

[7] Because the Sierra Club has not contested on appeal the timeliness of the state's application nor whether the disposition may impair the state's ability to protect its interests in the subject matter, we deem requirements (1) and (3) satisfied. See *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 260 n. 9 (5th Cir.1995) (holding that "failure to provide any legal or factual analysis of an issue results in waiver"). The Sierra Club does, however, contend that the state (in its various capacities) does not have an interest in the subject matter of the litigation and that whatever interests it may have are represented adequately by other existing parties. We cannot agree.

[8] With respect to the interests of the state (in its various capacities) in the subject matter of the litigation, we find that they are several and important: (1) The state *qua* state has an important sovereign interest in protecting the self-governing authority of the Edwards Aquifer Act and in seeing that the scheme passed by the legislature is properly enforced, see *Glickman*, 82 F.3d at 110; (2) the state as legal representative of the TNRCC has an interest in the regulation of various water rights of the pumpers of the aquifer, see *TEX. WATER CODE ANN. § 5.013*; (3) the state as legal representative of the TPWD has an interest in the protection of the state's fish and wildlife resources, see *TEX. PARKS & WILD.CODE ANN. § 12.001*; (4) the state as legal representative of the TDA has an interest in maintaining and regulating agricultural interests affected by the aquifer, including the financial assistance programs that support some of the pumper farmers, see *TEX. AGRIC. CODE ANN. § 12.002*; *Glickman*, 82 F.3d at 110; and (5) the state as *parens patriae* has an interest in the physical and economic health and well-being of the citizens directly affected by changes in the water level draw-downs at the aquifer. See *Alfred L. Snapp*, 458 U.S. at 607, 102 S.Ct. at 2269. Although we do not dispute the Sierra Club's contention that this case is about the alleged excess water pumping of the various "customers" of the aquifer only, we are at a loss to understand its insistence that these above-named constituencies do not have a direct, cognizable legal interest in the subject matter of the litigation.

[9] We similarly reject the Sierra Club's argument that the state's various interests are represented adequately by the existing parties. It is axiomatic that the interests of the pumpers, who are local cities, businesses, and governmental entities that rely on the aquifer's water supply for their immediate subsistence, will diverge from those of the various state agencies who are charged with taking a state-wide view of the aquifer as it affects wildlife, water resources and quality, and the agricultural industry, as well as those of the state *qua* state and as *parens patriae*. Plainly, the pumpers will not represent adequately the interests of these state constituencies and, under Texas law, may not do so. See *Hill*, 568 S.W.2d at 741.

[10] Because we find that the state has met the requirements of rule 24(a)(2), we REVERSE the partial denial of intervention and REMAND with direction to the district court to grant the state's motion for intervention as of right.



MARATHON OIL COMPANY; Marathon International Oil Company; Marathon Petroleum Norge A/S, Plaintiffs-Appellants Cross-Appellees,

v.

RUHRGAS, A.G., Defendant-Appellee Cross-Appellant.

No. 96-20361.

United States Court of Appeals,  
Fifth Circuit.

June 10, 1997.

Oil company and international affiliates sued German gas supplier in state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations, relating to development of North Sea



oil field reserves. Gas supplier removed matter to federal court and sought dismissal. Oil company and affiliates sought remand. The United States District Court for the Southern District of Texas, Melinda Harmon, J., dismissed for lack of personal jurisdiction. Oil company and affiliates appealed. The Court of Appeals, Politz, Chief Judge, held that district court did not have removal jurisdiction.

Vacated and remanded.

### 1. Federal Courts ⇨5

As courts of limited jurisdiction, federal courts may adjudicate case or controversy only if there is both constitutional and statutory authority for federal jurisdiction.

### 2. Removal of Cases ⇨115

Federal court was not required to rule on personal jurisdiction challenge in removed case, merely because disposition would be easier, without first determining whether there was subject matter jurisdiction.

### 3. Federal Courts ⇨30

#### Removal of Cases ⇨102

Appropriate course is for federal court to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss.

### 4. Federal Courts ⇨34

Given limited nature of federal jurisdiction, there is a strong presumption against it, and burden of establishing the contrary rests upon party asserting jurisdiction.

### 5. Removal of Cases ⇨41

Plaintiff's status as alien corporation defeated diversity jurisdiction in removed suit, when defendant was also alien corporation, unless plaintiff was fraudulently joined for that very purpose.

### 6. Removal of Cases ⇨36

Oil company did not fraudulently join related Norwegian corporation as plaintiff to defeat diversity jurisdiction in its removed tort suit against German corporation relating to development of North Sea oil field re-

serves, in light of questions existing regarding which company owned title to reserves.

### 7. Removal of Cases ⇨36, 107(7)

To establish that defendant has been joined fraudulently to defeat diversity, removing party must show by clear and convincing evidence either that there is no possibility that plaintiff would be able to establish cause of action against nondiverse defendant in state court, or that there has been outright fraud in plaintiff's pleadings of jurisdictional facts.

### 8. Removal of Cases ⇨19(1)

Oil company's state law tort claims against German gas supplier, relating to development of North Sea oil field reserves, did not implicate foreign relations or affect foreign economic interest to a degree sufficient to require resolution of substantial questions of federal law, such that there would be federal question jurisdiction over removed case.

### 9. Removal of Cases ⇨19(1)

Oil company and international affiliates, which were not parties to any arbitration agreements, were not attempting to recover for wrongs to related corporation that was party to such an agreement, and thus they were not estopped from opposing arbitration, and their tort suit against German gas supplier was not subject to removal as suit related to arbitration agreement falling under Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where they alleged they were fraudulently induced into investing \$300 million into related corporation. 9 U.S.C.A. § 205.

Clifton T. Hutchinson, Dallas, TX, J. Gregory Taylor, David John Schenck, Hughes & Luce, Dallas, TX, for Plaintiffs-Appellants-Cross-Appellees.

Ben H. Sheppard, Jr., Guy Stanford Lipe, Michael John Mucchetti, Harry M. Reasoner, Vinson & Elkins, Houston, TX, for Ruhrgas.

Peter Heidenberger, Thomas G. Corcoran, Jr., Berliner, Corcoran & Rowe, Washington, DC, for Federal Republic of Germany, Amicus Curiae.

Appeals from the United States District Court for the Southern District of Texas.

Before POLITZ, Chief Judge, and WIENER and STEWART.



POLITZ, Chief Judge:

This international commercial dispute involves allegations of fraud, civil conspiracy, and various business torts. Concluding that the district court lacked subject matter jurisdiction, we vacate and remand with instructions.

#### Background

In 1976 Marathon Oil Company (MOC) became involved in North Sea gas exploration activities when its affiliate, Marathon International Oil (MIO), purchased a European concern holding a North Sea production license.<sup>1</sup> The production license, originally held by Marathon Petroleum Norge (Norge), ultimately gave another affiliate, Marathon Petroleum Norway (MPN), rights to 24% of a gas field in the North Sea known as the Heimdal field.<sup>2</sup> Another large interest holder in the Heimdal field was Statoil, Norway's state-owned gas company, which had purchased a 40% interest in 1975.

The present litigation arises from alleged oral and written agreements between the Marathon companies, Ruhrgas, A.G., and other European companies regarding the development and production of Heimdal field reserves. Ruhrgas is Germany's primary gas company. According to the Marathon plaintiffs, Ruhrgas, Statoil, and a consortium of other European companies secretly conspired to monopolize the western European gas market by funneling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

The plaintiffs allege that to effectuate this plan Ruhrgas duped them into providing MPN with \$300 million to participate in extensive construction and drilling operations

1. MIO acquired Pan Ocean and its subsidiary, Pan Ocean Norge, which held the North Sea production license. Pan Ocean was later renamed Marathon Petroleum Norway, and Pan Ocean Norge became Marathon Petroleum Norge.

2. MPN acquired the production license by virtue of a Pass Through Agreement with its subsidiary, Marathon Petroleum Norge, the original license holder.

3. This proposal was known as the "Heimdal Gas Agreement," which allegedly guaranteed a \$5.50 per million BTU price. MPN, as assignee of Norge's Heimdal license, was a party to this agreement.

with the false promises of premium prices for MPN's European gas sales and guaranteed pipeline transportation tariffs to help offset the substantial construction investment.<sup>3</sup>

When it ultimately became apparent that premium prices would not be honored and the scheduled transportation tariffs would not materialize, MOC, MIO, and Norge sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations. Ruhrgas timely removed, invoking jurisdiction under diversity of citizenship, federal question, and 9 U.S.C. § 205. After removal, Ruhrgas moved for a stay pending arbitration in Europe which the district court denied. Ruhrgas then filed a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for *forum non conveniens*. The Marathon plaintiffs moved to remand for lack of subject matter jurisdiction. The district court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction and dismissed all other motions as moot. The court then denied Ruhrgas's motion for reconsideration in which Ruhrgas reurged the court to abate all proceedings pending compelled arbitration in Europe. All parties timely appealed.

#### Analysis

[1,2] We address at the threshold the vital question of federal subject matter jurisdiction. As courts of limited jurisdiction, federal courts may adjudicate a case or controversy only if there is both constitutional and statutory authority for federal jurisdiction.<sup>4</sup> Ruhrgas insists that we must rule on

4. As a signatory to the Heimdal Gas Agreement, MPN's claims were subject to binding arbitration in Europe. Norge, however, was not a signatory and asserts that although it assigned its Heimdal license to MPN, it nonetheless has standing to sue for the alleged devaluation of the license. We address that contention *infra*.

5. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545 (Former 5th Cir.1981); Erwin Chemerinsky, *Federal Jurisdiction* 217 (1989); see also *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 12 L.Ed. 1147 (1850) (Congress may create lower federal courts and thus has the power to vest them with less than full Article III jurisdiction).



its personal jurisdiction challenge without first determining whether we have jurisdiction *ratione materiae*. We are cognizant that in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction.<sup>6</sup>

We decline, however, to extend those cases into mandatory rules of trial and appellate procedure governing the order in which jurisdictional motions must be determined. No dispositive precedent of our circuit has held that a court must ignore a lack of subject matter jurisdiction when it has before it an easier disposition of a motion to dismiss for lack of personal jurisdiction. Such a rule necessarily would be invalid in light of our constitutional and statutory authority and the overwhelming body of precedent commanding all federal courts to scrutinize assiduously subject matter jurisdiction at each stage of litigation, trial and appellate, and to dismiss cases not properly before us.<sup>7</sup>

[3] We must be ever mindful that any rule or decision allowing a federal court to act without subject matter jurisdiction con-

flicts irreconcilably with basic principles of federal court authority.<sup>8</sup> On several occasions we have sounded the caution that "[w]here a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."<sup>9</sup> If dismissals for lack of personal jurisdiction were judgments on the merits, decisions allowing that determination in the absence of federal subject matter jurisdiction would have no validity.<sup>10</sup> The appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss.<sup>11</sup> Such a course respects the proper balance of federalism. We must, therefore, reject *Ruhgas's* invitation to ignore the formidable subject matter jurisdiction issue presented herein and resolve that fundamental issue.

[4] Given the limited nature of federal jurisdiction, there is a strong presumption

6. See, e.g., *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir.1993); *Asociacion Nacional de Pescadores v. Dow Chemical*, 988 F.2d 559 (5th Cir.1993); *Walker v. Stone*, 335 F.2d 536 (5th Cir.1964).

7. See, e.g., *Carter v. Roe*, 48 U.S. (7 How.) 729, 12 L.Ed. 890 (1849); *Mansfield v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908); *Mitchell v. Maurer*, 293 U.S. 237, 55 S.Ct. 162, 79 L.Ed. 338 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939); *Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975); *Judice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5th Cir.1981); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir.1985); *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir.1989); *Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir.1992); *Moore v. United States Dept. of Agriculture ex rel. Farmers Home Admin.*, 55 F.3d 991 (5th Cir.1995).

8. See, e.g., *Kokkonen*, 511 U.S. at 377, 114 S.Ct. at 1675 (holding that the jurisdiction of the federal courts "is not to be expanded by judicial decree") (citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951)).

9. *B. Inc.* 663 F.2d at 548; see also *Stafford v. Mobil Oil Corp.*, 945 F.2d 803 (5th Cir.1991); *Getry Oil Corp. v. Insurance Co. of N. Am.*, 841 F.2d 1254 (5th Cir.1988); *In re Majestic Energy Corp.*, 835 F.2d 87 (5th Cir.1988); *In re Carter*, 618 F.2d 1093 (5th Cir.1980).

10. See *Caterpillar, Inc. v. Lewis*, — U.S. —, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996) (holding that a district court must have subject matter jurisdiction by the time it renders judgment for the judgment to be valid); see also *Weeks v. Fidelity & Cas. Co.*, 218 F.2d 503, 504 (5th Cir. 1955) ("If the refusal to remand was erroneous, the judgment of dismissal was likewise erroneous.") (citing *Ruff v. Gay*, 67 F.2d 684 (5th Cir. 1933), *aff'd*, 292 U.S. 25, 54 S.Ct. 608, 78 L.Ed. 1099 (1934)).

11. Confronted with virtually identical facts, in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir.1990), we raised the subject matter jurisdiction question *sua sponte* and vacated the judgment of dismissal which was based on a lack of personal jurisdiction.



against same,<sup>12</sup> and "the burden of establishing the contrary rests upon the party asserting jurisdiction."<sup>13</sup> Ruhrgas, as the removing party, has advanced several theories in support of federal jurisdiction. We address each in turn.

#### A. Diversity of Citizenship

[5,6] MOC is an Ohio corporation with its principal place of business in Houston, Texas. MIO is a Delaware corporation with its principal place of business in Houston, Texas. Norge is an alien corporation headquartered in Norway. The defendant, Ruhrgas, A.G., is an alien corporation headquartered in Germany.

Norge's status as an alien corporation defeats diversity jurisdiction,<sup>14</sup> unless, as Ruhrgas contends, Norge was fraudulently joined for that very purpose. Among other complaints,<sup>15</sup> Norge contends that Ruhrgas's monopolization of the western European gas market completely prevents both MPN and itself from marketing Heimdal gas reserves to non-consortium buyers and thereby devalues the production license. Ruhrgas responds that Norge cannot complain of any damage to its production license as Norge assigned all of its interests in the Heimdal license to MPN.

12. *Cf. Leffell v. Dallas Indep. School Dist.*, 28 F.3d 521, 524 (5th Cir.1994) ("Removal statutes are to be strictly construed against removal.").

13. *Kokkonen*, 511 U.S. at 377, 114 S.Ct. at 1675; see also *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir.1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction").

14. See *Giannakos*, 762 F.2d at 1298 (holding that "diversity does not exist where aliens are on both sides of the litigation").

15. At the time the parties filed their appellate briefs, Norge did not have the right to market Heimdal gas under the Pass Through Agreement. Briefing indicated that MPN's rights under the Pass Through Agreement would terminate if it failed to perform certain obligations. Norge predicted that such a reversion would occur as a result of Ruhrgas's activities during the summer of 1996. The current status of the Pass Through Agreement therefore is unclear. Terms in the agreement, however, indicate that Norge may have continuing obligations to the nation of Norway under the original production license and

[7] The party attempting to prove fraudulent joinder has a heavy burden.<sup>16</sup> To establish that a defendant has been joined fraudulently, "the removing party must show [by clear and convincing evidence] either that there is no possibility that the plaintiff would be able to establish a cause of action against the [nondiverse] defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts."<sup>17</sup> In making this determination, a court must resolve "all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party."<sup>18</sup>

A close reading of the record and the extensive briefing on fraudulent joinder leave us unconvinced that Norge has been joined fraudulently to defeat diversity jurisdiction. It is not clear what interest Norge possessed when granted the production license, nor can we determine with certainty from the record and briefings what interest *vel non* Norge retains after the Pass Through Agreement. Although Norge maintains that it holds legal title to all unproduced reserves, it is apparent that several other possibilities exist for classifying Norge's property interest. Given Texas's choice of law rules Norwegian law likely would have to be consulted to answer these difficult questions.<sup>19</sup> At this stage in

that Ruhrgas's interference in MPN's activities may be impacting those obligations. Norge also asserts that Ruhrgas has tortiously interfered with MPN's obligations to Norge under the Pass Through Agreement.

16. *Ford v. Elsbury*, 32 F.3d 931 (5th Cir.1994).

17. *B, Inc.*, 663 F.2d at 549 (footnote omitted).

18. *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992); see also *Burden v. General Dynamics Corp.*, 60 F.3d 213 (5th Cir.1995); *B, Inc.*

19. See *Cantu v. Bennett*, 39 Tex. 303 (1873) (indicating that the law of the situs would control the characterization of Norge's property interests); but see *Swanson v. Schlumberger Tech. Corp.*, 895 S.W.2d 719 (Tex.App.—Texarkana 1995, writ granted) (indicating that Texas law may control this determination under the "most significant relationship" test). Given the fraudulent joinder standards, we must presume that Norwegian law would apply. *Burden*. There is, however, no evidence of Norwegian law in the record. Even



the proceedings, however, Ruhrgas shoulders the burden of proof, and it simply cannot prove, by clear and convincing evidence, that Norge has absolutely no possibility of recovering damages under any theory of liability. Diversity jurisdiction, therefore, is not present.

#### B. Federal Question Jurisdiction

[8] Ruhrgas asserts that federal question jurisdiction is present because the "[p]laintiffs' claims raise substantial questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form a part of the federal common law." The Marathon plaintiffs note that they have alleged only state law causes of action and contend that the well-pleaded complaint rule bars a finding of federal question jurisdiction.

In *Torres v. Southern Peru Copper Corp.*,<sup>20</sup> we found federal question jurisdiction based on the federal common law of foreign relations. As in *Torres*, the defendant's government, the Republic of Germany, has filed a letter of protest with the State Department and an amicus brief with the court. The similarities between the two cases end there. Our holding in *Torres* is a very specific application of the well-pleaded complaint rule, under which the complaint must state a cause of action necessarily requiring the "resolution of a substantial question of federal law."<sup>21</sup> That test was met in *Torres* because the suit itself struck directly at vital economic interests of the nation, and, indeed, at the very sovereignty of the Republic of Peru.

The same cannot be said herein for the Republic of Germany. Its amicus brief focuses primarily on two areas: the enforceability and breadth of European arbitration clauses, and the impact on international trade from allowing suits against European

if we were to attempt to apply Texas law, classification of these various interests and the concomitant rights of Norge to pursue damage remedies would be unclear. This alone precludes a finding of fraudulent joinder. See *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746 (5th Cir.1996).

20. 113 F.3d 540, (5th Cir.1997).

companies to proceed in United States courts. Such concerns, though not insubstantial, would describe many international commercial disputes between western European corporations and United States corporations and cannot properly form the basis of federal subject matter jurisdiction.

Ruhrgas appears to be an important gas supplier in Germany and western Europe but this action does not strike at the sovereignty of a foreign nation. The plaintiffs' claims do not call into question official German policy decisions and the Republic of Germany was not a participant in the activities giving rise to this suit. This litigation does not seek to impose liability for injuries to foreign citizens occurring solely on foreign soil, as was the situation in *Torres*. Indeed, Ruhrgas allegedly came to the United States and defrauded a United States company on American soil. Merely requiring a German corporation to abide by state law when present here does not necessarily implicate substantial foreign relations issues between the United States and Germany. Further, we remain unconvinced that this suit may impact severely the vital economic interests of a highly developed and flourishing industrial nation such as Germany. Federal question jurisdiction does not exist.

#### C. 9 U.S.C. § 205

[9] Finally, Ruhrgas claims that this case is removable under 9 U.S.C. § 205 because the plaintiffs' claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Notably, MOC, MIO, and Norge were not signatories to any arbitration agreement, nor were they parties to any arbitration proceedings.<sup>22</sup>

Under 9 U.S.C. § 205, federal jurisdiction exists if the plaintiffs' claims relate to an arbitration agreement or award falling under

21. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983).

22. MPN, however, has participated successfully in arbitration proceedings in Europe.



**U.S. v. SULTAN**  
Cite as 115 F.3d 321 (5th Cir. 1997)

the Convention on the Recognition of Foreign Arbitral Awards. An arbitration agreement or award falling under the Convention is one which arises out of an international commercial legal relationship.<sup>23</sup> No one disputes that the plaintiffs' claims arise from international commercial relationships; the issue is whether any relevant arbitration agreement exists between the parties to this litigation, a necessary predicate for federal jurisdiction under 9 U.S.C. § 205.<sup>24</sup> Simply stated, there is no such agreement.<sup>25</sup>

Ruhrgas maintains that the Marathon plaintiffs are attempting to enforce provisions of the Heimdal Gas Agreement, an agreement to which they are not parties. It further characterizes this suit as an inappropriate attempt to circumvent the arbitration agreement under which MPN is bound to arbitrate any disputes concerning the Heimdal Gas Agreement. As such, Ruhrgas contends that the Marathon plaintiffs should be estopped from denying the applicability of the arbitration provisions. We are not persuaded.

MOC and MIO are not seeking redress for wrongs done to MPN. Rather, they allege that Ruhrgas and others jointly participated in a scheme to induce them fraudulently into investing \$300 million into MPN. That Ruhrgas may have effectuated this fraud through its contractual relationship with MPN does not lead to the conclusion that MOC and MIO are seeking damages for harm done to MPN. Further, MOC and MIO are not seeking damages for any breach of contract; they could not do so because no contracts exist between them and Ruhrgas.<sup>26</sup> The same is true of Norge's claims. Norge merely claims that Ruhrgas's tortious conduct has affected the value of its production license and impeded its obligations and rights

under the Heimdal license and Pass Through Agreement. Norge is not seeking damages on behalf of MPN, nor has it claimed entitlement to any rights under the Heimdal Gas Agreement.

Finally, Ruhrgas asserts other theories for its thesis that the arbitration provisions in the Heimdal Gas Agreement should apply to all of MPN's corporate affiliates. None is persuasive.

**Conclusion**

Concluding that the district court lacked subject matter jurisdiction, we vacate the judgment of the district court and remand with instructions that this action be remanded to the 152nd Judicial District Court of Harris County, Texas.

**VACATED and REMANDED.**



**UNITED STATES of America,**  
Plaintiff-Appellee,

**v.**  
**Mohammed SULTAN, Defendant-**  
Appellant.

No. 96-20483.  
United States Court of Appeals,  
Fifth Circuit.

June 10, 1997.

Following jury trial, defendant, who owned auto parts surplus warehouse, was with Ruhrgas and that none of the plaintiffs ever signed an arbitration agreement.

23. See 9 U.S.C. §§ 205, 2.

24. See *Seifen, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140 (5th Cir.1985) (holding that the Convention only applies where (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) the agreement to arbitrate arises from a commercial legal relationship; and (4) a non-American citizen is a party to the agreement).

26. Contrary to Ruhrgas's contention that the Marathon plaintiffs are seeking to enforce the pricing arrangements in the Heimdal Gas Agreement, plaintiffs do not seek injunctive relief. Moreover, the plaintiffs would not be entitled to recover the lost profits of MPN, though the figures are in dispute. In proving the estoppel



a foreign country, it was legally precluded from staying the arbitration without making any findings that the requirements for a stay were satisfied, A.C.E. says.

Further, the record indicates the prerequisites for a stay of arbitration were not, and could not have been, satisfied, A.C.E. argues.

"The Attorney General has no substantial likelihood of success on the merits," A.C.E. maintains. "Given (i) the broad character of the arbitration provisions at issue, (ii) the weighty federal policy presumption in favor of arbitration, especially in the international context, and (iii) the Attorney General's express acknowledgment that he is a third party beneficiary of the very contracts that contain the arbitration provisions, a court is highly unlikely to relieve him of an obligation to arbitrate his claims against A.C.E. Nor is there a substantial threat that the Attorney General will suffer irreparable harm absent a stay of arbitration. If he ultimately succeeds on his claim that the arbitration provisions in the A.C.E. contracts do not bind him, the only 'harm' he would suffer from having arbitrated the issue would be expense and duplication of effort, considerations that this Court has held do not constitute irreparable harm."

Moreover, there is no reason to delay arbitration until the remand appeal is resolved because the outcome of that appeal will have no impact on the arbitrability of the Attorney General's claims against A.C.E. while A.C.E. is being severely harmed by the stay because it is losing the benefit of its bargain with its insureds to arbitrate all issues related to its insurance contracts, the insurer says.

*[Editor's Note: A.C.E.'s brief on the stay issue is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 03-980527-013. 69 pages. Subscriber price: \$1 per page plus \$15.]*

### **A.C.E. Brief On Remand Issue**

On May 18, A.C.E. told the Fifth Circuit denial of the remand motion should be affirmed and that the District Court properly held that a claim for coverage under an insurance contract containing an arbitration agreement governed by the New York

Convention "relates to" the insurance contract and its arbitration clause.

The removability of claims under Section 205 does not depend on the arbitrability of claims being removed, A.C.E. argues. "On the contrary, the whole point of § 205 was to provide a federal forum for considering the sorts of arbitrability defenses that the Attorney General apparently intends to raise. Accordingly, the Attorney General's arguments concerning arbitrability are plainly irrelevant to the various jurisdictional questions before this Court, and also premature."

The only real issue before the court is whether the Attorney General's coverage claims against A.C.E. "relate to" the terms and conditions of A.C.E.'s insurance contracts, including their arbitration provisions, the insurer contends. "In this case, given the Attorney General's repeated insistence that the State of Louisiana is a third-party beneficiary entitled to enforce A.C.E.'s insurance contracts, it necessarily follows that the Attorney General's claims 'relate to' the arbitration agreements in those contracts as a matter of law. Under § 205, that is all that matters."

*[Editor's Note: A.C.E.'s brief on the remand issue is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 03-980527-014. 85 pages. Subscriber price: \$1 per page plus \$15.]* ■

### **\$300 Million Case Before 5th Circuit Hinges On Jurisdiction**

NEW ORLEANS — Whether a federal court lacking subject matter jurisdiction can dismiss a case for want of personal jurisdiction was the question presented to the full Fifth Circuit U.S. Court of Appeals May 18 in a dispute between the Marathon Oil Co. and Ruhrgas A.G. (Marathon Oil Co. v. Ruhrgas A.G., 96-20361, 5th Cir.; See February 1998, Page 11).

The 5th Circuit determined that there was no federal subject matter jurisdiction, but

United States

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granted rehearing of the appeal in order to determine whether the U.S. District Court's dismissal for absence of personal jurisdiction in Texas was nevertheless valid.

All courts have the competence to determine their own jurisdiction, and the lower court's dismissal for lack of personal jurisdiction can only be overturned for abuse of discretion, argued Ben H. Sheppard Jr. of Vinson Elkins of Houston, counsel for Ruhrgas.

However, Chief Circuit Judge Henry A. Politz pointed out that a dismissal for lack of personal jurisdiction will preclude plaintiffs from proceeding in state court in Texas. Judge Politz openly wondered if it was fair for the lower court to effectively end all potential state law claims if it had no authority over the subject matter. "Get me over that hurdle and I'm with you," the Chief Circuit Judge assured Sheppard.

It is a "bedrock" principle of law that a court cannot determine the merits of a case if it does not have jurisdiction, contended J. Gregory Taylor of Hughes & Luce of Dallas, counsel for Marathon. Sheppard agreed, but urged that a dismissal for lack of personal jurisdiction does not go to the merits of the case.

"Give me a case!" exhorted Circuit Judge Edith H. Jones looking for precedent. Neither party could cite a case directly on point. Circuit Judge Jones also asked if plaintiffs are entitled to raise the issue of a conflict between subject matter and personal jurisdiction when they had not done so before. "Isn't the district judge being sandbagged?" asked Circuit Judge Patrick E. Higgenbotham.

Both counsel came prepared to reargue whether there had been an arbitration agreement between the parties giving rise to federal subject matter jurisdiction under Section 205 of the Federal Arbitration Act (FAA). The Circuit Court had determined almost a year ago that there was no such agreement, and diverted the attorneys from readdressing that subject. The fate of the \$300 million litigation appears to lie in whether or not the District Judge had the power to determine personal jurisdiction in Texas. If the Court agrees with Ruhrgas then Marathon will be unable to pursue its claims in state court.

Sheppard maintained that this would be a fair result in a matter involving "European clients [sell-

ing] European gas . . . in Europe, under a contract executed in Europe to be arbitrated in Sweden." Taylor countered that Ruhrgas induced his Texas clients to finance a North Sea pipeline with false promises that they would be able to purchase gas at premium discounts. According to Taylor that deception was a common law tort that pre-dated any contract and was committed in the State of Texas.

Taylor, also asserted that without any decision on the merits the Circuit Court had to view all issues in the light most favorable to his clients. Circuit Judge Robert M. Parker gave Taylor support and warned his fellow justices that if they uphold the lower court's dismissal they risk "following the 9th Circuit down the primrose path of 'hypothetical jurisdiction, [a doctrine rejected by the U.S. Supreme Court]." Sheppard contended that there was no precedent in which a court was found incompetent to determine its own personal jurisdiction.

Circuit Judge Jerry E. Smith asserted that the crucial distinction between subject matter jurisdiction and personal jurisdiction is that the parties can waive a defense of personal jurisdiction, while the court has an obligation to dismiss any case over which it does not have subject matter jurisdiction. Marathon argued that this distinction highlights why it was improper for the District Court judge to rule on personal jurisdiction without first determining if the matter itself was cognizable in federal court.

The Marathon companies are represented by Clifton T. Hutchinson, J. Gregory Taylor and David J. Schenck of Hughes & Luce of Dallas.

Counsel for Ruhrgas are Ben H. Sheppard Jr., Harry M. Reasoner, Guy S. Lipe and Michael J. Mucchetti of Vinson Elkins of Houston and Charles Alan Wright of Austin, Texas. ■

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United States  
Page 9 of 12



# MARATHON

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-2034

MARATHON OIL COMPANY, MARATHON

INTERNATIONAL OIL COMPANY, MARA-

TION PETROLEUM NORGE A/S,

Plaintiffs-Appellants

vs.

RUBIGAS, A.G.

Defendant-Appellee

Cross-Appellant

Appeals from the United States District Court  
For the Southern District of Texas

June 10, 1997

Before POLITZ, Chief Judge, WIENER and STEWART, Circuit Judges.

POLITZ, Chief Judge:

This international commercial dispute involves allegations of fraud, civil conspiracy, and various business torts. Concluding that the district court lacked subject matter jurisdiction, we vacate and remand with instructions.

### Background

In 1978 Marathon Oil Company (MOC) became involved in North Sea gas exploration activities when its affiliate, Marathon International Oil (MIO), purchased a European concern holding a North Sea production license.<sup>1</sup> The production license, originally held by Marathon Petroleum Norge (MPN), ultimately gave another affiliate, Marathon Petroleum Norway (MPN), rights to 20% of a gas field in the

North Sea known as the Hilsund. Field.<sup>2</sup> Another large interest holder in the Hilsund field was Statoil, Norway's state-owned gas company, which had purchased a 40% interest in 1975.

The present litigation arises from alleged oral and written agreements between the Marathon companies, Rubigas, A.G., and other European companies regarding the development and production of Hilsund field reserves. Rubigas is Germany's primary gas company. According to the Marathon plaintiffs, Rubigas, Statoil, and a consortium of other European companies secretly conspired to monopolize the western European gas market by funneling a large portion of North Sea gas reserves through Rubigas's production facilities in Germany.

The plaintiffs allege that to effectuate this plan Rubigas duped them into providing MPN with \$100 million in extensive construction and drilling operations with the false promise of premium prices for MPN's European gas sales and guaranteed pipeline transportation tariffs to help offset the substantial construction investment.<sup>3</sup>

When it ultimately became apparent that premium prices would not be honored and the scheduled transportation tariffs would not materialize, MOC, MIO, and Norge<sup>4</sup> sued Rubigas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations. Rubigas timely removed, invoking jurisdiction under diversity of citizenship, federal question, and 9 U.S.C. § 205. After removal, Rubigas moved for a stay pending arbitration in Europe which the district court denied. Rubigas then filed a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for *forum non conveniens*. The Marathon plaintiffs moved to remand for lack of subject matter jurisdiction. The district court granted Rubigas's motion to dismiss for lack of personal jurisdiction and dismissed all other motions as moot. The court then denied Rubigas's motion for reconsideration in which Rubigas urged the court to abate all proceedings pending completed arbitration in Europe. All parties timely appealed.

We address at the threshold the vital question of federal subject matter jurisdiction. As courts of limited jurisdiction, federal courts may adjudicate a case or controversy only if there is both constitutional and statutory authority for federal jurisdiction.<sup>5</sup> Rubigas insists that we must rule on its personal jurisdiction challenge without first determining whether we have jurisdiction ratione materiae. We are cognizant that in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction.<sup>6</sup>

We decline, however, to extend these cases into mandatory rules of trial and appellate procedure governing the order in which jurisdictional motions must be determined. No dispositive precedent of our court has held that a court must ignore a lack of subject matter jurisdiction when it has before it an *in rem* disposition of a motion to dismiss for lack of personal jurisdiction. Such a rule necessarily would be invalid in light of our constitutional and statutory authority and the overwhelming body of precedent commanding all federal courts to ascertain *ratione materiae* subject matter jurisdiction at each stage of litigation, trial and appellate, and to dismiss cases not properly before us.<sup>7</sup>

We must be ever mindful that any rule or decision allowing a federal court to act without subject matter jurisdiction conflicts inescapably with basic principles of federal court authority.<sup>8</sup> On several occasions we have sounded the caution that "[w]here a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."<sup>9</sup> If dismissals for lack of personal jurisdiction were judgments on the merits, decisions allowing that determination in the absence of federal subject matter jurisdiction would have no validity.<sup>10</sup> The appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss.<sup>11</sup> Such a course respects the proper balance of federalism. We must, therefore, reject Rubigas's invitation to ignore the formidable subject matter jurisdiction issue presented herein and resolve that fundamental

issue.

Given the limited nature of federal jurisdiction, there is a strong presumption against same,<sup>12</sup> and "the burden of establishing the necessary facts upon the party asserting jurisdiction."<sup>13</sup> Rubigas, as the removing party, has advanced several theories in support of federal jurisdiction. We address each in turn.

### A. Diversity of Citizenship

MOC is an Ohio corporation with its principal place of business in Houston, Texas. MIO is a Delaware corporation with its principal place of business in Houston, Texas. Norge is an alien corporation headquartered in Norway. The defendant, Rubigas, A.G., is an alien corporation headquartered in Germany.

Norge's status as an alien corporation defeats diversity jurisdiction,<sup>14</sup> unless, as Rubigas contends, Norge was fraudulently joined for that very purpose. Among other complaints,<sup>15</sup> Norge contends that Rubigas's monopolization of the western European gas market completely prevents both MPN and itself from marketing Hilsund gas reserves to non-consortium buyers and thereby devalues the production license. Rubigas responds that Norge cannot complain of any damage to its production license as Norge assigned all of its interests in the Hilsund license to MPN.

The party attempting to prove fraudulent joinder has a heavy burden.<sup>16</sup> To establish that a defendant has been joined fraudulently, "the removing party must show [by clear and convincing evidence] either that there is no possibility that the plaintiff would be able to establish a cause of action against the [nondiverse] defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts."<sup>17</sup> In making this determination, a court must resolve "all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party."<sup>18</sup>

A close reading of the record and the extensive briefing on fraudulent joinder leaves us unconvinced that Norge has been joined fraudulently to defeat diversity jurisdiction. It is not clear what interest Norge possessed when it procured the production license, nor can we determine with certainty from the record and briefings what interest of non-Norge remains after the Pass Through Agreement. Although Norge maintains that it holds legal title to all unproduced reserves, it is apparent that several other possibilities exist for classifying Norge's property interest. Given Texas's choice of law rule Norwegian law likely would have to be assembled to answer these difficult questions.<sup>19</sup> At this stage in the proceedings, however, Rubigas shoulders the burden of proof, and it simply cannot prove, by clear and convincing evidence, that Norge has absolutely no possibility of recovering damages under any theory of liability. Diversity jurisdiction, therefore, is not present.

### B. Federal Question Jurisdiction

Rubigas asserts that federal question jurisdiction is present because the "[p]laintiffs' claims raise substantial questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form a part of the federal common law."<sup>20</sup> The Marathon plaintiffs note that they have alleged only state law causes of action and contend that the well-pleaded complaint rule bars a finding of federal question jurisdiction.

In *Tarros v. Southern Peru Copper Corp.*,<sup>21</sup> we found federal question jurisdiction based on the federal common law of foreign relations. As in *Tarros*, the defendant's government, the Republic of Germany, has filed a letter of protest with the State Department and an amicus brief with the court. The similarities between the two cases end there. Our holding in *Tarros* is a very specific application of the well-pleaded complaint rule, under which the complaint must state a cause of action necessarily requiring the "resolution of a substantial question of federal law."<sup>22</sup> That test was met in *Tarros* because the suit itself struck directly at vital economic interests of the nation, and, indeed, the sovereignty of the Republic of Peru.



The same cannot be said herein for the Republic of Germany. Its amicus brief focuses primarily on two areas: the enforceability and breadth of European arbitration clauses, and the impact on international trade from allowing suits against European companies to proceed in United States courts. Such concerns, though not insubstantial, would describe many international commercial disputes between western European corporations and United States corporations and cannot properly form the basis of federal subject matter jurisdiction.

Ruhrgas appears to be an important gas supplier in Germany and western Europe but this action does not strike at the sovereignty of a foreign nation. The plaintiff's claims do not call into question official German policy decisions and the Republic of Germany was not a participant in the activities giving rise to this suit. This litigation does not seek to impose liability for injuries to foreign citizens occurring solely on foreign soil, as was the situation in *Torres*. Indeed, Ruhrgas allegedly came to the United States and defrauded a United States company on American soil. Merely requiring a German corporation to abide by state law when present here does not necessarily implicate substantial foreign relations issues between the United States and Germany. Further, we remain unconvinced that this suit may impact severely the vital economic interests of a highly developed and flourishing industrial nation such as Germany. Federal question jurisdiction does not exist. <sup>24</sup>

C-9 U.S.C. § 305 - *And. 205 P. 2. d.*

Finally, Ruhrgas claims that this case is removable under 9 U.S.C. § 205 because the plaintiff's claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Notably, MOC, MO, and Norge were not signatories to any arbitration agreement, nor were they parties to any arbitration proceedings.<sup>25</sup>

Under 9 U.S.C. § 205, federal jurisdiction exists if the plaintiff's claims relate to an arbitration agreement or award falling under the Convention on the Recognition of Foreign Arbitral Awards. An arbitration agreement or award falling under the Convention is one which arises out of an international commercial legal relationship.<sup>26</sup> No one disputes that the plaintiff's claims arise from international commercial relationships; the issue is whether any arbitration agreement exists between the parties to this litigation, a necessary predicate for federal jurisdiction under 9 U.S.C. § 205.<sup>27</sup> Simply stated, there is no such agreement.<sup>28</sup>

Ruhrgas maintains that the Marathon plaintiffs are attempting to enforce provisions of the Heindal Gas Agreement, an agreement to which they are not parties. It further characterizes this suit as an inappropriate attempt to circumvent the arbitration agreement under which MPN is bound to arbitrate any disputes concerning the Heindal Gas Agreement. As such, Ruhrgas contends that the Marathon plaintiffs should be estopped from denying the applicability of the arbitration provisions. We are not persuaded.

MOC and MO are not seeking redress for wrongs done to MPN. Rather, they claim that Ruhrgas and others justify participated in a scheme to induce them fraudulently to invest \$500 million into MPN. That Ruhrgas may have effectuated this fraud through its commercial relationship with MPN does not lead to the conclusion that MOC and MO are seeking damages for wrongs done to MPN. Further, MOC and MO are not seeking damages for any breach of contract they could not do so because no contracts exist between them and Ruhrgas.<sup>29</sup> The core of Norge's claims. Norge merely claims that Ruhrgas's tortious conduct has affected the value of its production license and impeded its obligations and rights under the Heindal license and Pass Through Agreement. Norge is not seeking damages on behalf of MPN, nor has it claimed entitlement to any rights under the Heindal Gas Agreement.

Finally, Ruhrgas asserts other theories for its thesis that the arbitration provisions in the Heindal Gas Agreement should apply to all of MPN's corporate affiliates. None is persuasive.

Continues

Concluding that the district court lacked subject matter jurisdiction, we vacate the judgment of the district court and remand with instructions that this action be remanded to the 13th Judicial District Court of Harris County, Texas.

VACATED and REMANDED

1. <sup>1</sup> MO acquired Pan Ocean and its subsidiary Pan Ocean Norge, which held the North Sea production license. Pan Ocean was later renamed Marathon Petroleum Norway, and Pan Ocean Norge became Marathon Petroleum Norge.

2. <sup>2</sup> MPN acquired the production license by virtue of a Pass Through Agreement with its subsidiary, Marathon Petroleum Norge, the original license holder.

3. <sup>3</sup> This proposal was known as the "Heindal Gas Agreement," which allegedly guaranteed a \$5.50 per million BTU price. Norge, an assignee of Norge's Heindal license, was a party to this agreement.

4. <sup>4</sup> As a counterparty to the Heindal Gas Agreement, MPN's claims were subject to binding arbitration in Norway. However, it was not a signatory and asserts that although it assigned its Heindal license to MPN, it nonetheless has standing to sue for the alleged deviation of the license. We address that issue below.

5. <sup>5</sup> *Kakkonen v. Guardian Life Ins. Co. of America*, 311 U.S. 371 (1934); *B. Inc. v. Miller Brewing Co.*, 643 F.2d 345 (5th Cir. 1981); *Erwin Chmerovski, Federal Jurisdiction* 217 (1989); see also *Sturton v. SUI*, 49 U.S. (11 How.) 441 (1815) (Congress may create lower federal courts and thus has the power to vest them with less than full Article III jurisdiction).

6. <sup>6</sup> See, e.g., *Villar v. Crawley Maritime Corp.*, 990 F.2d 1418 (5th Cir. 1993); *Association National de Producteurs v. Dow Chemical*, 918 F.2d 539 (5th Cir. 1991); *Walker v. Sewell*, 315 F.2d 514 (5th Cir. 1964).

7. <sup>7</sup> See, e.g., *Culter v. Kat*, 7 U.S. (7 How.) 329 (1843); *Manfield v. Swan*, 111 U.S. 377 (1844); *Louisville & Nashville R.R. Co. v. Motley*, 211 U.S. 149 (1908); *Mitchell v. Meador*, 293 U.S. 237 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Phillbrook v. Glodgett*, 421 U.S. 707 (1975); *Julier v. Yull*, 430 U.S. 327 (1977); *Beider v. Williamspart Area School Dist.*, 435 U.S. 534 (1988); *FWPBS, Inc. v. City of Dallas*, 491 U.S. 215 (1989); *Star the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5th Cir. 1981); *Guzarski v. M/V Bravo Trader*, 362 F.2d 1295 (5th Cir. 1961); *Macklin v. Oklahoma Lease Dist.*, 477 F.2d 427 (5th Cir. 1973); *Triad Properties, Inc. v. United States Mineral Prods. Co.*, 934 F.2d 632 (5th Cir. 1992); *Mason v. United States Dept. of Agriculture et al. Farmers Home Admin.*, 55 F.3d 991 (5th Cir. 1991).

8. <sup>8</sup> See, e.g., *Kakkonen*, 311 U.S. at 377 (holding that the jurisdiction of the federal courts "is not to be expanded by judicial decree") (citing *American Fire & Cas. Co. v. Finn*, 431 U.S. 6 (1958)).

9. <sup>9</sup> *B. Inc.*, 643 F.2d at 348; see also *Stafford v. Mobile Oil Corp.*, 915 F.2d 803 (5th Cir. 1991); *Getty Oil Co. v. Interstate Co. of N. Am.*, 841 F.2d 1234 (5th Cir. 1988); *In re Majorie Energy Corp.*, 835 F.2d 87 (5th Cir. 1988); *In re Carter*, 614 F.2d 1095 (5th Cir. 1980).

10. <sup>10</sup> See *Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996) (holding that a district court must have subject matter jurisdiction by the time it renders judgment for the judgment to be valid); see also *Works v. Fidelity & Cas. Co.*, 318 F.2d 503, 504 (5th Cir. 1953) ("If the refusal to remand was erroneous, the judgment of dismissal was likewise erroneous") (citing *Raff v. Gay*, 67 F.2d 684 (5th Cir. 1933); *at* 242 U.S. 25 (1934)).

11. <sup>11</sup> Confronted with virtually identical facts, in *Zigler v. Champion Mortgage Co.*, 913 F.2d 220 (5th Cir. 1990), we raised the subject matter jurisdiction question sua sponte and vacated the judgment.



of dismissal which was based on a lack of personal jurisdiction.

12. <sup>12</sup> Cf. *Laffal v. DuPont Indep. School Dist.*, 38 F.3d 531, 534 (5th Cir. 1994) ("Removal statutes are to be strictly construed against removal").

13. <sup>13</sup> *Kokkorn*, 511 U.S. at 377; see also *Stafford v. Mobil Oil Corp.*, 945 F.2d 800, 804 (5th Cir. 1993) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction.")

14. <sup>14</sup> See *Glennaker*, 762 F.2d at 1258 (holding that "[d]iversity does not exist when aliens are on both sides of the litigation").

15. <sup>15</sup> At the time the parties filed their appellate briefs, Norge did not have the right to market Hirsid gas under the Pass Through Agreement. Briefing indicated that MPN's rights under the Pass Through Agreement would terminate if it failed to perform certain obligations. Norge predicted that such a termination would occur as a result of Rubagas's activities during the summer of 1996. The current status of the Pass Through Agreement therefore is unclear. Terms in the agreement, however, indicate that Norge may have continuing obligations to the nation of Norway under the original production license and that Rubagas's interference in MPN's activities may be impacting those obligations. Norge also asserts that Rubagas has tortiously interfered with MPN's obligations to Norge under the Pass Through Agreement.

16. <sup>16</sup> *Ford v. Babbey*, 32 F.3d 931 (5th Cir. 1994).

17. <sup>17</sup> *U, Inc.*, 603 F.2d at 549 (footnote omitted).

18. <sup>18</sup> *Dedson v. Spillida Maritime Corp.*, 935 F.2d 40, 42 (5th Cir. 1992); see also *Borden v. General Dynamics Corp.*, 60 F.3d 213 (5th Cir. 1995); *U, Inc.*

19. <sup>19</sup> See *Caata v. Jensen*, 39 Tex. 304 (1873) (indicating that the law of the situs would control the characterization of Norge's property interests); but see *Swanson v. Schlumberger Tech. Corp.* (Tex.App. - Tarrant 1995, writ granted) (indicating that Texas law may control this determination under the "most significant relationship" test). Given the fraudulent joinder standards, we must presume that Norwegian law would apply. *Borden*. There is, however, no evidence of Norwegian law in the record. Even if we were to attempt to apply Texas law, clarification of these various interests and the concomitant rights of Norge to pursue damage remedies would be unclear. This alone precludes a finding of fraudulent joinder. See *Sid Richardson Carbon & Gunkar Co. v. Interberg Res. Ltd.*, 99 F.3d 746 (5th Cir. 1996).

20. <sup>20</sup> No. 96-40201, 1993 WL 239649 (5th Cir. May 19, 1993).

21. <sup>21</sup> *Franklin Tax Bd. v. Construction Laborers Union Trust*, 403 U.S. 1, 13 (1971).

22. <sup>22</sup> MPN, however, has participated assiduously in arbitration proceedings in Europe.

23. <sup>23</sup> See 9 U.S.C. § 205, 2.

24. <sup>24</sup> See *Sodin, Inc. v. Petrolweld Metallurgy Metallizing Int'l Ltd. Corp.*, 767 F.2d 1149 (5th Cir. 1985) (holding that the Convention only applies where (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in conformity of a Convention signatory; (3) the agreement to arbitrate arises from a commercial legal relationship; and (4) a non-American citizen is a party to the agreement).

25. <sup>25</sup> Rubagas acknowledges that none of the Meriton plaintiffs have any contractual relationship with

Rubagas and that none of the plaintiffs ever signed an arbitration agreement.

26. <sup>26</sup> Contrary to Rubagas's contention that the Meriton plaintiffs are seeking to enforce the pricing arrangements in the Hirsid Gas Agreement, plaintiffs do not seek punitive relief. Moreover, the plaintiffs would not be entitled to recover the lost profits of MPN, though such figures may be relevant in proving the extent of the plaintiffs' damages.

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