

VENEZUELA SEES LAWSUIT DISMISSED UNDER FSIA

Rachel Hall

19 February 2014

A company arguing that the Venezuelan government is preventing it from claiming US\$400 million from the Lehman Brothers' estate has seen its case thrown out by a New York court on grounds of lack of jurisdiction.

The Southern District Court of New York dismissed the case with prejudice on 27 January, ruling that there was no jurisdiction over the Venezuelan sovereign entities under the Foreign Sovereign Immunities Act (FSIA).

US firms Diaz Reus & Targ LLP and Winne, Banta, Hetherington, Basralian & Kahn PC represented Venezuela's government protection agency for bank deposits, FOGADE, while Foley Hoag LLP represented the banking regulator, SUDEBAN.

Smith Rocke, advised by Chadbourne & Parke LLP, brought the lawsuit, claiming that the government agencies had expropriated its entitlement to payments worth over US\$400 million from the Lehman Brothers' bankruptcy, which famously contributed to the unfolding of the global financial crisis in 2008.

British Virgin Islands-registered Smith Rocke's Venezuelan controlling shareholders argue they have a claim to payouts from the bank because of their previous association with Venezuela's Banco Canarias and affiliated entity Credican, both Lehman Brothers creditors, which were placed into receivership by the Venezuelan banking regulators several years ago. At that time, Smith Rocke laid claim to the right to receive payments owed to Banco Canarias and Credican from the Lehman Brothers' bankruptcy estate. Credican and its administrators were advised in this case by Alcantar Law PLLC.

Venezuela is also seeking to recover the assets in order to satisfy depositors and creditors of the failed financial institutions. Once the government learned of the attempted diversion of assets by Smith Rocke's shareholders, it notified the Lehman bankruptcy trustee in a bid to prevent payments from the estate being made to them, on the basis of which Smith Rocke filed the suit.

"The problem for Smith Rocke, of course, is that these shareholders never had a legitimate legal claim to these assets, and now the court has told them so," says Diaz Reus partner Michael Diaz.

Smith Rocke plans to appeal against the decision by 3 March, and will also pursue claims in other forms and jurisdictions. According to Chadbourne & Parke partner Thomas Hall, the company disputes the invocation of the FSIA, arguing that the Venezuelan agencies engaged in commercial activity in the US when they notified the trustee to assert that the disputed securities from the Lehman estate belonged to the Venezuelan government. Smith Rocke also argues that the alleged expropriation of its right to receive payments due from Lehman Brothers to Credican constitutes a violation of international law – which transcends the scope of the FSIA.

Counsel to FOGADE

Diaz, Reus & Targ LLP

Partners Michael Diaz, Chad Purdie, Gary Davidson, Brant Hadaway and Carlos Gonzalez

Winne, Banta, Hetherington, Basralian & Kahn PC

Principal Gary Redish in New Jersey

Counsel to SUDEBAN

Foley Hoag LLP

Partner Andrew Schwartz and associates Thomas Ayres, Julia Amhrein, Kiran Ghia, Elizabeth Holland and Richard Baldwin in Boston, partner Richard Goodman, of counsel Janis Brennan and international associate Diego Cadena in Washington, DC

Counsel to Smith Rocke

Chadbourne & Parke LLP

Partner Thomas Hall and associates Marcelo Blackburn in New York and partner Michael Socarras in Washington, DC

Counsel for defendants Moreno Franco, Jimenez Urrutia, and Junta Administradora de Credican

Alcantar Law PLLC

Partner Jose Raul Alcantar Villagran