaco-based bank – and other defendants, interfered with Smagin’s attempts to collect on the award and California judgment. Smagin therefore argued that these defendants impaired the value of the California judgment and therefore caused injury to his intangible property.

The defendants moved to dismiss the case and the Central District of California granted the motion in May 2021, finding that Smagin had not alleged an injury to his “domestic” property and therefore could not establish standing to pursue a RICO claim in U.S. court.

In June 2022, the U.S. Court of Appeals for the Ninth Circuit reversed. It expressly rejected the bright-line rule established by the Seventh Circuit and held that “determining whether a plaintiff has alleged a domestic injury is a context-specific inquiry that turns largely on the particular facts alleged in a specific complaint.” The Ninth Circuit took the view that because Smagin sought to exercise the rights conferred by the California judgment in California, and because much of the conduct underlying the alleged injury “occurred in, or was targeted at” California, Smagin’s



intangible property should be considered to exist in that state for RICO purposes. Therefore, the alleged harm to Smagin's rights under the California judgment constituted a "domestic injury."

The Ninth Circuit denied petitions for rehearing *en banc*, and Yegiazaryan and CMB Monaco subsequently filed petitions for certiorari with the Supreme Court. The Supreme Court granted those petitions on January 13, 2023, and consolidated the two cases. The Court will likely schedule oral argument in the consolidated cases for April 2023, with a decision expected by this summer.

Potential Implications of the Case

The Supreme Court's decision could have important implications for how foreign creditors can enforce international arbitral awards in the United States. Should the Supreme Court uphold the Ninth Circuit's decision, it will open the door for those award creditors to invoke RICO to collect on their awards in appropriate cases – particularly where the award debtors have allegedly employed fraudulent or other unlawful means to evade payment. Further, an award creditor who prevails in such a RICO proceeding could obtain treble damages, recovering far more than just the value of the original award. The mere threat of treble damages could prove to be an important tool in convincing intransigent award debtors to make payment. It bears noting, however, that an award creditor would need to establish the various elements of a successful civil RICO claim, including the predicate criminal offenses and a connection to an "enterprise," which can be a complicated endeavor.

On the other hand, should the Supreme Court reverse the Ninth Circuit's decision and adopt the approach followed by the Seventh Circuit, non-U.S. plaintiffs will not be able to bring RICO claims solely on the basis of alleged injury to intangible property such as arbitral awards or U.S court judgments enforcing those awards.

Regardless of the outcome, the Court's decision is of interest to both U.S. and non-U.S. individuals and companies alike. It will help further define the circumstances in which non-U.S. plaintiffs can bring RICO actions in the United States, and the extent to which they may invoke RICO in support of efforts to collect on international arbitral awards. This in turn will have implications for the potential vulnerability to RICO suits of any individual or company's U.S.-based assets.

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