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Between a sovereign and a hard place: enforcing arbitral awards against "independent" state entities in the U.S. courts

Annalise Nelson (Associate Editor) · Thursday, June 14th, 2012

The United States Court of Appeals for the District of Columbia Circuit recently issued a decision that has some interesting implications for the enforcement of foreign arbitral awards in the U.S. against foreign state agencies or state-owned companies. American readers, get ready for a review of Civil Procedure 101 on personal jurisdiction!

The United States is signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is incorporated into U.S. law via Chapter 2 of the Federal Arbitration Act. In turn, the Foreign Sovereign Immunities Act, or "FSIA," waives immunity and permits U.S. courts to enforce arbitral awards rendered against foreign States. Under the FSIA, federal district courts have subject-matter jurisdiction over "any nonjury civil action against a foreign state . . . as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). More specifically to the point here, the FSIA eliminates foreign sovereign immunity with respect to certain arbitration claims. 28 U.S.C. § 1605(a)(6) provides that a foreign state is *not* immune from the jurisdiction of U.S. courts where:

> [T]he action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if
> …
> (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards
> …

In other words, a foreign State with an arbitral award against it is *not* immune to U.S. enforcement jurisdiction if that award is governed by the New York Convention.

Easy enough. But what about state agencies or state-owned enterprises? The FSIA has a pretty clear answer here, too. 28 U.S.C. § 1603(a)-(b) defines "foreign state" for purposes of the statute to

include “an agency or instrumentality of a foreign state.” In turn, an agency or instrumentality of a foreign state is defined as “any entity…a majority of whose shares or other ownership interest is owned by a foreign state.” So no problem there, either; they’re treated just like the sovereign when it comes to enforcing arbitral awards against them.

But are all state entities treated the same? That’s where things can get a little trickier. Enter *GSS. v. National Port Authority* (decision available here), and a good old-fashioned discussion of the *International Shoe* minimum contacts test for personal jurisdiction.

The case concerns an arbitral award that was obtained by GSS Group Ltd. (“GSS”) against the National Port Authority of Liberia (“NPA”) back in 2009. The arbitration concerned a dispute over a contract for the construction and operation of a container park at the Freeport of Monrovia. After the NPA had failed to present arguments on the merits, the sole arbitrator, who was seated in London, held in favor of GSS and issued an award against the NPA for US$ 44.3 million.

GSS petitioned to enforce the arbitral award in the Federal District Court for the District of Columbia. The NPA moved to dismiss the petition on several grounds, including an argument that the District Court did not have personal jurisdiction over the NPA, because it did not have offices or employees or generate any income in the United States that would constitute the sufficient “minimum contacts” for the United States to have personal jurisdiction over it.

GSS argued, in return, that personal jurisdiction over NPA has been satisfied. Under the FSIA, jurisdiction is established over a “foreign state,” including state agencies like the NPA, so long as the court has subject matter jurisdiction over the plaintiff’s claims and service has been effected in accordance with the relevant provision of the FSIA. 28 U.S.C. § 1330(b). Because service had been made on the NPA in accordance with the FSIA, and because the court had subject matter jurisdiction under § 1330(a), GSS argued, personal jurisdiction had been established.

GSS also argued that the FSIA was dispositive on the issue of personal jurisdiction. GSS asserted that the “minimum contacts” test, a constitutional due process test that limits personal jurisdiction to those defendants who have enough contacts with the United States such that they could reasonably expect to be hailed before a U.S. court, does not apply to sovereign states. Because the NPA counted as a sovereign for purposes of the FSIA, GSS reasoned, the NPA couldn’t benefit from the constitutional “minimum contacts” test, just as Liberia itself couldn’t.

The district court disagreed with GSS, however. It characterized the NPA as falling “somewhere between” the categories of a foreign sovereign and a private foreign person, to whom the “minimum contacts” test would apply. After noting that the Petitioner did not contest evidence of the NPA’s independence from Liberia–including evidence that the NPA was responsible for its own finances, that it received no funding or subsidies from the Government of Liberia, that its primary purposes were commercial, and that the Government was not involved in its day-to-day management—the Court concluded the NPA benefits from the due process protections afforded to private foreign persons for purposes of personal jurisdiction. *See, e.g., Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984).

On appeal, the D.C. Circuit affirmed. It interpreted circuit case law as permitting the NPA to treatment as a separate “person” entitled to due process protection, including the right to assert a minimum contacts defense. Here, the NPA had claimed to be an independent juridical entity in its

motion to dismiss, and GSS had failed to contest that characterization.

A few tensions remain with respect to the Circuit's decision. First, as pointed out by the district court (as well as in Austen L. Parrish's "Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants," 41 WAKE FOREST L. REV. 1, 7 (2006)), "it is not clear why foreign defendants, other than foreign sovereigns, should be able to avoid the jurisdiction of United States courts by invoking the Due Process Clause when it is established in other contexts that nonresident aliens without connections to the United States typically do not have rights under the United States Constitution." Federal courts have regularly declined to hear suits brought by nonresident aliens claims who claim that they were deprived of Fifth Amendment rights. (See, as one example, *Doe v. United States*, 95 Fed.Cl. 546 (Fed.Cl. 2010), in which the United States Court of Federal Claims concluded that an Iraqi plaintiff did not have standing to raise, *inter alia,* a Fifth Amendment takings claim based upon occupation of his home by the U.S. military because he did not have substantial connections to the United States.) This tension is unlikely to be resolved anytime soon, of course; *Asahi Metal* and its progeny remain Supreme Court precedent.

Second, the concurring opinion in the Circuit's decision introduces a note of caution in what it characterizes as the potentially unnecessary "Constitutionalization" of the issue of suing foreign state-owned-entities. Instead, the concurrence suggests that Congress might be able to find a more sensible solution to the issue for these quasi-sovereign, quasi-private entities than by resorting to Con Law. Of course, in the meantime, it is hard to avoid "Constitutionalizing" the issue of personal jurisdiction when an entity lies somewhere on the spectrum between being full sovereign, on one hand, and a private actor benefiting from constitutional protections, on the other.

What remains clear in the meantime, however, is that lawyers looking to petition for arbitral enforcement against a foreign agency in the United States had better be prepared to dig down into the facts to establish those "minimum contacts."

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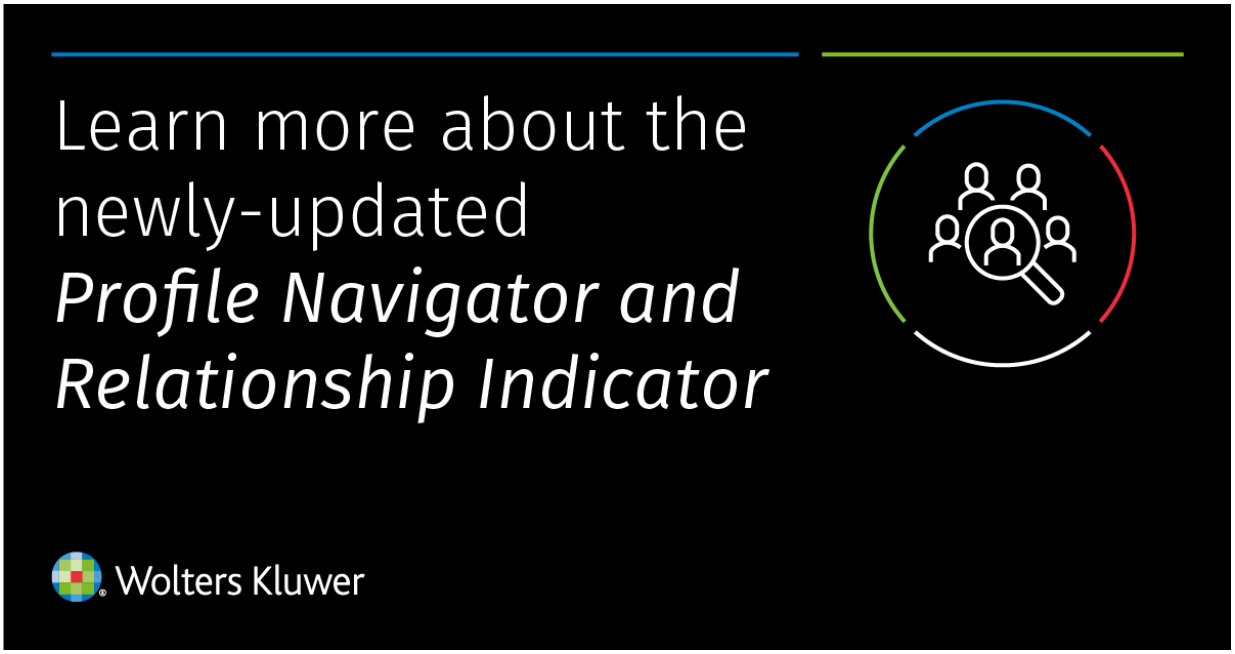

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