



North America

United States

JURISDICTION AND ENFORCEMENT

United States v Park Place Associates Ltd

LT Awards; Commercial arbitration; Jurisdiction; State immunity; United States

Enforcement; sovereign immunity; subject matter jurisdiction; stay in favour of arbitration; The Tucker Act; the Court of Federal Claims; Federal Arbitration Act; terms of the arbitration agreement; privity of contract; parties to arbitration agreement

United States v Park Place Associates Ltd / In order to obtain relief against the United States in a contract action in the United States, there must be both subject matter jurisdiction and a waiver of sovereign immunity.

563 F.3d 907 (9th Cir.), United States Court of Appeals for the Ninth Circuit, April 22, 2009

¹ Simply put, subject matter jurisdiction is the legal authority of a federal court (as opposed to a court within the system of an individual State) to hear and decide a particular type of dispute. Federal courts are created by statute as courts of limited jurisdiction, and federal courts can only consider a dispute if specifically authorized to do so.

The United States Court of Appeals for the Ninth Circuit overturned confirmation of a US\$93 million AAA arbitration award against the United States on the grounds that the United States had not waived its immunity from enforcement of an arbitration award in federal district courts.

Facts and Background

The underlying facts span more than twenty years and involve drugs and gambling. In 1983, Park Place entered into a Joint Venture Agreement (JVA) with LCP Associates (LCP) to develop, own, and operate a casino in California. The JVA contained the following arbitration clause:

Any dispute or controversy arising under, out of, in connection with, or in relation to this Agreement, or any breach thereof, or in connection with the dissolution thereof, shall be determined and settled by arbitration in Los Angeles County pursuant to the rules of the American Arbitration Association. Any award rendered therein shall be final and binding on all of the parties, and judgment may be entered thereon in any court of competent jurisdiction in the State of California.

LCP was the majority partner, owning 65 per cent of the joint venture. Unbeknownst to Park Place, LCP had financed more than twelve million dollars of its initial investment in the joint venture using the proceeds of an illegal drug trafficking ring. By 1993, some 10 years after the commencement of the JVA, the United States had acquired a controlling 55 per cent interest in the joint venture as a result of criminal forfeiture from LCP under the Racketeer Influenced and Corrupt Organizations Act. Thereafter, the United States managed its interest in LCP and the casino through a series of court-appointed trustees, until it sold its interest in 1999.

In April 1998, Park Place issued proceedings in the federal court in California, seeking damages in excess of US\$150 million against the United States for breach of the JVA, asserting claims in contract and in tort. Park Place asserted that the United States had mismanaged the casino, claiming that the United States had not protected the value of the ongoing business because it hired incompetent staff and failed to modernize the facilities. The United States moved to dismiss for lack of subject matter jurisdiction.¹ The court dismissed the tort claims. As to the contract claims, the court explained that although federal district courts have concurrent jurisdiction with the Court of Federal Claims (a specialist tribunal) over contract claims

against the United States not exceeding US\$10,000, the Court of Federal Claims has exclusive jurisdiction over contract claims in excess of US\$10,000. The court therefore directed Park Place to file its contract claims in the proper forum: the Court of Federal Claims.

In October 1999, Park Place filed a complaint in the Court of Federal Claims, again alleging that the United States had breached its contractual obligations to Park Place under the JVA. The United States again moved to dismiss for lack of subject matter jurisdiction. The Court of Federal Claims granted the motion and dismissed the complaint for lack of jurisdiction, because the JVA was a contract between Park Place and LCP. In other words, Park Place's lack of privity with the United States deprived the court of subject matter jurisdiction over the breach of contract claims. The court also noted that even if the JVA bound the United States, the arbitration clause in the JVA would preclude jurisdiction.

Park Place appealed that decision to the United States Court of Appeals for the Federal Circuit, which vacated the decision of the Court of Federal Claims. The Federal Circuit held that privity of contract was established because the United States had elected to step into the shoes of LCP, and Park Place had no choice but to accept its new partner. It made no difference, held the Federal Circuit, that the United States happened to obtain its interest in the casino through forfeiture, as opposed to any other means. Accordingly, there was Tucker Act jurisdiction over contract-based claims even though there was "no literal contract" between the plaintiff and the United States.²

Then, in 2003, Park Place initiated an arbitration with the AAA seeking US\$100 million from the United States for its poor management of the club. Following unsuccessful motions in the Court of Federal Claims where, *inter alia*, the United States had sought to stay the arbitration, a ten-day arbitration hearing took place in California on the merits of Park Place's allegations. Prior to the hearing, the United States responded to the arbitration demand, helped select the arbitration panel, and participated in the preliminary hearing; however, the United States refused to participate in discovery and failed to attend the arbitration hearing itself.

The tribunal rejected an argument by the United States that it was protected from the arbitration proceedings by immunity, on the grounds that the United States had chosen to become LCP's general partner, had engaged in a concerted effort to obtain control of the club and to reap pecuniary gain from it, and consequently had "stepped into the shoes" of LCP.

Following the hearing, the arbitration tribunal issued an award in favour of Park Place. The arbitral tribunal awarded Park Place a total sum of US\$93,612,892.

Shortly after obtaining this award, Park Place filed motions in the Court of Federal Claims to confirm the arbitration award. The Court of Federal Claims, in an opinion affirmed by the Federal Circuit, granted the United States' motion to dismiss for lack of jurisdiction because the Federal Arbitration Act (FAA) only grants such authority to the district courts, not the Court of Federal Claims. Moreover, the court found that the JVA specifically provided that an arbitral award could only be confirmed by a court of competent jurisdiction in California.

In the meantime, in October 2004, while the post-arbitration motions were pending before the Court of Federal Claims, the United States filed an action in a California federal district court to vacate the arbitration award. Park Place filed a motion to confirm the arbitration award in the same court.

²The Tucker Act, 28 U.S.C. s.1491, provides in pertinent part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The district court confirmed the arbitration award and denied the United States' motion to vacate. The United States appealed to the Ninth Circuit.

Holding

The Ninth Circuit first considered the United States' motion to vacate. As an initial matter, the court wrestled with whether the district court had jurisdiction to consider the motion. Noting that the FAA does not provide an independent basis for subject matter jurisdiction, the Court held that the district court had properly exercised jurisdiction under 28 U.S.C. s.1345. That statutory provision furnishes an independent basis for federal subject matter jurisdiction for "all civil actions, suits or proceedings commenced by the United States." Here, the United States commenced civil proceedings when it filed a complaint and motion to vacate the arbitration award. The court found that s.1345 was sufficient to support the district court's jurisdiction over the motion to vacate even though the United States did not initiate the arbitration proceedings at issue.

The court then considered whether the district court erred in denying the United States' motion to vacate. The United States offered three reasons why the arbitration award should have been vacated. First, the United States contended that Park Place waived any right to arbitrate claims against the United States because it initially relied on litigation. Secondly, the United States argued that the arbitration panel should have applied the California rather than the federal statute of limitations. Thirdly, the United States asserted that California partnership law precluded the enforcement of an arbitration award against a general partner where creditors had not first attempted to collect against the partnership. The court considered and rejected each of these arguments.

The Ninth Circuit, having found that the district court properly denied the United States' motion to vacate the award, turned to "the more difficult question of whether it may be confirmed." The analysis hinged on two issues: sovereign immunity and subject matter jurisdiction. Although closely linked, they are two distinctly different concepts. As the Court explained, a waiver of sovereign immunity means the United States is amenable to suit in a court properly possessing jurisdiction; it does not guarantee a forum. Subject matter jurisdiction, on the other hand, provides a forum, but does not waive sovereign immunity.

Park Place made four arguments in support of its claim that sovereign immunity and subject matter jurisdiction did not preclude on order confirming the award by the federal district court in California.

First, Park Place argued that the Federal Circuit's earlier decisions held that the United States waived its sovereign immunity when it assumed ownership of LCP's interests, and, thus, the United States was estopped from contesting the issue of sovereign immunity. The Ninth Circuit rejected this argument because Park Place had invoked Tucker Act jurisdiction in the civil actions giving rise to the Federal Circuit's earlier decisions, whereas the litigation giving rise to the appeal was based on the FAA. The court explained that the Tucker Act supplies both a basis for the exercise of subject matter jurisdiction and a waiver of sovereign immunity in the Court of Federal Claims over contract actions against United States. But the Tucker Act neither waives sovereign immunity nor provides subject matter jurisdiction for contract actions against the United States in a federal district court in California.

Secondly, independent of those prior decisions, Park Place argued that the United States waived its immunity by assenting to the JVA and its arbitration clause. It was on this basis that the district court confirmed the arbitration award. The Ninth Circuit said that this determination was improper. The court again noted that the Tucker Act is the statutory authority that waives sovereign immunity for actions based in contract. While not disagreeing that the United States is a party to the JVA and subject to suit under the Tucker Act, the Ninth Circuit held that the district court did not have subject matter

jurisdiction because the Court of Federal Claims has exclusive jurisdiction for suits against United States, where the claimant is seeking more than \$10,000.

Thirdly, Park Place argued that Congress waived the United States' immunity to this action under the Administrative Procedure Act, which provides a limited waiver of sovereign immunity for review of government action under certain circumstances. Among other reasons, the Ninth Circuit rejected this argument because the Administrative Procedure Act does not waive sovereign immunity when the underlying claim involves money damages.

Fourthly, Park Place argued that the United States waived its sovereign immunity when it filed its motion to vacate. Citing a long line of case law, the Ninth Circuit rejected this argument. The court noted that even if the United States' action somehow provided a basis for subject matter jurisdiction, there was no statutory predicate for finding that the United States had waived sovereign immunity. Moreover, the court found this argument unpersuasive because Congress (in the Tucker Act) specifically provided that the Court of Federal Claims, not a district court in California, had exclusive jurisdiction over contract actions involving more than \$10,000. Park Place's argument would essentially render meaningless this element of the Tucker Act. The court also pointed out another flaw in Park Place's argument. It is well settled that only Congress can waive sovereign immunity. And Park Place's argument turned on a decision by the Department of Justice, which is part of the executive branch, to file suit. For this reason, as well, the Ninth Circuit found this argument troubling.

Ultimately, the Ninth Circuit reversed the district court's judgment confirming the award, holding that (i) the lower court did not have subject matter jurisdiction and (ii) the United States had not waived sovereign immunity.

Comments

Although the facts of this case are unique and rather complex, the holding has implications that are not limited to this case. We make three brief observations.

First, in order to obtain relief against the United States in a contract action, there must be *both* subject matter jurisdiction and a waiver or sovereign immunity. Here, the United States may have waived sovereign immunity and been amenable to suit in the Court of Federal Claims. But the Court of Federal Claims lacked subject matter jurisdiction to hear the merits of the dispute because the JVA provided for arbitration, thereby stripping the Court of Federal Claims of jurisdiction. Similarly, the Court of Federal Claims lacked subject matter jurisdiction to consider an action seeking to confirm an arbitration award, because Congress—through the FAA—gave that exclusive authority to the district courts. Because the Court of Federal Claims is a specialist tribunal rather than a district court, it lacked this authority. Where a contract involves or may involve the United States, other parties can protect their interests only if the United States waives sovereign immunity (*i.e.*, rendering the government amenable to formal claims) and subject matter jurisdiction is vested in a tribunal (*i.e.*, a forum where the dispute can be heard).

Secondly, arbitration clauses merit particular attention where a sovereign is involved. Here, the language of the arbitration clause served as a barrier to Park Place's ability to obtain relief. Because the arbitration clause provided that an award could only be confirmed by "any court of competent jurisdiction in the State of California," the Court of Federal Claims—which is located in Washington, D.C.—could not confirm the award even if it might otherwise have had jurisdiction. The attempt to draft the arbitration agreement with precision ultimately made it impossible for Park Place to obtain relief.

Thirdly, this judgment tells a cautionary tale that deserves consideration when one is contemplating business with the United States government (or

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APPLE & EVE, LLC v YANTAI N. ANDRE JUICE CO LTD

Waiver of right to arbitrate

LT *Arbitrability; Arbitration agreements; Seat of arbitration; Waiver*

Waiver of right to arbitrate; stay of proceedings in favour of arbitration; kompetenz-kompetenz; abuse of process; delay; waiver from conduct in litigation

Apple & Eve, LLC v Yantai N. Andre Juice Co Ltd / The Court

determined that the courts are better suited than arbitrators to decide an issue of waiver due to litigation conduct.

2009 WL 1118862 (E.D.N.Y. 2009),
US District Court for the Eastern
District of New York

¹ In full, the arbitration clause provided: "If no settlement can be reached, the claim in dispute shall then be submitted or [sic] arbitration in the country of defendant in accordance with the arbitration organization of the defendant country." *Apple & Eve, L.L.C. v. Yantai N. Andre Juice Co.*, 499 F.Supp.2d 245, 246 (E.D.N.Y. 2007).

² See 9 U.S.C. § 205 (allowing the defendant to remove an action brought in state court to federal court if the subject matter of the action relates to an arbitration agreement or award falling under the New York Convention).

³ 499 F.Supp.2d at 253.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention], implemented in the U.S. by the Federal Arbitration Act, 9 U.S.C. §§ 201-208.

⁵ 499 F.Supp.2d at 248-51.

⁶ 499 F.Supp.2d at 252.

any other sovereign) or other business in the United States in which the federal government might become involved as it did in this case. The United States' legal framework is such that, as a general matter, parties doing business with the government face additional risks that must be factored into any decision-making process. As the Ninth Circuit noted, "The concept of make-whole relief inherent in much of the common-law tradition does not apply in the context of actions brought against the United States ... a suit against the United States must start from the opposite assumption that no relief is available." For this reason, a detailed understanding of the legal regime and careful drafting are essential when conducting business with or in the United States.

The US District Court for the Eastern District of New York vacated its previous order compelling arbitration and lifted a stay on proceedings, holding that the Chinese defendant had waived its right to arbitrate the US plaintiff's breach of contract claim by seeking invalidation of the arbitration clause in China. The Court addressed the waiver issue despite language in a recent US Supreme Court case suggesting the determination be left to arbitrators.

Facts

Yantai North Andre Juice Co Ltd. (Yantai), a Chinese company, had entered into two contracts with Apple & Eve, LLC, a Delaware company, to supply apple juice concentrate. The contracts included an arbitration clause which required disputes to be submitted to arbitration "in the country of defendant in accordance with the arbitration organization of the defendant company".¹ Claiming that Yantai breached its obligations under the contracts, Apple & Eve filed suit in New York state court in December 2006. Yantai removed the action to the US District Court for the Eastern District of New York² and moved to compel arbitration in China pursuant to the arbitration clause. The Court granted the motion and stayed the action pending arbitration, despite the vague language of the arbitration agreement.³ The Court emphasized the strong federal policy favoring arbitration of international disputes and its obligation under art.II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to recognize arbitration "agreements in writing".⁴ Referring to a long line of US court decisions holding that the exception in art.II of the New York Convention for arbitration agreements found to be "null and void, inoperative or incapable of being performed" is to be construed narrowly, the Court held that the arbitration agreement's failure to identify a situs in China and an arbitration organization was not sufficient to fall within that exception.⁵ Finding that Chinese arbitration law allowed the parties to cure such a defect, the Court declined to find that the defect rendered the arbitration agreement "null and void, inoperative or incapable of being performed" as a matter of law.⁶

Apple & Eve then instituted arbitration before the Hong Kong International Arbitration Commission (HKIAC). Yantai resisted by refusing to appoint an arbitrator. Apple & Eve thereupon moved to lift the stay and compel arbitration in New York given Yantai's refusal to arbitrate before the HKIAC. The Court, however, denied the motion as premature. In the meantime, unbeknownst to Apple & Eve, Yantai filed a petition before the People's Court of Yantai in China (the "Yantai petition") to have the arbitration clause declared invalid. When Apple & Eve learned about the Yantai petition, it filed a second motion to vacate the order compelling arbitration and lift the stay. Yantai then informed the Court that it had instructed its Chinese counsel to withdraw the Yantai petition and to consent unconditionally to arbitration before the HKIAC. Arguing that Yantai was only seeking to delay and had effectively conceded that the arbitration clause was invalid by filing the Yantai petition, Apple & Eve insisted on its motion. On April 27, 2009,