UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Arbitration of Certain Controversies Between TELCORDIA TECHNOLOGIES, INC.,	:	
Petitioner,	:	
and	:	Civil Action No. 02-1990 (JR)
TELKOM SA, LIMITED,	:	
Respondent.	:	

MEMORANDUM

Telcordia Technologies, Inc. ("Telcordia"), seeks enforcement of a partial award rendered in arbitration in South Africa of its commercial dispute with Telkom SA, Limited ("Telkom"), a South African company. Telkom moves to dismiss for lack of personal jurisdiction and on *forum non conveniens* grounds. For the reasons stated below, Telkom's motion will be granted.

Background

Telcordia is a technology services company based in New Jersey. Pet. at ¶ 5. Telkom is a corporation organized under the laws of South Africa with its principal place of business in South Africa. Ngcobo Decl. at ¶ 3. The dispute between Telcordia and Telkom involves an agreement for Telkom to provide and Telcordia to purchase telecommunications software. The South African government owned sixty-seven percent of

Telkom's stock shares at the time Telkom entered into the contract with Telcordia. Id. at ¶ 4. The contract ("Integrated Agreement") was negotiated in South Africa and was executed there on June 24, 1999. Id. at ¶ 9; Castelli Decl. at ¶ 3. It provided that disputes would be submitted to arbitration in South Africa, under the jurisdiction of the South African courts, and that the contract terms were to be interpreted under the laws of South Africa. Integrated Agreement, Ex. A at ¶ 19.1. Telcordia was required to set up a local office in South Africa to perform its responsibilities under the contract, and delivery of the software products was to be made in South Africa. Integrated Agreement at ¶ 10. Telkom was to wire payments due under the contract to Telcordia's bank account in the United States. Integrated Agreement, Ex. B at ¶ 10.3. Telcordia asserts that "much of the work" was performed at its offices in the United States, Castelli Decl. at ¶ 4.[1] During the performance of the contract, Telkom's technical staff visited Telcordia's offices in the United States to learn more about the product that Telcordia was designing for Telkom. Castelli Decl. at ¶ 5; Ngcobo Decl. at ¶ 9.

In early 2001, after disputes arose about Telcordia's performance, both parties exercised their rights to cancel the Integrated Agreement, each claiming a breach by the other. The

[1] This is disputed. Ngcobo Decl. at ¶ 10.

dispute went to arbitration before the International Chamber of Commerce. A single arbitrator (an English barrister) was appointed. Pursuant to the Integrated Agreement, the arbitration took place in South Africa. In August 2002, while the arbitration was in process, Telkom believed that the arbitrator was applying English contract law rather than South African law and thus, "referred a question" to the High Court of South Africa under Section 20 of the South African Arbitration Act of 1965, which allows such a submission to the High Court during the pendency of arbitration. Telkom also requested a stay of arbitration proceedings until the Section 20 question was resolved by the High Court, but the arbitrator declined that request and, on September 27, 2002, released a partial arbitral award in favor of Telcordia. The partial arbitral award did not assess damages. On November 5, 2002, Telkom petitioned the High Court to set aside the partial arbitral award, asserting that the arbitrator had violated Section 20 and objecting that the partial award had been entered before it had the chance to submit evidence and argument on certain issues. That petition to set aside the partial arbitral award is still pending before the High Court in South Africa. Nonetheless, in this court, Telcordia seeks enforcement of the partial arbitral award.

Analysis

I. Personal jurisdiction

Telkom does not dispute that it is an "agency or instrumentality of a foreign state," as defined by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603(b), and that subject matter jurisdiction is proper under the arbitral exception to the FSIA, 28 U.S.C. § 1605(a)(6), but Telkom asserts that the exercise of personal jurisdiction in this case offends the Due Process Clause of the Fifth Amendment because of the insufficiency of minimum contacts with the forum. Telcordia, for its part, insists that the "minimum contacts" analysis is irrelevant, because the Due Process Clause does not apply to foreign instrumentalities, and it asserts that, once subject matter jurisdiction over a claim against a foreign instrumentality has been established under one of the exceptions of the FSIA, personal jurisdiction is automatic. Telcordia also argues that, even if the "minimum contacts" test applies, Telkom has enough minimum contacts with the United States to justify personal jurisdiction over the foreign respondent.

Subject matter jurisdiction under the FSIA and personal jurisdiction under the Due Process Clause of the Constitution are two distinct inquiries. As the Court of Appeals explained in

Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982):

> [S]tatutorily, personal jurisdiction exists so long as subject matter jurisdiction exists and service has been properly made under section 1608 of FSIA . . . . However, a statute cannot grant personal jurisdiction where the Constitution forbids it, and the Supreme Court has held repeatedly that certain "minimum contacts" must exist between the person and the jurisdiction to be consistent with the Due Process Clause of the Fifth Amendment.

Id. at 1028. Thus, the court "must undertake a bifurcated analysis, asking first whether a United States court has subject matter jurisdiction, and second whether it can exercise personal jurisdiction over the defendants." Id. at 1026. In Telcordia's submission, Gilson is no longer good law, because of Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82 (D.C. Cir. 2002), which held that foreign states cannot invoke the minimum contacts test to contest personal jurisdiction. Price, however, was limited to cases involving an "actual foreign government," id. at 99; the Court of Appeals expressly declined to decide whether other entities that fall within the FSIA's definition of 'foreign state' -- including corporations -- can be considered persons under the Due Process Clause. Id. at 100 (internal citation omitted). Telcordia's argument for extending the holding of Price to remove due process protection for any foreign corporation in which a foreign state owns a majority interest is rejected. The proposition is unsupported by persuasive authority

and runs afoul of the well-established precedent that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." Dole Food Co. v. Patrickson, 123 S. Ct. 1655, 1660 (2003)(quoting First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 625 (1983)).

Due process requires that the defendant "have [had] certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Creighton Ltd. v. Gov't of Qatar, 181 F.3d 118, 127 (D.C. Cir. 1999)(citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). There must be some purposeful availment of the privilege of conducting activities within the forum state, and the contacts "must be of a quality that [the defendant] 'should reasonably anticipate being haled into court' in the forum." Id. (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). When the claims against a defendant arise from its activities within the forum state, maintenance of the action within the forum state generally does not offend "traditional notions of fair play and substantial justice," because in those circumstances, the defendant ordinarily should reasonably anticipate being haled into court there. World-Wide Volkswagen, 444 U.S. at 297. Conversely, when

the claims are unrelated to the defendant's activities in the forum, jurisdiction is likely to be improper. See id. at 297-98.

Regardless of whether Telcordia is asserting specific or general jurisdiction, Telkom's contacts with the forum are insufficient to exercise personal jurisdiction in this case. Telcordia's claims do not arise out of Telkom's actions in the United States, and there are no acts by Telkom of purposeful availment of the privileges of conducting business in the United States, or acts pursuant to which Telkom should have reasonably anticipated being haled into court here.[2] Indeed, Telkom reasonably expected the opposite -- not to be haled into court here -- because the parties expressly consented to the jurisdiction of the South African courts and agreed that South African law would govern their agreement, and because the contract activities were centered in South Africa.

Except for the fact that payment was to be made by wiring funds to an account in Telcordia's bank in the United States, this case is analogous to Creighton, in which the Court of Appeals found that Qatar lacked minimum contacts with the United States notwithstanding Qatar's contract with a U.S.-based company, because the contract was offered, accepted, performed, and allegedly breached in Qatar. Creighton, 181 F.3d at 128.

[2] Telkom does not argue that due process requires that it have contacts with the forum state as opposed to the United States in general.

Telcordia's contract with Telkom was negotiated, executed, and performed in South Africa, and was subject to the laws of that country. Telkom did not solicit Telcordia's business or secure its services in the United States. Instead, Telcordia won the contract by outbidding other companies. Telkom's assertion that "much of its work" on the contract took place in the United States is not quantified, Castelli Decl. ¶ 4, and that mere assertion does not trump the Integrated Agreement's provision that the place of performance was South Africa. Telcordia agreed to "creat[e] a branch office of Telcordia Technologies, Inc. in the Republic of South Africa in order to perform Telcordia's responsibilities and obligations under this Integrated Agreement," Integrated Agreement at 8, § 10, and Telkom explains that this branch office requirement was not merely a formality. The office was a key location for Telcordia employees to perform the work required by the contract. See 6/25/03 Tr. at 3. Telcordia did not dispute that proposition in its briefs or in oral argument. The facts of record do not add up to the minimum contacts that would be necessary for personal jurisdiction.

Telkom's four visits to the United States between April and September 2000, Castelli Decl. at ¶ 5, do not amount to purposeful availment. See Creighton, 181 F.3d at 128 (recognizing distinction between purposeful availment and contacts that are incidental to the fact that the party providing

the services under the contract happens to be located in the United States). Nor does Telkom's obligation to wire funds to Telcordia's bank account in the United States give rise to personal jurisdiction here: the dispute was not about payments in America but about performance in South Africa. See, e.g., Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co., 18 F.3d 389, 395 (7th Cir. 1994); Patterson v. Dietze, Inc., 764 F.2d 1145, 1147 (5th Cir. 1985). Cf. Hanil Bank v. PT. Bank Negara Indonesia, 148 F.3d 127, 134 (2d Cir. 1998)(plaintiff's breach of contract claim arose from defendant's issuance of a letter of credit consenting to make payment wherever plaintiff specified, and thus, defendant's obligation to wire funds to plaintiff's account in New York satisfied minimum contacts test). To exercise jurisdiction based on Telkom's payments to Telcordia's bank account in the United States and on a few visits to the United States that were incidental to the fact that Telcordia is located here would not comport with "traditional notions of fair play and substantial justice," Int'l Shoe Co., 326 U.S. at 316.

Telkom has other contacts here that were unrelated to the contractual dispute. It listed an initial public offering on the New York Stock exchange; it retained management services from a San-Francisco company; and it contracted briefly with a company in Westport, Connecticut (resulting in a credit report

erroneously suggesting the existence of a Telkom office in Connecticut, see 6/25/03 Tr. at 10-11). Those contacts unrelated to the dispute between Telcordia and Telkom were not and are not the "systematic and continuous" contacts that are necessary for general personal jurisdiction. See Helicopteros Nacionalies de Colombia, S.A. v. Hall, 466 U.S. 408, 416-18 (1984)(one-time visit to the forum for contract negotiations or personnel training deemed insufficient for general personal jurisdiction); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 97 (2d Cir. 2000)(absent other substantial contacts, a company is not "doing business" in the forum merely by taking ancillary steps in support of its listing on a New York stock exchange); Recycling Sciences Int'l, Inc. v. Soil Restoration & Recycling, L.L.C., 159 F. Supp. 2d 1095, 1102 (N.D. Ill. 2001)(no personal jurisdiction based on one-time sale in the forum unrelated to the cause of action). And if those contacts could somehow be construed as substantial, the exercise of general jurisdiction in a case such as this -- where the parties expressly agreed to be subject to the jurisdiction of another forum and their course of dealing was primarily in that other forum -- would be inconsistent with traditional notions of fair play and substantial justice.

II. *Forum non conveniens*

Telkom's motion to dismiss is also granted on the alternative ground of *forum non conveniens*. Telcordia has not

questioned the ability of South African courts to provide an alternative forum to resolve the parties' dispute. In fact, the South African High Court is currently reviewing Telkom's petition to set aside the partial arbitral award that Telcordia seeks to enforce. South Africa is a signatory to the New York Convention, making it possible for Telcordia to seek enforcement of the arbitral award in South Africa. Telcordia argues that it was foreseeable that it would seek enforcement of the arbitral award in the United States, merely because it is an American company and Telkom agreed to arbitration, but that argument -- which essentially means that Telcordia agreed to South African law and South African courts with its fingers crossed -- is rejected on policy grounds.

Applying the traditional balancing test, it appears that the private interest factors -- relative ease of access to sources of proof, availability of witnesses, and the costs of obtaining witnesses[3] -- are in equipoise, because both parties claim that it is more convenient to litigate in their respective countries. The public interest factors,[4] however, strongly favor South Africa as the forum. The contract was for services to be provided to a company in South Africa for the benefit of South

[3] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

[4] Id. (public factors include the local interest in resolving local disputes and the problems implicated in the application of foreign law).

African consumers. The laws of South Africa that govern the contract would be best enforced by the courts of that country. All of these considerations outweigh Telcordia's private interest in seeking enforcement of its arbitral award in the United States.

Conclusion

For the foregoing reasons, Telcordia's petition to enforce the partial arbitral award will be dismissed. An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge