

CLIENT ALERT

Fifth Circuit Rejects the Enforcement of An International Arbitral Award Against Saudi Aramco on Sovereign Immunity Grounds

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In *Al-Qarqani v. Saudi Arabian Oil Company*, Case No. 21-20034, the Fifth Circuit Court of Appeals has denied a petition seeking enforcement of a foreign arbitration award, finding that it lacked subject matter jurisdiction. The Court held that Saudi Arabian Oil Company, commonly known as Saudi Aramco, qualifies as a foreign State for purposes of the Foreign Sovereign Immunities Act (“FSIA”), and was immune from enforcement of the award in the courts of the United States.

The case demonstrates a reminder that both States and the companies they own enjoy protections from the jurisdiction of United States courts, and the burden falls on the plaintiff to demonstrate that an exception to those protections applies.

Background

The case arises from a highly unusual set of facts involving what appears to be a sham arbitration. In 2014, the plaintiffs, a group alleging their ancestors had been expropriated of oil-rich land in the Kingdom of Saudi Arabia in 1949, initiated arbitral proceedings against Saudi Aramco in Cairo, Egypt through an organization called the International Arbitration Centre (“IAC”). After chaotic proceedings in which arbitrators resigned and an award declining jurisdiction was reversed, arbitrators awarded \$18 billion to plaintiffs and \$23 million in fees to the IAC. The arbitrators responsible for this award were prosecuted and convicted in Egypt, and sentenced to three-year terms of imprisonment.

Despite the fate of the arbitrators, plaintiffs sought to enforce the award against Saudi Aramco in the Southern District of Texas. An attempt to enforce the award against another respondent company in the Northern District of California and Ninth Circuit has also failed.^[1]

Immunity for State-owned Enterprises

Under the FSIA, States enjoy special immunity from the jurisdiction of United States courts unless an enumerated exception applies. As the Fifth Circuit noted here, scrutiny of that subject matter jurisdiction is a question for every court to satisfy itself. Upon a *prima facie* showing that a party satisfies the definition of “foreign state” as set forth in the FSIA, it is then for the opponent to show an FSIA exception applies. See *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992).

Under the FSIA, immunity extends to “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” 28 U.S.C. § 1603(a). An “agency or instrumentality of a foreign state” includes “any entity . . . which is a separate legal person, corporate or otherwise, and . . . a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and . . . is neither a citizen of a State of the United States . . . nor created under the laws of any third country.” 28 U.S.C. § 1603(b). Accordingly, as the Kingdom of Saudi Arabia owns Saudi Aramco, the Fifth Circuit confirmed it satisfies the definition of a “foreign state” for FSIA purposes.

Attempts to Pierce Saudi Aramco's Immunity All Fail

While State-owned enterprises like Saudi Aramco enjoy the cloak of the FSIA, they (just as their master States) can be exposed to United States litigation under a number of exceptions. Here, the plaintiffs' two key attempts to establish jurisdiction were the typical routes used to bypass FSIA immunity in order to enforce arbitral awards against States: either express waiver (28 U.S.C. § 1605(a)(1)) or the enforcement of an arbitration agreement on any subject arbitrable under United States law, or any award resultant on such an agreement, governed by treaties in force for the United States for the recognition and enforcement of arbitration awards (28 U.S.C. § 1605(a)(6)).

The plaintiffs alleged that Saudi Aramco waived immunity under a 1933 agreement between Standard Oil of California and the Kingdom of Saudi Arabia, which contained an arbitration clause. Since there was no dispute that neither the plaintiffs nor Saudi Aramco had signed the agreement (and Saudi Aramco did not exist at the time), the Fifth Circuit found that there was no basis for considering either waiver or the existence of arbitration agreement. The plaintiffs also relied on a 1949 agreement between their purported ancestors and the precursor to Saudi Aramco, the Arabian American Oil Company. That 1949 agreement had no arbitration agreement, and while it referred to the 1933 agreement, it did not purport to incorporate its arbitration clause in any way.

Plaintiffs also attempted to invoke two other FSIA exceptions. They argued that the exception relating to a State or State-owned enterprise's commercial activities or actions with direct effect in the United States applied (28 U.S.C. § 1605(a)(2)). There was, however, no relevant commercial activity by Saudi Aramco in the United States, and the Fifth Circuit held that a foreign-held arbitration in Cairo had no "direct effect" in the United States.

The final, and rather rarely invoked, exception brought to bear in this case was that:

A foreign state shall not be immune . . . in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3)

Given that there was no relevant property inside the United States and that there were no relevant commercial activities by Saudi Aramco involved, the Court found that this exception failed for the same reason as the §1605(a)(2) exception. The Court also provided a reminder of customary international law principles: an expropriation is a violation of minimum standards of treatment of aliens, not citizens. As the plaintiffs were Saudi nationals, the Fifth Circuit held that international law, and therefore the §1605(a)(3) exception, could not be engaged regardless of the result of the arbitration award.

Ultimately, despite acknowledging other available avenues for denying the petition for enforcement, the Court found that it lacked subject matter jurisdiction because Saudi Aramco does in fact qualify as a foreign state under the FSIA and no exceptions applied. This is a further demonstration of the strong position of State-owned enterprises in United States immunity law. Under other law, such as the United Kingdom's State Immunity Act 1978, more stringent qualifications than mere majority ownership are often required for State-owned enterprises to enjoy foreign State immunity.

It bears noting that the treaty that typically governs the enforcement of foreign arbitral awards, the New York Convention, allows a court to decline to enforce awards unless they are the result of a written arbitration agreement evidenced to the satisfaction of the court under Articles II, III and V. On the facts here, it is entirely plausible that the Fifth Circuit would have denied enforcement on these grounds under the New York Convention regardless of Saudi Aramco's special status under the FSIA.

[1] *Al-Qarqani v. Chevron Corp.*, 2019 WL 4729467 (N.D. Cal. Sept 24, 2019), *aff'd Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018 (9th Cir. 2021).

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