UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GULF PETRO TRADING COMPANY, INC.; PETREC INTERNATIONAL, INC.; JAMES S. FAULK; and JAMES W. FAULK,	:	CASE NO. 1:05CV619
Plaintiffs,	:	JUDGE RON CLARK
v.	:	
NIGERIAN NATIONAL PETROLEUM CORPORATION; BOLA AJIBOLA; JACKSON GAIUS-OBASEKI: SENA ANTHONY; ANDREW W.A. BERKELEY; IAN MEAKIN; HANS VAN HOUTTE, and ROBERT CLARKE,	:	
Defendants.	:	

ORDER ON DEFENDANTS' MOTION TO DISMISS

Defendants Nigerian National Petroleum Corporation ("NNPC"), Prince Bola Ajibola ("Ajibola"), Prince Jackson Gaius-Obaseki ("Obaseki"), Chief Sena Anthony ("Anthony"), and Dr. Robert Clarke ("Clarke") (collectively "the NNPC Defendants") moved to dismiss, asserting lack of subject matter jurisdiction, sovereign immunity, and lack of personal jurisdiction. Defendants Andrew Berkeley, Ian Meakin, and Hans Van Houtte do not join in this motion and have not appeared in the law suit. This court lacks subject matter jurisdiction over this action to nullify or vacate a foreign arbitration award. In the alternative, the court lacks jurisdiction over NNPC, Anthony, and Obaseki because no exception to sovereign immunity exists. The court also lacks personal jurisdiction over Ajibola and Clarke because they do not have sufficient minimum contacts with Texas or with the United States.

I. Background

Plaintiffs, all Texas residents, bring this suit after years of litigation with NNPC over a contract dispute that arose from a 1993 joint venture involving the reclamation and salvaging of petroleum production discarded by NNPC in the course of its daily operations in Nigeria. Pursuant to the contract, the dispute was arbitrated in accordance with the rules of the Chamber of Commerce and Industry of Geneva, Switzerland. All arbitration proceedings were held in either Switzerland or England between 1998 and 2001, ending with a final judgment for NNPC in 2001. Plaintiffs appealed the final award to the Federal Court in Switzerland in 2002 and the Swiss Court issued an order upholding the arbitration panel's decision.[1]

Plaintiffs then sued NNPC in the United States District Court for the Northern District of Texas seeking to modify or vacate this award. That Court held it lacked subject matter jurisdiction to vacate or modify the foreign arbitral award. *See Gulf Petro Trading Company, Inc., et al. v. Nigerian National Petroleum Corp.*, 288 F.Supp.2d 783, 792-93 (N.D. Tex. 2003), *aff'd,* 115 Fed. Appx. 201 (5th Cir. 2004).

In the present suit, Plaintiffs claim that there was a scheme to suborn the corruption and bribery of the international arbitration panel. Plaintiffs have sued the same Defendant, NNPC, as in the Northern District case, and have included as Defendants former officers of NNPC, Anthony and Obaseki, a lawyer for NNPC, Robert Clarke, the former Nigerian High Commissioner to the United Kingdom, Ajibola, and the arbitrators, Berkeley, Meakin, and Van

[1]Switzerland, unlike the United States, does not have lower federal courts. The Swiss Federal Court, also called the Swiss Federal Supreme Court, is the court of last resort for civil cases. For the reasons discussed in its April 2002 decision, the parties were able to directly appeal the arbitral award to the Swiss Federal Court. *See* Defs. Mot. to Dismiss, Ex. 1.

Houtte. Plaintiffs allege violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq., the Federal Arbitration Act, 9 U.S.C. § 1 et. seq., the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code § 17.46 et seq., and Texas common law fraud and conspiracy. In response, the NNPC Defendants moved to dismiss all claims for lack of subject matter and personal jurisdiction.

The parties agreed that no discovery was needed to develop any facts pertinent to jurisdiction. All parties have had time to present all evidence they believe is relevant and no party even hinted at a need to present any live testimony.

II. Law and Analysis

A. Lack of Subject Matter Jurisdiction to Vacate a Foreign Arbitral Award

Plaintiffs ask this court to vacate a foreign arbitral award and to award various types of damages because the arbitration panel was allegedly suborned by corruption and bribery. Defendants argue that this court lacks subject matter jurisdiction because all of Plaintiffs' claims amount to either a direct or collateral attack on a foreign arbitral award.

Under the Convention on Recognition and Enforcement of Arbitral Awards, 21 U.S.T. 2517, *implemented by* 9 U.S.C. §§ 201-208 ("the Convention"), a foreign court is precluded from vacating an arbitral award.[2] *See Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negarara*, 335 F.3d 357, 368 (5th Cir. 2003). The country in which an arbitration award was made is said to have primary jurisdiction over the arbitration award. *Id.* at 364. All other parties to the treaty only have secondary jurisdiction.

[2]At the outset the court notes that this is not a case in which foreign or international law is supplanting or modifying the laws of the United States. The Convention was approved by Congress, and the parties chose to arbitrate under the jurisdiction of Swiss courts.

Id. at 364.

In a country with secondary jurisdiction, the only decision that can be made is whether that country should enforce the arbitral award. *Id.* at 364. "[I]t is not the district court's burden . . . to protect [a party] from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it." *Id.* at 369.

Here, it is undisputed that the parties agreed to arbitrate their contract dispute under the rules of the Chamber of Commerce and Industry of Geneva. Plaintiffs initiated the arbitration proceedings. All proceedings were held in Switzerland and England, and the Swiss Federal Court upheld the award. Plaintiffs are now challenging the award in the United States, a country with only secondary jurisdiction. For the reasons discussed fully by the United States District Court for the Northern District of Texas involving the same parties and same arbitral award, a court in a country with secondary jurisdiction lacks subject matter jurisdiction to modify or vacate the award. *See Gulf Petro,* 288 F.Supp.2d at 792-93.

Plaintiffs argue that this case is different from the proceedings in the Northern District because there is new evidence of a scheme to bribe the arbitrators. While this might be true, the result is the same. This court sits in a country with secondary jurisdiction. Under the Convention this court cannot vacate an arbitral award that was not made in the United States and did not in any way involve the laws of the United States. *See M&C Corp. v. Behr GmbH & Co., KG*, 87F.3d 844, 849 (6th Cir. 1996)(a challenge to vacate an arbitration award under the Convention may be heard only in the courts of the country where the arbitration occurred or courts of any country whose procedural law was specifically involved in the contract calling for

arbitration.).

Plaintiffs were competent adults who entered into a contract with a Nigerian company. They agreed that disputes would be arbitrated in a neutral forum, under Swiss law. This court is not going to revisit the resulting decision of the arbitration panel, nor the decision by the Swiss Court. Such a practice by courts in the United States would invite similar treatment by foreign courts of arbitration awards rendered in this country. Any losing party in one country could run to a court in another country with tales of bribery, corruption, and injustice. The proper forum for such collateral challenges is the country with original jurisdiction over the arbitration. In this case, as the parties agreed in their contract, that country is Switzerland. Any other ruling would "disrupt the reliability of international arbitration established under the Convention over four decades." *Gulf Petro*, 288 F. Supp. 2d at 793.

In their response, Plaintiffs briefly suggest that only one of their claims attacks the arbitration award. But all of Plaintiffs' claims are predicated upon the same theory – the arbitrators were bribed and that the arbitration award is invalid. While Plaintiffs directly ask this court to vacate the award in only one claim, all remaining claims ask for damages to which Plaintiffs would not be entitled, unless the arbitration award was vacated.

Plaintiffs seek costs of arbitrating, lost revenue and profits, which they allege should have been awarded at the arbitration proceedings, damage to reputation from losing the award, and loss of business opportunities from losing the award. *See* Pls. Compl. ¶¶ 79, 93, 109,125, 132, and 143. A valid arbitration award would preclude recovery for any of these damages. Plaintiffs may not transform what would constitute an impermissible attack on an arbitration award simply by altering the relief sought. *See Corey v. New York Stock Exchange*, 691 F.2d

1205, 1213 (2nd Cir. 1982).

This is precisely the type of second guessing of foreign arbitral awards that the Convention was designed to eliminate. Because this court would have to vacate the arbitration award to give Plaintiffs the relief sought, the court concludes that all of Plaintiffs' claims are an impermissible attack on a foreign arbitral award. This court lacks subject matter jurisdiction to hear such claims.

B. Foreign Sovereign Immunities Act Claims by NNPC, Anthony, and Obaseki

Alternatively, Defendants NNPC, Anthony, and Obaseki state that they are entitled to sovereign immunity. Plaintiffs argue that Anthony and Obaseki cannot invoke sovereign immunity and that an exception to immunity applies in this case.[3]

1. Standard of Review

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"), states the standards to be used to resolve all sovereign immunity issues. *Kelly v. Syria Shell Petroleum Devel., B.V.*, 213 F.3d 841, 845 (5th Cir. 2000). "The general rule under the FSIA is that foreign states are immune from the jurisdiction of the United States Courts." *Moran v. The Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994).

However, the FSIA confers jurisdiction over nonjury civil actions against a foreign state as to any claim for relief in personam where an exception under 28 U.S.C. §§ 1605-1607 applies. *Kelly,* 213 F.3d at 845, *citing* 28 U.S.C. § 1330(b). The party claiming FSIA

[3]Defendant Ajibola also claims that he is entitled to immunity under the FSIA. His claim is based on the fact that he was the High Commissioner of the Federal Republic of Nigeria to the United Kingdom during the relevant time period. The court does not need to determine if Defendant's assertions establish a prima facie case to immunity because this court clearly lacks personal jurisdiction over Ajibola, see *infra*.

immunity has the initial burden to establish a prima facie case that it satisfies the definition of a "foreign state" under the FSIA. *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999). Once this prima facie case is established, the burden of production shifts to the nonmovant to raise an exception and prove that it applies in this case. *Id.* The party claiming FSIA immunity retains the ultimate burden of persuasion throughout. *Id.*

2. NNPC, Anthony, and Obaseki can establish a prima facie case for immunity

It is undisputed that NNPC is an agency or instrumentality of Nigeria and so is immune from suit unless an exception under the FSIA applies. *See* 28 U.S.C. § 1603(a). "Normally, the FSIA extends to protect individuals acting within their official capacity as officers of corporations considered foreign sovereigns." *Byrd*, 182 F.3d at 388. The FSIA's protections, however, cease when the individual acts beyond his official capacity. *Id.*

In the complaint, Plaintiffs allege in numerous places that, on behalf of NNPC and as officers, Defendants Anthony and Obaseki engaged in the scheme to bribe the arbitrators. The letter regarding the bribery submitted with Plaintiffs' complaint appears to be written on NNPC letter head, and is signed by Anthony as an officer of the corporation. There is nothing before the court which suggests that if these individuals wrote the letter, they were acting beyond their official capacity. The allegations and evidence are enough to establish a prima facie case that the actions Plaintiff alleges Anthony and Obaseki took were within their official capacity as officers for NNPC.

The burden of production, then, shifts to Plaintiffs to show that one of the exceptions alleged, the commercial activities exception under Section 1605(a)(2) or the arbitration

exception under Section 1605(a)(6), apply to Defendants NNPC, Anthony, and Obaseki.

3. Plaintiffs have not produced sufficient evidence to show that the commercial activities exception applies.

The most significant exception to immunity under the FSIA is the commercial activities exception under Section 1605(a)(2). This Section lists three types of acts that can result in a loss of sovereign immunity: (1) a commercial activity carried on in the United States by a foreign state, (2) an act performed in the United States in connection with a commercial activity of the foreign state, and (3) an act outside the territory of the United States in connection with a commercial activity of foreign state elsewhere and that act causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2). All three clauses require that the claim be based upon an act or activity of the foreign state that is commercial in nature. *See Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998). A commercial act is to be determined by reference to its nature, rather than its purpose. 28 U.S.C. § 1603(d). The question is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Voest-Alpine*, 142 F.3d at 892 (citations omitted).

The majority of Plaintiffs' arguments focus on the contract signed in 1993 and the contacts with the United States in regard to the contract (e.g. the acts of coming to Texas to sign the contract, and the contract required payment to be made in Texas). Plaintiffs have not alleged that the contract itself was part of the scheme to bribe the arbitrators and there is no breach of contract cause of action. While the contract may have led to the conduct and the scheme that eventually injured Plaintiffs, it is not the basis of Plaintiffs' claim. *See Saudi*

Arabia v. Nelson, 507 U.S. 349, 357, 113 S.Ct. 1471, 1477 (1993). Defendants' acts in connection with the contract cannot serve as the basis for jurisdiction in this case. *See Byrd*, 182 F.3d at 389-90.

The alleged scheme itself – bribery to benefit a commercial business venture – might be considered commercial in nature. Simply because an act is illegal does not make it non-commercial. *See Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1214-17 (10th Cir. 1999). Plaintiffs, however, have come forward with no allegations or evidence to show how any part of the alleged bribery scheme was carried on in the United States or that any activities relating to any alleged bribery were performed in the United States. They have only generally stated that the scheme itself had a direct effect in the United States. This invokes the third clause of 28 U.S.C. § 1605(a)(2).

"[A]n effect is direct if it follows as an immediate consequence of the defendant's activity." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618, 112 S.Ct. 2160, 2168 (1992)(quotations and citations omitted). Jurisdiction may not be predicated on purely trivial effects in the United States. *See Weltover*, 504 U.S. at 618, 112 S.Ct. at 2168. The direct effects clause does not permit jurisdiction over foreign states whose acts cause only speculative, generalized, immeasurable, and ultimately unverifiable effects in the United States. *Voest-Alpine*, 142 F.3d at 894 n.10.

Plaintiffs suggest that the alleged scheme had a direct effect in the United States because there was an expectation of payment from the arbitration panel in the United States. Assuming, for the sake of argument, that there was a bribe, the complaint does not allege, and there is no evidence of, an agreement or any provision that the arbitration award would be paid in the

United States. Additionally, it is entirely possible that the arbitration panel would have reached the same decision absent any bribery scheme. Plaintiffs simply have produced no evidence to show that any non-trivial effect in the United States was an immediate consequence of the bribery scheme.

4. The arbitration exception is facially inapplicable to this case.

Plaintiffs argue that the arbitration exception in Section 1605(a)(6) applies to Count IV of their complaint. Section 1605(a)(6) states that a court has jurisdiction when "the 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 . . . or to confirm an award made pursuant to such an agreement to arbitrate." 28 U.S.C. § 1605(a)(6). In Count IV of the complaint, Plaintiffs directly ask the court to vacate the arbitration award. This is outside the language of the exception. *See Hirsh v. State of Israel*, 962 F.Supp. 377, 384-85 (S.D.N.Y. 1997) (Section 1605(a)(6) is facially inapplicable where the Plaintiff does not seek to enforce an agreement to arbitrate, or to enforce an outstanding arbitral award). Therefore, no exception to the FSIA applies and Defendants NNPC, Anthony, and Obaseki have immunity under the FSIA from all claims in this case.

C. Lack of Personal Jurisdiction over Ajibola and Clarke

Plaintiffs have invoked jurisdiction on both diversity and federal question grounds. Defendants Ajibola and Clarke claim that this court lacks personal jurisdiction over them. When a defendant files a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing a prima facie case of jurisdiction. *Gundle Lining Constr. v. Adams Cty. Ashphalt, Inc.*, 85 F.3d 201, 204 (5th Cir. 1996).

1. Standard of Review

a. Diversity Jurisdiction

A federal court sitting in diversity may exercise personal jurisdiction over a nonresident defendant if two requirements are met: (1) the long-arm statute of the forum state confers personal jurisdiction over the defendant; and (2) the exercise of such jurisdiction by the forum state is consistent with due process under the Fourteenth Amendment of the United States Constitution. *See Electrosource, Inc. v. Horizon Battery Technologies, Ltd.*, 176 F.3d 867, 871 (5th Cir. 1999). Because Texas' long arm statute has been interpreted to extend to the limits of due process, the only question is whether Defendants' contacts with the State are sufficient to satisfy the due process clause of the Fourteenth Amendment. *See Cent. Freight Lines, Inc. v. APA Transp. Corp.*, 322 F.3d 326 (5th Cir. 2003).

b. Federal Question Jurisdiction

For actions arising under federal law, an alternative basis for personal jurisdiction exists under Fed. R. Civ. P. 4(k)(2). *See Quick Technologies, Inc. v. Sage Group PLC*, 313 F.3d 338, 344 (5th Cir. 2002). Rule 4(k)(2) allows for the exercise of personal jurisdiction over foreign defendants for claims arising under federal law when the defendant has sufficient contacts with the nation as a whole, the defendant does not have sufficient contacts to satisfy the due process concerns of the long-arm statute of any particular state, and the exercise of jurisdiction is consistent with the Fifth Amendment due process clause. *Id.* Whether the exercise of jurisdiction satisfies the due process clause of the Fifth Amendment (for federal question jurisdiction) or the Fourteenth Amendment (for diversity jurisdiction) involves the same analysis. *See World Tanker Carriers Corp. V. M/V Ya Mawlaya*, 99 F.3d 717, 723 (5th Cir.

2002).

c. Due Process Requirements

The Supreme Court has interpreted due process as requiring that the defendant has purposefully established "minimum contacts" with the forum state. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112-13, 107 S.Ct. 1026, 1032 (1987). "Minimum contacts can be established either through contacts sufficient to assert specific jurisdiction, or contacts sufficient to assert general jurisdiction." *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000). General jurisdiction may be found when the claim is unrelated to the nonresident's contacts with the forum but where those contacts are "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 415-416, 104 S.Ct. 1868, 1872-73 (1984). Specific jurisdiction exists if the cause of action is related to, or arises out of, the defendant's contacts with the forum, and those contacts meet the due process standard. *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.,* 9 F.3d 415, 418-419 (5th Cir. 1993).

If the court finds that the requisite minimum contacts exist, due process further requires that the court decide whether the exercise of jurisdiction offends traditional notions of fair play and substantial justice. *See Asahi Metal Indus. Co.,* 480 U.S. at 113, 107 S.Ct. at 1033. To make this determination, the court is to balance: (1) the burden upon the non resident defendant, (2) the interests of the forum state, (3) the plaintiff's interest in securing relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interests of the several States in furthering fundamental substantive social polices. *Central Freight Lines Inc. v. APA Transport Corp.*, 322 F.3d 376,

385 (5th Cir. 2003). To determine if due process is met, the issue is whether Plaintiffs can show that Defendants have minimum contacts with the United States as a whole (federal question jurisdiction) or Texas specifically (diversity jurisdiction), and if there are sufficient contacts, whether the exercise of jurisdiction is fair and reasonable.

2. Defendants Ajibola and Clarke do not have sufficient minimum contacts with either the United States as a whole, or Texas specifically, to satisfy due process.

a. General Jurisdiction

Plaintiffs contend that Defendants Ajibola and Clarke have continuous and systematic contacts with the United States and with Texas. The evidence before the court shows only that these Defendants have occasionally visited the United States for meetings and vacations. There is no evidence of continuous and systematic contacts with the United States in general (federal question jurisdiction), or with Texas in particular (diversity jurisdiction). Plaintiffs have failed to meet their burden of showing minimum contacts to establish general jurisdiction.

b. Specific Jurisdiction

Alternatively, Plaintiffs argue that Ajibola and Clarke have sufficient contacts with Texas (diversity jurisdiction) to establish specific jurisdiction because of their tortious activities. To establish a prima facie case of jurisdiction on this basis, there must be some evidence that these Defendants expressly aimed the tortious activity at the forum state, and that the Defendants knew the brunt of the injury would be felt in the forum state. *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988). The complaint only states generally that NNPC, Anthony, and Obaseki foresaw that breaching the contract would cause injury to Plaintiffs. Nowhere is it alleged that the bribery scheme, which is the basis of this

suit, was expressly aimed at Texas. Defendants Ajibola and Clarke are not even alleged to have known that the brunt of the injury from the scheme would be felt in Texas. Plaintiffs have not shown a prima facie case for jurisdiction on this ground.

Under both general and specific jurisdictional theories, Plaintiffs have failed to present a prima facie case to show that Defendants have sufficient minimum contacts either with Texas or with the United States to satisfy the due process clause of the Fourteenth Amendment (diversity jurisdiction) or the Fifth Amendment (federal question jurisdiction). Therefore, the court concludes that it lacks personal jurisdiction over Ajibola and Clarke.

III. Conclusion

This is the third time that Plaintiffs have challenged the arbitration panel's ruling in a court. While they take a more innovative approach in this case, one fact remains the same – Plaintiffs are seeking to vacate a foreign arbitral award. This court, like the United States District Court for the Northern District of Texas, does not have subject matter jurisdiction to hear such claims. Therefore, this case must be dismissed in its entirety.

Additionally, the court has determined that even if Plaintiffs were not simply seeking to vacate a foreign arbitral award, this court still lacks jurisdiction to hear Plaintiffs' claims against the NNPC Defendants. Defendants NNPC, Anthony and Obaseki all fall under the rubric of a "foreign state" for purposes of the FSIA, and Plaintiffs have failed to show that an exception applies in this case. This court lacks personal jurisdiction over Defendants Ajibola and Clarke because they do not have sufficient minimum contacts with Texas or with the

United States.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss [**Doc. # 24**] is **GRANTED**. A final judgment will be entered by separate order.

So **ORDERED** and **SIGNED** this **15** day of **March, 2006.**

Ron Clark, United States District Judge