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Jurisdiction Over a Person or Property Remains a Critical Prerequisite to the Enforcement of Foreign Arbitral Awards

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A party seeking to confirm an arbitral award in the United States under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") must establish, as a threshold matter, that the court has either personal jurisdiction over the respondent or jurisdiction over the respondent's property (so-called, *quasi in rem* jurisdiction). Indeed, such jurisdiction is fundamental to the power of federal courts in the United States to exercise control over litigating parties.

In a recent decision, *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009), which examines this requirement where the respondent is wholly owned by a foreign state, the United States Court of Appeals for the Second Circuit reaffirmed the jurisdictional prerequisite, expressly overruled prior Second Circuit precedent by holding that a foreign state is not a "person" for purposes of the Due Process Clause, and upheld the lower court's refusal to allow jurisdictional discovery where the petitioner had failed to make out a *prima facie* case for jurisdiction.

Although the decision reminds any party seeking to enforce an arbitral award to keep its eye on the jurisdictional ball, the Second Circuit's decision in *Frontera Resources* is of particularly critical importance where enforcement is sought against either a foreign state or an entity that is wholly owned by a foreign state and acts as that state's agent or instrumentality. In such cases, although the requirements of the Foreign Sovereign Immunities Act ("FSIA") must be met, there is no need for a litigant to meet the minimum-contacts requirements imposed by the U.S. Constitution's Due Process Clause under the Supreme Court's well-established precedent in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Where, however, an entity wholly owned by a foreign state is not merely an instrumentality or agent of the foreign state, *Frontera Resources* leaves open the question of whether such an entity is entitled to the Due Process Clause's protections.

Background: The Parties' Dispute and the Swedish Arbitral Award

In November 1998, Frontera Resources Azerbaijan Corporation ("Frontera") and the State Oil Company of the Azerbaijan Republic ("SOCAR") entered into a written agreement pursuant to which Frontera would develop and manage oil deposits in Azerbaijan and deliver oil to SOCAR. In 2000, a SOCAR refused to pay for some of this oil and, in response, Frontera allegedly sought to sell oil that was supposed to be sold to SOCAR to parties outside of Azerbaijan. In November 2000, after instructing local customs authorities to block Frontera's oil exports, SOCAR seized the oil.

In March 2002, the bank that had financed Frontera's business in Azerbaijan foreclosed on its loan, and Frontera assigned its rights in the project to the bank. Although the bank settled its claims with SOCAR in July 2002, Frontera continued to seek payment for both previously delivered and seized oil. In July 2003, Frontera served SOCAR with an arbitration request and, in January 2006, after a hearing on the merits in which both parties fully participated, a Swedish arbitral tribunal awarded Frontera approximately $1.24 million plus interest.

On February 14, 2006, Frontera filed a petition in the United States District Court for the Southern District of New York, seeking to confirm the arbitral award pursuant to Article II(2) of the New York Convention. Because the district court concluded that SOCAR had insufficient contacts with the United States to meet the Due Process Clause's requirements for the assertion of personal jurisdiction, the court dismissed the petition for lack of personal jurisdiction. Although the district court questioned the soundness of according due-process protections to a company owed by a foreign state, the court followed the Second Circuit's precedent in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).

In addition, because Frontera had failed to identify any specific SOCAR assets within the court's jurisdiction, the district court also declined to find *quasi in rem* jurisdiction over SOCAR. The district court also declined Frontera's request for jurisdictional discovery.

The Jurisdictional Prerequisite

The Second Circuit rejected Frontera's argument that a district court does not need personal jurisdiction (or *quasi in rem* jurisdiction) over a respondent to confirm a foreign arbitral award. Explicitly recognizing that it previously had declined to decide whether personal or *quasi in rem* jurisdiction is required to confirm foreign arbitral awards pursuant to the New York Convention,[1] the Second Circuit identified a number of other courts that have required such jurisdiction.[2]

Noting that federal courts are courts of limited jurisdiction requiring a specific grant of jurisdiction and that the need for personal jurisdiction is fundamental to the court's power to exercise control over the parties,[3] the Second Circuit rejected Frontera's argument that, because the New York Convention does not have a jurisdictional requirement, such a requirement cannot be imposed by a court. As the Court explained:

> [The] exclusivity [of Article V of the New York Convention] limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought.[4]

Limits on Due-Process Protection

and Jurisdictional Discovery

Although the Second Circuit held that the district court correctly treated jurisdiction over SOCAR or SOCAR's property as a prerequisite to the enforcement of Frontera's petition, the Second Circuit explained, at some length, that the district court nonetheless gave the U.S. Constitution's Due Process Clause an unwarranted place in its analysis. Accordingly, the Second Circuit explained that the district court's concerns over the correctness of the Second Circuit's holding in *Texas Trading* were "well-founded."

In *Texas Trading*, the Second Circuit held, without much analysis, that a foreign state was a "person" within the meaning of the Due Process Clause, and that a court asserting personal jurisdiction over a foreign state must not only comply with the FSIA, but it must engage in "a due process scrutiny of the court's power to exercise its authority" over the state. 647 F.2d at 308, 313 ("the [FSIA] cannot create personal jurisdiction where the Constitution forbids it").

As the Second Circuit found, however, "since *Texas Trading* . . . the case law has marched in a different direction."[5] In *Republic of Argentina v. Weltover, Inc.*, the U.S. Supreme Court "assum[ed], without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," 504 U.S. 607, 619 (1992), and then cited *South Carolina v. Katzenbach*,*383 U.S. 301, 323-24 (1966)*, which held that "States of the Union are not 'persons' for purposes of the Due Process Clause," 504 U.S. at 619. According to the Second Circuit, the Court's implication was plain: If the "States of the Union have no rights under the Due Process Clause, why should foreign states?"[6] Implicitly answering this rhetorical question, the Second Circuit held that "the district court erred, albeit understandably in light of *Texas Trading*, by holding that foreign states and their instrumentalities are entitled to the jurisdictional protections of the Due Process Clause." [7]

Because, however, SOCAR was not a foreign state, but instead an instrumentality or agency of a foreign state, the Second Circuit addressed Frontera's argument that, because the FSIA treats foreign states and their agencies and instrumentalities identically, SOCAR should be treated just as Azerbaijan would be treated. The Second Circuit reject this argument, explaining that "the simple fact that SOCAR is deemed a foreign state as a *statutory* matter . . . does not answer the *constitutional* question of SOCAR's due process rights."[8] If, for example, the Azerbaijan government exerted sufficient control over SOCAR to make it an agent of the state, then there would be no reason to extend a constitutional right to SOCAR that would be denied to the Azerbaijan government.[9]

The Second Circuit further explained, however, that, even if SOCAR were not an agent of the Azerbaijan state, it would still be necessary to determine whether, as a corporation owned by a foreign state, SOCAR would be entitled to the Due Process Clause's protections. And, although the U.S. Supreme Court has accorded such protections to privately owned foreign corporations, it has not been decided whether it would do so for state-owned foreign corporations.[10] Because the issue of SOCAR's alleged agency had not been reached by the district court , however, the Second Circuit remanded the questions of: (i) whether SOCAR is an agent of Azerbaijan; and (ii) whether SOCAR is entitled to the protections of the Due Process Clause.

Finally, noting that the district court's denial of Frontera's request for jurisdictional discovery is reviewed using an abuse-of-discretion standard and that the issue is only relevant if the Due Process Clause protects SOCAR's interests, the Second Circuit affirmed the district court's denial. In particular, the Court noted that the fact that SOCAR may have had relationships with American companies, without more, could be the result of "occasional or casual solicitations, or solicitations outside the United States," rather than the kind of "deliberate and not occasional or casual" contacts to make out a *prima facie* case for personal jurisdiction.[11]

[1] *Citing Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 207 (2d Cir. 2003).

[2] *Citing Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178-79 (3d Cir.2006); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120-22 (9th Cir.2002); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*,283 F.3d 208, 212-13 (4th Cir.2002); *Transatl. Bulk Shipping Ltd. v. Saudi Chartering S.A.*,622 F.Supp. 25, 27 (S.D.N.Y.1985).

[3] *Citing Leroy v. Great W. United Corp.*,*443 U.S. 173, 180 (1979)*.

[4] *Frontera Resources Azerbaijan Corp.*, 582 F.3d at 397.

[5] *Id*. at 398.

[6] *Id*. at 398-99.

[7] *Id*. at 399.

[8] *Id*. at 400 (emphasis in original).

[9] *See id.*, *citing*, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec"), 462 U.S. 611, 626-27 (1983)* and *TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 301 (D.C.Cir.2005)*.

[10] *See id*. at 401, *citing*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,*466 U.S. 408, 418-19 (1984)*; *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*,*171 F.3d 779, 784 (2d Cir.1999)*; *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 571 (2d Cir.1996).

[11] *Id*. at 401-02.

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