

CLIENT ALERT

Second Circuit Decision in *Frontera v. SOCAR* Holds that Foreign Sovereigns and their Agents Are Not Entitled to Due Process Protections under the U.S. Constitution

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In a recent decision in *Frontera Resources Azerbaijan Corporation v. State Oil Company of the Azerbaijan Republic*, the United States Court of Appeals for the Second Circuit held that a state-owned foreign corporation is not entitled to the Due Process jurisdictional protections under the U.S. Constitution where the corporation is deemed to be an agent of a foreign sovereign. Docket No. 07-1815-cv, -- F.3d --, 2009 WL 3067888 (2d Cir. September 28, 2009). The decision is a significant shift in precedent in the Second Circuit, a jurisdiction which includes federal courts in New York City, a hub for international financial transactions and a venue where many award creditors seek to confirm and enforce arbitration awards. While the decision opens the door for award creditors to petition for confirmation of an arbitration award against a foreign state or its agents without consideration whether the entity regularly does business in the jurisdiction, the court's holding is limited to foreign states and their agents and does not affect the Due Process rights of foreign private corporations.

Background. Frontera Resources Azerbaijan Corporation ("Frontera") had obtained an arbitration award in the sum of \$1.24 million plus interest against the State Oil Company of the Azerbaijan Republic ("SOCAR"), arising from a dispute regarding payment for oil previously delivered to and seized by SOCAR. Frontera filed a petition in the federal court in the Southern District of New York to confirm the award pursuant to Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The district court had dismissed the petition on the ground that SOCAR lacked sufficient contacts with the United States to meet the Due Process Clause's minimum contacts requirements and, therefore, the court lacked personal jurisdiction under the traditional due process test set forth in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981). The court also found that there was no quasi in rem jurisdiction over SOCAR, because Frontera failed to identify specific assets of SOCAR within the court's jurisdiction.

Holding. On appeal, the Second Circuit confirmed that, as a general rule, a party petitioning to confirm a foreign arbitral award must establish that the court has personal jurisdiction over either the respondent or the respondent's property. The appellate court, however, abandoned its prior precedent in *Texas Trading & Milling Corp.* and held that foreign states do not enjoy Due Process protections under the U.S. Constitution, and thus, a plaintiff need not satisfy the "minimum contacts" requirements for personal jurisdiction as to a defendant foreign state. Whether a corporation owned by or affiliated with a foreign government is a "foreign state," however, depends on whether the foreign government "exerted sufficient control over" the entity "to make it an agent of the State." In making this determination, the court adopted the Supreme Court's analysis in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)* in which the Court held that an agency relationship with a foreign state is not established by reference to any mechanical formula, but includes a review of whether the state participates in the day-to-day control of the corporation. The appellate court remanded the case back to the district court for a determination of whether SOCAR is an agent of the Azerbaijani state under the *Bancec* analysis, and, as such, lacks due process rights.

Through this decision, the Second Circuit has aligned itself with the law prevailing in the District of Columbia Circuit, a residual jurisdiction for lawsuits against foreign states and their agencies and instrumentalities under the U.S. Foreign Sovereign Immunities Act.

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