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9th Circ. Ruling Shows International Arbitration Jurisdictional Snags

Law360

August 23, 2023

This article was originally published in Law360 on August 23, 2023 and can be found here.

The U.S. has a well-deserved reputation as a pro-arbitration jurisdiction – and many foreign sovereigns maintain assets in the country. It is thus unsurprising that prevailing parties in international arbitration disputes frequently seek to enforce awards against foreign states in the U.S.

These advantages do not mean, however, that enforcing such an award in the U.S. is automatic. As a recent U.S. Court of Appeals for the Ninth Circuit opinion confirms, a party must satisfy the jurisdictional requirements of the federal courts – and doing so requires careful thought.

In *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, the Ninth Circuit's Aug. 1 decision reversed a decision confirming an International Chamber of Commerce award in favor of Devas for more than \$560 million plus interest.

The Ninth Circuit's opinion hinges on the conclusion that the district court lacked personal jurisdiction over Antrix – a foreign state under the terms of the Foreign Sovereign Immunities Act at Title 28 of the U.S. Code, Section 1604.

The FSIA is the exclusive basis for a federal court to take jurisdiction over a foreign sovereign. It provides that a foreign state "shall be immune from the jurisdiction of the courts of the United States" unless one of several enumerated exceptions applies. If an exception

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applies, "[p]ersonal jurisdiction over [the] foreign state shall exist ... where service has been made."

In *Devas*, there was no dispute that one of the exceptions applied, and that service was proper. At first blush, then, it might seem that the district court could properly assert jurisdiction over Antrix.

But the Ninth Circuit currently demands more, concluding that personal jurisdiction under the statute only exists if the traditional minimum contacts standard is satisfied. Pursuant to that standard, personal jurisdiction can only be found if (1) a party purposely directed activity at the forum state — i.e., the home of the court; (2) the claims arise from the forum-related activities; and (3) it is reasonable to exercise personal jurisdiction.

Devas argued that the U.S. Supreme Court's 1992 decision in *Republic of Argentina v. Weltover Inc.* calls into question the Ninth Circuit's personal jurisdiction jurisprudence.

Devas asserted that the minimum contacts test applies to ensure that the exercise of personal jurisdiction over a person complies with the due process clause of the Fifth Amendment to the U.S. Constitution. That clause states that no "person shall be ... deprived of life, liberty, or property, without due process of law."

In *Weltover*, the Supreme Court strongly suggested — but did not determine — that a foreign state is not a person. Thus, according to *Devas*, the district court did not need to apply the minimum contacts test to assume jurisdiction over Antrix. The district court accepted this argument.

The majority of circuits to consider the issue have done the same, concluding that a foreign sovereign is not a person and, thus, not covered by the protections of the due process clause and the minimum contacts test.^[1]

The Ninth Circuit concluded that it was bound by its prior precedent despite the Supreme Court decision in *Weltover* for two reasons. First, the Supreme Court did not actually decide whether foreign states are persons. Thus, to the extent the Ninth Circuit cases rested on a constitutional analysis of due process requirements for persons, those cases were not clearly irreconcilable with *Weltover*.

Second, the Ninth Circuit reasoned that its prior precedent did not rest on a constitutional analysis in any event. Rather, the Ninth Circuit's prior cases concluded that as a matter of statute, the FSIA incorporates the minimum contacts test.

Thus, even if a foreign state is not a person — and not entitled to the constitutional protections of the due process clause — it remains entitled to a minimum contacts analysis under the FSIA. In so reasoning, the Ninth Circuit sidestepped the thorny — and undecided — constitutional question of whether a foreign state is a person for purposes of the due process analysis.

The Ninth Circuit also confirmed the existence of a circuit split on this issue. In its 2016 decision in *Rote v. Zel Custom Manufacturing LLC*, the U.S. Court of Appeals for the Sixth Circuit rejected the argument that the FSIA incorporates the minimum contacts test, and concluded that interpreting the FSIA to impose a minimum contacts analysis would create statutory requirements by judicial fiat that do not exist in the text.

Until the Supreme Court clarifies whether foreign states are entitled to due process protections — and whether the FSIA imposes a minimum contacts analysis as a precondition for the exercise of personal jurisdiction — parties seeking to enforce an award against a foreign state in the U.S. will have to take care.

At least in the Ninth Circuit, and potentially in any circuit that has yet to consider the issue, parties must satisfy the minimum contacts analysis to meet their jurisdictional burden.

The Devas opinion provides another important reminder to practitioners as well. The concurrence notes that, at least in the Ninth Circuit, the minimum contacts test will typically have little practical significance in a suit to confirm or enforce an arbitral award because the test can be satisfied by the presence of the sovereign's assets in the forum. In the normal course, a party will seek to enforce an award against a foreign state in a jurisdiction where the sovereign's assets can be found.

Other circuits have not yet explicitly adopted this test in the foreign arbitral context. However, several courts have held that the presence of assets satisfies personal jurisdiction requirements in suits to enforce foreign monetary judgments.[2] The same logic would seem to apply to a foreign arbitral award.

In Devas, the plaintiffs failed to raise such an argument or invoke the court's jurisdiction over Antrix's assets, thereby forfeiting it. Parties seeking to enforce awards against a sovereign in the future would do well to ensure both that the foreign state has assets in the forum in which enforcement is sought, and that the enforcement action invokes the court's jurisdiction over those assets directly.

[1] See, e.g., *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.D.C. 2005); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2011); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 398-99 (2d Cir. 2009).

[2] See, e.g., *Lenchyshyn v. Pelko Electric, Inc.*, 281 A.D.2d 42, 47-51, 723 N.Y.S.2d 285, 289-92 (4th Dep't 2001) (citing cases).