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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Creighton Limited
Plaintiff,

v. Civil Action No. 94-1035 RMU

The Government Of The State Of Qatar (Ministry Of Public Works)
Defendant. Document No.

FILED
MAR 22 1995
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

For the reasons stated in the Memorandum Order of March 20, 1995, it is this 22 day of March, 1995,

ORDERED that the Defendant's Motion to Dismiss Petition pursuant to Fed. R. Civ. P. 12(b)(6), be and is hereby GRANTED.

SO ORDERED.

Ricardo M. Urbina
United States District Judge

sent by Fax to

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Creighton Limited, Plaintiff,	:	
v.	:	Civil Action No. 94-1035 RMU
The Government Of The State Of Qatar (Ministry Of Public Works), Defendant.	:	Document No.

MEMORANDUM ORDER
Granting Defendant's Motion to Dismiss Petition

Upon consideration of Defendant's Motion to Dismiss the Petition, Plaintiff's Opposition thereto, and Defendant's Reply, the court grants Defendant's Motion to Dismiss the Petition without prejudice. Section 1605(6)(B) of the FSIA provides this court with subject-matter and personal jurisdiction over The Government of the State of Qatar ("Qatar") to review this complaint. The court further finds that the United Nations (New York) Convention on Recognition and Enforcement of Foreign Arbitral Awards ("Convention") provides this court with authority to refuse the recognition of the award based on Article V(1)(e). Accordingly, as the court has decided to exercise this discretionary right, the court concludes that the plaintiff has failed to state a claim for which relief is available.

I. Applicability of the Foreign Sovereign Immunities Act ("FSIA")

A. Subject-Matter Jurisdiction

Whenever the court is presented with a suit against a foreign state, the court must initially determine whether it has jurisdiction to hear the case. The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. sections 1602-1611 (1994) "provides the

sole basis for obtaining jurisdiction over a foreign state in the courts of this country." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976), U.S. Code Cong. & Admin. News 1976, p. 6604 (explaining that the FSIA was enacted to set forth "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States" and "when a foreign state is entitled to sovereign immunity").

According to the FSIA, a foreign state is entitled to immunity unless one of the statutory exceptions applies. See Saudi Arabia v. Nelson, 113 S. Ct. 1471, 1476 (1993) (stating that "under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state"). There are six exceptions to foreign sovereign immunity. The exception at issue in this case, section 1605(6)(B), states that:

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States ... in which 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 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.... (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.... (emphasis added)

Upon examination of this provision, the court determines that section 1605(6)(B) establishes subject-matter jurisdiction

over the dispute. First, because Qatar is a foreign state, the FSIA is applicable. Second, because this action is one to confirm an arbitral award, section 1605(6) is applicable. Finally, since the Convention is a treaty or international agreement in force for the United States[1], section 1605(6)(B) is applicable. See Cargill Intern. S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1018 (2d Cir. 1993) (confirming that the New York Convention "is exactly the sort of treaty Congress intended to include in the arbitration exception"). Based on this analysis, the court determines that Qatar has waived its immunity with respect to suit regarding the arbitration award.

Although Qatar is not a signatory to the Convention, Qatar's personal status is irrelevant.[2] In E.A.S.T., Inc. of Stamford, Conn v. M/V Alaia, 876 F.2d 1168, 1172 (5th Cir. 1989), the court confirmed that "the Convention focuses on the situs of the arbitration, not upon the nationality of the parties." See National Iranian Oil Co. v. Ashland Oil, 817 F.2d 326, 334 (5th Cir.) (explaining that NIOC [a citizen of a non-signatory to the Convention] "could have chosen to negotiate a forum selection clause with a situs in any one of the 65 nations that are signatories to the Convention") cert. denied, 484 U.S. 943 (1987); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES section 487 (1986) ("indicating that a contract with a national of a state that is not a party to the Convention, can be brought under the Convention by an agreement to arbitrate in a state that

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[1] The United States became a signatory to the Convention in 1970, (1970) 3 U.S.T. 2517, T.I.A.S. No. 6997, and implemented the international agreement into 9 U.S.C. sections 201-208.

[2] This interpretation supports the goal of the Convention. In Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1973), the Court noted that "the goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries."

is a party to the Convention, even if that state has no connection with the parties or with the transaction"). In this case, since the arbitration proceedings took place and the award was issued in France, a signatory to the Convention, the Convention is applicable.

1. Retroactive Application of the FSIA

Congress amended the FSIA by inserting section 1605(6)(B) on November 9, 1988. FSIA, Pub. L. 100-669, 102 Stat. 3969 (1988). As a result, defendant argues that the application of this exception to a contract created six years before the enactment of the exception,[3] would permit the court to apply the exception retroactively, a practice which is recognized as disfavored by U.S. courts, and would interfere with defendant's antecedent, substantive rights. See Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790 n.4 (1980) (stating that in order to determine subject-matter jurisdiction, "a court may have to interpret the substantive principles embodied in sections 1605-1607 before deciding whether to take jurisdiction"); Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 485 n.5 (1983) (stating that "under the Act, both statutory subject-matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on the application of the substantive provisions of the Act"); Landgraf v. USI Film Products, 123 L.Ed. 229, 225 (1994) (stating that "the presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact"); Kaiser Aluminum & Chemical Corp. v. Bonjourno, 494 U.S. 827, 842-844 (1990) (Scalia, L., concurring) (pointing out that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic").

[3] The parties entered into a contract in 1982.

Despite this contention, the court need not address the retroactive question because the court finds that the defendant has mistakenly argued it as a defense to subject-matter jurisdiction. Section 1605(6)(B) refers to the confirmation of an award or the enforcement of an agreement to arbitrate. In other words, for issues concerning the confirmation of an award, the provision looks to the time when the award was issued and not the time when the two parties agreed to arbitrate. Plaintiff correctly states that the conduct giving rise to this provision arose when the ICC issued its arbitration award in 1993; even the first partial award was issued in 1989, after the enactment of the provision. As a result, the award was issued post-enactment and thereby falls within the scope of the provision. Had the award been issued prior to 1988 and there was a pending trial to set aside or suspend the award, this court could entertain defendant's motion and follow the series of cases rejecting the retroactive application of the FSIA. With the applicability of section 1605(6)(B), the court concludes that there exists subject-matter jurisdiction over Qatar under the FSIA.

B. Personal Jurisdiction

Once the court establishes subject-matter jurisdiction, the FSIA provides the court with personal jurisdiction. See FSIA, 28 U.S.C. section 1330(b) (1993) ("personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [subject-matter jurisdiction]..."); See Transport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 575 (1993) quoting Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981) (stating that "the FSIA makes the statutory aspect of personal jurisdiction simple: subject-matter jurisdiction plus service of process equals personal jurisdiction") cert. denied 454 U.S. 1148 (1982); and Guzel v.

State of Kuwait, 818 F. Supp. 6, 7 (D.D.C. 1993) (stating that "personal jurisdiction over a foreign sovereign, like subject-matter jurisdiction, exists only when one of the exceptions to the FSIA applies").

Defendant argues that since it does not have "minimum contacts" with the forum, there is no personal jurisdiction. In Republic of Argentina v. Weltover, 119 L. Ed 2d. 394, 406 (1992), the Court stated that there must be a finding of minimum contacts with the forum to establish personal jurisdiction. Defendant mistakenly applies this rationale to this case. In Weltover, the Court applied the minimum contacts test within the context of section 1605(a)(2), the commercial activity exception to immunity. One way of triggering section 1605(a)(2) is if the commercial activity outside the United States has a direct effect in the United States, and in determining whether there was a direct effect, the Court applied the minimum contacts test.

In this case, there is no direct effects question. Therefore, for section 1605(6)(b) purposes, there is no requirement to prove independently that a foreign state has minimum contacts with the forum.[4] See H.R. REP. No. 1487, 94th Cong., 2d Sess. 6604 6612 (1976) (explaining that "the requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision [section 1330 (b)]" and "these immunity provisions [sections 1605-1607], therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction"). In light of the above analysis, the court holds that there is both subject-matter jurisdiction and personal jurisdiction over Qatar.

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[4] Venue is proper in this court pursuant to 28 U.S.C. section 1391(f)(4), which enables a party to bring suit against a foreign state in the District of Columbia.

II. Confirmation of a Foreign Arbitral Award Under the Convention

The Convention enables a party to request the confirmation of a foreign arbitral award by United States District Courts. See 9 U.S.C. section 203 (providing United States District Courts with original jurisdiction to hear cases falling under the Convention). 9 U.S.C. Section 207 states that the requesting party must apply to the court "within three years after an arbitral award falling under the Convention is made. . ."

The debtor party, however, may challenge the request with discretionary grounds for refusal or deferral. See section 207 (stating that "the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention"). Articles V and VI of the Convention list those grounds for refusal and deferral. See Spier v. Calzaturificio Tecnica S.P.A., 663 F. Supp. 871, 873 (S.D.N.Y. 1987) (noting that the grounds for refusal and deferral are found in Articles V and VI of the Convention). Article V lists seven grounds for refusal. See Ipitrade International v. Federal Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978) (stating that "Article V of the Convention specifies the only grounds on which recognition and enforcement of a foreign arbitration award may be refused"); Hewlett-Packard, Inc. v. Berg, 867 F. Supp. 1126, (D.C.D.Ma. 1994) (confirming that "Article V of the Convention sets forth the only grounds under which a court may refuse to confirm an award"). The applicable Article V provision is (1)(e), which enables a court to refuse recognition and enforcement if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." (emphasis added).

To determine whether an award has been set aside or suspended, the court must look to the laws of the competent

authority of the country under which the award was made. In Intern. Standard Elec. v. Bridas Sociedad Anonima, 745 F. Supp. 172, 178 (S.D.N.Y. 1990), the court held that this clause referred "exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract...." As a result, in that case, because the situs of the arbitration was in Mexico, and because the governing procedural law was that of Mexico, the courts of Mexico were the only courts with jurisdiction under the Convention to vacate the award. Id. 178. See also Dworkin-Cosell Interair Courier Serv. v. Avraham, 728 F. Supp. 156, 161 (S.D.N.Y. 1989) (noting that "Article V, section 1(e) requires a determination that the award is final and binding, according to the law of the country where the award was rendered").

Defendant asserts that it has filed a timely appeal in the Paris Court of Appeal, the competent authority in which the award was rendered. Under article 1504 of French Code of Civil Procedure, "an arbitral award rendered in France in international arbitral proceedings is subject to an action to set aside on the grounds set forth in article 1502"; article 1502 lists when a party can appeal a decision granting recognition or enforcement. Once the party appeals, Article 1506 states that "enforcement of the arbitral award is suspended during the time limit for exercising the means of recourse defined in articles 1501, 1502 and 1504. The pendency of such an action brought within the time limit also has a suspensive effect."

In this case, according to French Code of Civil Procedure, the arbitral award has been suspended. Because this court must look to the procedural law of the place in which the award was rendered, this court concludes that the award has been suspended for Article V(1)(e) purposes. Plaintiff does not even dispute the fact that the award has been suspended under French law and that the Paris Court of Appeal is the competent authority here. Plaintiff merely argues that "this court is not bound by the

effect of Article 1506 of the French Code of Civil Procedure any more than the Paris Court of Appeal would be by a pronouncement by this Court directed at it." Pet. Brief at p.11. Case law[3], however, indicates that this court must defer to the procedural laws of the place that rendered the award; in this case, France.

Plaintiff asks this court to consider Article VI instead of Article V, since both provisions are permissive and Article VI would avoid the possibility of rendering a decision inconsistent with the pending French decision.[4] Article VI states that:

> if an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

This Article is clearly permissive. The court has the discretion to adjourn or proceed with its decision. Defendant agrees with the plaintiff that Article VI is permissive but asks the court to consider Article V, since Article V does not require the posting of security.

There is not enough dispositive information or legislative

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[3] See Intern. Standard Elec. v. Bridas Sociedad Anonima, supra p. 7 and Dworkin-Cosell Interair Courier Serv. v. Avraham, supra p. 8.

[4] Plaintiff cites to cases where courts have applied Article VI instead of Article V(1)(e) when given a choice. See Spier v. Calzaturificio Tecnica S.P.A., 663 F. Supp. 871, 875 (S.D.N.Y. 1987) (demonstrating the court's preference to stay the proceeding until the foreign court, under which laws the award was made, renders a final judgment); and Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 949, 962 (1981) (same). These cases, however, dealt with the award's final and binding status. In this case, the relevant portion of Article V(1)(e) concerns the suspended status and not the binding status of an award. As a result, the two cases are distinguishable from the one confronting this court.

history to determine whether Article V is mandatory or permissive. Defendant argues that Article V is mandatory; if Article V was permissive, it would be a superflucus and duplicative provision under the Convention. In contrast, the plaintiff focuses on the language, "may refuse" to argue the permissive nature of Article V. Upon careful examination of the language, the court concludes that one distinction between Article V(1)(e) and Article VI deals with the status of the award. Article V(1)(e) applies to those situations where the award has been suspended. On the other hand, Article VI applies to those situations where the application to suspend an award is pending before a court.

In this case, there is no question that the award has been suspended; an action to set aside an arbitral award in France is all that is required to suspend that award according to French Code of Civil Procedure. Even if Article V is permissive, this court can exercise its discretionary right to refuse recognition and enforcement of the award as provided for in the Convention. Consequently, there is no reason to determine the permissive or mandatory function of Article V because with the award's status triggering Article V(1)(e), the court chooses to exercise its authority to dismiss.

For the reasons stated herein, the court grants Defendant's Motion to Dismiss the Petition without prejudice. A separate order shall follow.

Ricardo M. Urbina
United States District Judge