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Client Alert

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D.C. Circuit Affirms That Foreign State-Owned Corporations Are Entitled to Due Process Protections in United States Courts

On May 25, 2012, the United States Court of Appeals for the D.C. Circuit, ruling in *GSS Group Ltd. v. National Port Authority*,[i] re-confirmed that foreign corporations owned by a foreign sovereign are entitled to the Fifth Amendment's jurisdictional due process protections. The Court's decision rested heavily on its own precedent, *TMR Energy Ltd. v. State Prop. Fund of Ukraine*,[ii] which held that a foreign state-owned corporation is entitled to constitutional due process protections under the Fifth Amendment unless it can be shown that the foreign corporation has a principal-agent relationship with the state within the meaning of the Supreme Court's holding in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*").[iii] The concurrence, however, seriously questioned the logical soundness of the Court's analysis in *TMR Energy*, suggesting that "in a suitable case it may be valuable for courts to reconsider" the assumptions made in *TMR Energy*, and to reconcile the evident inconsistencies among earlier Supreme Court and D.C. Circuit precedents dealing with the application of due process in suits against individual foreign defendants and private foreign corporations. While the Court of Appeals' majority decision holds fast to precedent and breaks very little new ground, statements by the district court and the Court of Appeals' concurring opinion highlight some logical inconsistencies that have been repeatedly noted by courts and litigants in prior cases dealing with the constitutional rights of foreign state-owned corporations. Such inconsistencies continue to spark debate, and reflect a persisting view that existing precedents may not provide the most logical solutions to jurisdictional issues arising in cases involving foreign corporations entitled to sovereign immunity.

Background

Petitioner GSS Group Ltd. (GSS), an Israeli construction company, entered into a contract with the National Port Authority of Liberia ("Port Authority") providing that GSS would build and operate a container park at the port of Monrovia. The Port Authority, responsible for the management and operation of Liberia's ports, is a public corporation incorporated in Liberia, but wholly owned by the Liberian government. Unfortunately for GSS, a change in Liberia's government just a few months later resulted in the termination of GSS's contract. Pursuant to the arbitration clause contained

For more information, contact:

James E. Berger
+1 212 556 2202
jberger@kslaw.com

Charlene C. Sun
+1 212 556 2107
csun@kslaw.com

King & Spalding
New York
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100
Fax: +1 212 556 2222

www.kslaw.com

within that contract, GSS commenced arbitration against the Port Authority in London, claiming that the Port Authority breached the contract. The arbitrator ruled in favor of GSS and rendered an award in the amount of $44,347,260 in damages (the "Award").

Just over a year later, GSS filed a petition in the U.S. District Court for the District of Columbia to confirm the Award. The Port Authority contested enforcement, asserting, *inter alia*, that the district court lacked personal jurisdiction over it. While acknowledging the D.C. Circuit's decision in *Price v. Socialist People's Libyan Arab* Jamahiraya,[iv] which held that "foreign states are not 'persons' protected by the Fifth Amendment,"[v] the Port Authority relied upon subsequent D.C. Circuit precedent which established that foreign state-owned corporations were, unlike their sovereign parent, entitled to due process protections unless found to be an agent of the state. Specifically, in *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, the Court of Appeals was directly faced with the question of whether a foreign corporation that was majority- or wholly-owned by a foreign state was entitled to constitutional due process protections, and concluded that such corporations were presumptively entitled to such protections. In reaching this conclusion, the *TMR Energy* court relied upon several cases holding that foreign corporations must be considered "persons" within the meaning of the Fifth Amendment, beginning with *Helicopteros Nacionales de Columbia, S.A. v. Hall*[vi] and *Asahi Metal Industries Co. v. Superior Court*.[vii] Furthermore, the Court of Appeals imported the Supreme Court's holding in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"),[viii] which held that a foreign state-owned company is generally presumed to be separate from its sovereign parent unless it can be shown that the foreign corporation has a principal-agent relationship with the state, ruling that a foreign state-owned corporation is entitled to constitutional due process protections under the Fifth Amendment, unless, under *Bancec*, the corporation was found to be a mere agent or alter-ego of the state. Citing this precedent, the Port Authority asserted that it was a "legally separate" entity from the Liberian government, and further that it lacked minimum contacts with the United States, as it maintained no offices or personnel in the United States, and had never engaged in any commercial activity in the United States. Thus, under *TMR Energy*, the Port Authority argued that the case must be dismissed as it was not subject to personal jurisdiction in the district court.

In the district court, GSS did not challenge the Port Authority's assertions that it was a legally separate entity from the Liberian government, or that it lacked minimum contacts with the United States. Instead, GSS argued simply that a foreign state-owned corporation should not be entitled to a personal jurisdiction defense where the jurisdictional requirements of the Foreign Sovereign Immunities Act ("FSIA") are met, as there was no logical reason for bestowing additional constitutional protections to a foreign-state owned corporation when its sovereign parent was not entitled to such protections (regardless of the degree of control that the sovereign parent asserted over the corporation). GSS's case seemed to rest on its argument that the *TMR Energy* decision was wrongly decided and should be abandoned.

Unsurprisingly, the district court found that it lacked personal jurisdiction over the Port Authority and dismissed the action. Citing *TMR Energy*, the district court found that, while the Port Authority was subject to statutory personal jurisdiction under the FSIA (because it had subject matter jurisdiction under the FSIA, and because GSS had properly served the Port Authority in accordance with the FSIA), the court was bound by *TMR Energy* to make an additional inquiry concerning whether the its exercise of personal jurisdiction over the Port Authority would comport with constitutional due process. Given that GSS had not attempted to show that the Port Authority was an agent of the Liberian government under *Bancec*, or that it had minimum contacts with the United States, the district court was constrained by precedent to find that personal jurisdiction could not be exercised over the Port Authority and to dismiss the case for lack of personal jurisdiction.

Although its hands were clearly tied by D.C. Circuit precedent, the district court was not entirely unsympathetic to the logic of GSS's argument, noting that it was "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[ix] that nonresident aliens without connections to the United States typically do not have rights under the United States Constitution."[x]

Perhaps steeled by these comments, GSS moved the district court pursuant to Rule 59(e) to alter or amend the judgment based on three additional arguments that it did not raise to the district court prior to the dismissal of its case. First, GSS argued that the Port Authority acted as the Liberian government's agent under *Bancec*, and thus was not entitled to due process protections. Second, GSS argued that the district court should have permitted GSS jurisdictional discovery. And third, GSS argued that both the Federal Arbitration Act (FAA) and the FSIA provide sufficient due process to foreign state-owned corporations such as the Port Authority. The district court found that GSS had waived these arguments by failing to raise them earlier in the proceeding and denied its motion. GSS appealed both the dismissal of the case and the denial of its Rule 59 motion.

The D.C. Circuit's Majority Opinion

At the outset of its decision, the D.C. Circuit made quick work of GSS's appeal of the district court's denial of GSS's Rule 59 motion, explaining that a "Rule 59(e) motion may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment,"[xi] and held that the district court properly found that GSS's election not to present its three additional arguments in opposition to the Port Authority's motion to dismiss resulted in the waiver of those arguments.

The Court then turned to GSS's appeal of the district court's dismissal of the case due to lack of personal jurisdiction, and the "sole argument GSS Group has preserved for our consideration,"[xii] its claim that foreign state-owned corporations have no due process rights. GSS argued on appeal that the Court's analysis in the *Price* decision, holding that foreign states are not protected by the Fifth Amendment because they are "juridical equals on the level of international law and diplomacy outside the constitutional system,"[xiii] should logically be extended to foreign state-owned corporations as well, as they are "just as alien to our constitutional system" as their sovereign parents.

The Court of Appeals rejected this argument, holding fast to numerous binding Supreme Court precedents[xiv] where private foreign corporations were permitted to invoke due process protections as a challenge to personal jurisdiction. The Court explained that in each of those cases, the defendant was "'just as alien to our constitutional system' as the Libyan government was in *Price*."[xv] In the Court's view, the question presented in this case had already been asked and answered in *TMR Energy*, where the Court applied *Bancec*'s agency test to determine whether the foreign state-owned corporation in that case was entitled to constitutional due process protections under the Fifth Amendment. The Court explained that "[f]ar from being 'irrelevant,' as GSS Group claims, the extent of a state-owned corporation's juridical independence plays a dispositive role in the constitutional analysis," and concluded that "*Bancec* 'must govern' the question whether a foreign instrumentality has due process rights under the Fifth Amendment."[xvi]

The Court of Appeals did take notice of the district court's concern of a "possible doctrinal inconsistency" between the *Helicopteros* line of cases and other decisions, beginning with *Verdugo-Urquidez*, holding that aliens without property or presence in the United States are not entitled to constitutional due process, and, in dicta, attempted to reconcile them.

The Court speculated that perhaps foreign corporations, as opposed to foreign individual defendants, must necessarily be afforded due process because "[w]hen a foreign corporation is summoned into court, it is being forced to defend itself . . . [and] the corporation must appoint a representative to act for it – that is, an attorney," and "since it has been forced to appear in the United States, at least for that limited purpose, it is entitled to the protection of the due process clause as interpreted in *International Shoe* and later decisions involving foreign corporate defendants."[xvii]

Ultimately, the Court of Appeals abandoned further speculation as it need not "resolve the possible conflict described above" in this case because GSS had failed to properly raise its arguments concerning the *Verdugo-Urquidez* line of cases with the district court, and because existing the existing precedents were clear that "*Bancec* is the exclusive means for determining whether a foreign, state-owned corporation is a 'person' for Fifth Amendment purposes."[xviii] The district court judgment was affirmed in all respects.

The Concurring Opinion

Judges Williams and Randolph joined in a concurrence, finding it necessary to write separately from the majority "to express concerns about [the Court's] decision in *TMR Energy* . . ."[xix] The concurrence stated its view that *TMR Energy* extended *Bancec* "to a wholly new domain," which "constitutionalize[d] an issue quite unnecessarily."[xx] Specifically, the concurrence explained that *Bancec*'s holding was conceived as a solution to a U.S. bank's claim for a set-off for its losses caused by the Cuban government's seizure of Cuban assets. This solution, the concurrence noted, was an appropriate one for that case, but seemed less appropriate when applied as a constitutional doctrine. In fact, this unjustified metamorphosis of *Bancec* yielded some anomalous results in the concurrence's view. First, both the *Bancec* and *Price* decisions noted the importance of legislative policies where jurisdiction over sovereign entities was concerned. In *Price*, the Court of Appeals explained that the "availability of diplomatic measures" permitted the United States as a country to "take note of the behavior of foreign states and the structure of international relations."[xxi] Where, for example, a foreign country adopts a jurisdictional statute that authorizes its courts to exercise jurisdiction over a foreign defendant where that defendant's nation would do the same, the United States might respond by enacting a similar U.S. statute, a move which the concurrence viewed to be "sensible as negotiating strategy."[xxii] However, such a hypothetical enactment, though practical in the context of foreign relations, would seem to violate the constitutional doctrine born by *TMR Energy*. The concurrence further noted that "[s]tate-owned corporations, of course, will often have access to the diplomatic mechanisms alluded to in *Price*, and their use of that access might well precipitate the sort of negotiated solutions contemplated there."[xxiii]

In addition, the Court of Appeals' decision in *Price*, the concurrence explained, was largely predicated on its belief that "extending due process protections to foreign states would 'frustrate the United States government's clear statutory command' to subject foreign states to the jurisdiction of the federal courts under some circumstances."[xxiv] The FSIA was, in fact, enacted to define those very circumstances, and in the concurring judges' view, "it is not at all clear why that determination should not be given full effect."[xxv]

While the concurrence seemed to concede that, given its procedural footing, the case at bar was not the proper vehicle for the re-examination called for, it stated that "in a suitable case it may be valuable for courts to reconsider both the merits of the assumption in *Asahi Metal* and kindred cases that private foreign corporations deserve due process protections, and (perhaps more significantly) the application of that assumption to entities owned by a foreign state but not subject to the state's plenary control or otherwise treated as a state."[xxvi] Such action, however, would be required by

either the Supreme Court or Congress to free the Circuit and district courts from "the constitutional straightjacket that appears to prevail currently."[xxvii]

Conclusions

The *GSS* concurrence presents several interesting considerations which cast a questionable light on the logic of the analysis applied in *TMR Energy*. Perhaps most persuasive is the concurrence's view that the FSIA already provides clear guidelines for determining jurisdiction over foreign states and/or their instrumentalities. Several of the FSIA's provisions indicate that Congress did not intend for a different jurisdictional analyses to apply to foreign governments and foreign state-owned corporations. For example, the FSIA codifies the circumstances in which a United States court may exercise personal jurisdiction over a "foreign state" in 28 U.S.C. § 1330(b), providing that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." Sections 1603(a) and (b) define a "foreign state" to include not only a foreign government itself, but also a corporate entity that is majority-owned by a foreign government. Thus, under the plain language of the statute, it would seem that Congress intended that a foreign state-owned corporation would be subject to the same jurisdictional analysis as its sovereign parent.[xxviii] As the concurrence in *GSS* pointed out, the majority's approach (and the approach taken by the *TMR Energy* court) essentially rejects Congress' decision to treat states and their instrumentalities as equals for jurisdictional purposes, and has the effect of holding the FSIA's personal jurisdiction provision unconstitutional as applied to state-owned corporations and other state instrumentalities.

The only other circuit to have directly addressed the issue of whether a foreign state-owned corporation is entitled to due process protections is the Second Circuit, which largely adopted the D.C. Circuit's reasoning in *TMR Energy* in holding that "we think . . . that *Bancec*'s analytic framework is also applicable when the question is whether the instrumentality should have due process rights to which the state is not entitled."[xxix] However, given that the vast majority of circuits have yet to address the issue, the *GSS Group* concurrence may yet prove persuasive to other Courts of Appeals who might, in a "suitable case," reconcile the *Helicopteros*, *Verdugo-Urquidez*, and *Bancec* cases in a different manner, which might, in turn, bring about a circuit split worthy of the attention of the Supreme Court. As the law governing the treatment of foreign sovereigns continues to evolve, new developments on this question are sure to be closely watched.

[i] --- F.3d ----, 2012 WL 1889384 (D.C. Cir. May 25, 2012).
[ii] 411 F.3d 296 (D.C. Cir. 2005).
[iii] 462 U.S. 611 (1983).
[iv] 294 F.3d 82 (D.C. Cir. 2002).
[v] 294 F.3d at 96.

[vi] 466 U.S. 488 (1984).
[vii] 480 U.S. 102 (1987).
[viii] 462 U.S. 611 (1983).
[ix] *E.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004).
[x] *GSS Group Ltd. v. Nat'l Port Auth.*, 774 F. Supp. 2d 134, 139 (D.D.C. 2011).
[xi] --- F.3d ----, 2012 WL 1889384, at *4 (citing 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1).
[xii] --- F.3d ----, 2012 WL 1889384, at *5.
[xiii] *Id.* at *6 (citing Appellant's Br. 24-25).
[xiv] *E.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, --- U.S. ----, 131 S. Ct. 1026, 2785 (2011); *Asahi*, 480 U.S. at 113-16; *Helicopteros*, 466 U.S. 413-14.
[xv] --- F.3d ----, 2012 WL 1889384, at *6 (citing 294 F.3d at 96).
[xvi] *Id.* at *7 (citing 411 F.3d at 301). In *Bancec*, the Supreme Court held that the presumption of separateness generally owed to state-owned enterprises may be overcome where it is found to be "so extensively controlled by its [sovereign] owner that a relationship of principal and agent is created." 462 U.S. at 629.
[xvii] --- F.3d ----, 2012 WL 1889384, at *8.
[xviii] --- F.3d ----, 2012 WL 1889384, at *9.
[xix] *Id.*
[xx] *Id.*
[xxi] --- F.3d ----, 2012 WL 1889384, at *10.
[xxii] *Id.*
[xxiii] *Id.*
[xxiv] --- F.3d ----, 2012 WL 1889384, at *11.
[xxv] *Id.*
[xxvi] *Id.*
[xxvii] *Id.*
xxviii Section 1604 provides additional evidence of this intent by incorporating Section 1603's definition of "foreign state," and providing that any "foreign state" as defined in Section 1603 is entitled to presumptive immunity.
[xxix] *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 401 (2d Cir. 2009).