

Compagnie Noga D'imp v Russian Federation

02-9237

Filed: March 16, 2004

DENNIS JACOBS, Circuit Judge, concurring:

I concur in the result reached in the majority opinion and subscribe to the Discussion in Parts I.A, I.D, I.E, and Part II. I write separately on the choice of law issue and certain aspects of federal common law to explain by what route I arrive at the same place as the majority.

I

Compagnie Noga D'Importation et D'Exportation S.A. ("Noga") appeals from the district court's refusal to confirm a Swedish arbitration award against the Russian Federation (the "Federation") pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 53 (the "Convention"). Congress adopted the Convention in 1970 and implemented it through amendment to the Federal Arbitration Act ("FAA"). See 9 U.S.C. §§ 201-208 (1994). As the Supreme Court noted soon after implementation:

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of

1 commercial arbitration agreements in international
2 contracts and to unify the standards by which
3 agreements to arbitrate are observed and arbitral
4 awards are enforced in the signatory countries.

5 Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

6 Section 207 of the FAA says who may confirm against whom:

7 Within three years after an arbitral award falling
8 under the Convention is made, any party to the
9 arbitration may apply to any court having jurisdiction
10 under this chapter for an order confirming the award as
11 against any other party to the arbitration. The court
12 shall confirm the award unless it finds one of the
13 grounds for refusal or deferral of recognition or
14 enforcement of the award specified in the said
15 Convention.

16 9 U.S.C. § 207 ("§ 207") (emphasis added). The dispositive
17 question on this appeal is thus whether the Federation was a
18 "party" to the arbitration proceedings that resulted in the
19 award Noga seeks to confirm. The Federation says that it
20 was the Government of the Russian Federation (the
21 "Government"), and not the Federation itself, that
22 participated in the Swedish arbitration proceedings. Noga
23 counters that there is no legal or factual difference
24 between the Federation and the Government, and that both
25 entities are fully liable on Noga's arbitration award.

26 As the majority opinion explains, the first thing is to
27 determine which body of substantive law should be applied to
28 resolve the status of the Federation vis-à-vis the

1 Government. [**See Maj. Op. at 14-16.**] The parties offer
2 three sources of law: private international law (which the
3 Federation maintains mandates application of Russian Law),
4 federal common law, and public international law. The
5 majority opinion deems it unnecessary to cut this "Gordian
6 choice-of-law knot" because all three sources of law yield
7 the same result. On that basis (i.e., that the choices of
8 law present a false conflict), the majority opinion decides
9 that the Federation and the Government are not separate
10 juridical entities for the purposes of a confirmation
11 proceeding under § 207. [**Maj. Op. at 16**].

12 I think that the law is sufficiently clear that there
13 is no reason to sidestep the choice of law question disputed
14 by the parties. The Supreme Court's interpretation of the
15 FAA requires the application of federal common law to
16 determine who is a proper "party" to a confirmation
17 proceeding brought pursuant to § 207. This result is
18 consistent with the precedent of this Court, see Victrix
19 Steamship Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709,
20 712-13 (2d Cir. 1987), and the federal interests advanced by
21 the FAA.

22 Section 2 of the FAA requires that an agreement to

1 arbitrate "shall be valid, irrevocable, and enforceable,
2 save upon such grounds as exist at law or in equity for the
3 revocation of any contract." 9 U.S.C. § 2. This
4 "congressional declaration of a liberal federal policy
5 favoring arbitration agreements . . . create[s] a body of
6 federal substantive law of arbitrability, applicable to any
7 arbitration agreement within the coverage of the Act."
8 Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S.
9 1, 24 (1983) (emphasis added). "[A]t least since this
10 Nation's accession in 1970 to the Convention, and the
11 implementation of the Convention in the same year by
12 amendment of the Federal Arbitration Act," the federal
13 policy in favor of arbitration "applies with special force
14 in the field of international commerce." Mitsubishi Motors
15 Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631
16 (1985) (citation omitted).

17 The loan agreements between Noga and the Federation--
18 which contain the parties' agreement to arbitrate--are
19 subject to the Convention, and thus come within the coverage
20 of the FAA, as does Noga's claim to confirm the Swedish
21 arbitration awards at issue here--a cause of action created
22 by § 207. The question whether the Federation is a proper

1 party to a § 207 action is thus properly decided under
2 federal common law.

3 This result is consistent with the Supreme Court's
4 interpretation of the FAA and serves the important federal
5 policy favoring international arbitration agreements.
6 Resort to federal common law is disfavored in most contexts,
7 but it is favored where the application of foreign law (as
8 the Federation advocates) conflicts with an important
9 federal policy. See Atherton v. FDIC, 519 U.S. 213, 218
10 (1997). When it comes to the enforcement of an arbitral
11 award pursuant to § 207, "concerns of international comity,
12 respect for the capacities of foreign and transnational
13 tribunals, and sensitivity to the need of the international
14 commercial system for predictability in the resolution of
15 disputes" come into play, Mitsubishi Motors, 473 U.S. at
16 629, and militate in favor of using federal common law to
17 ascertain whether the requirements of the statute have been
18 met. The majority opinion commits no error, and I think
19 that the choices of law advanced by the parties present a
20 false conflict, but I think it is a more natural development
21 of the analysis to identify the proper source of law and
22 apply it. Doing so provides guidance to parties considering

1 where they may seek to enforce an arbitration agreement or
2 to confirm an award under the Convention. Many bodies of
3 law are potentially implicated in complex, international
4 commercial agreements; in this case, the candidates are
5 Swiss law, Russian law, the federal law of the United
6 States, and international law. Parties seeking to enforce a
7 commitment to arbitrate or an arbitration award should know
8 that if they choose the relief afforded by Congress under
9 the FAA, the viability of their cause of action will be
10 adjudicated under federal law.

11

12

II

13 The majority opinion considers several bodies of
14 federal common law--including the Foreign Sovereign
15 Immunities Act, the Eleventh Amendment, and the Bankruptcy
16 Act--to conclude that the Russian Government is not a
17 juridical entity separate from the Russian Federation in the
18 context of a § 207 confirmation proceeding. [**Maj. Op. at 18-**
19 **23**]. Among other things, the majority observes that "it is
20 black letter Eleventh Amendment law that the political
21 agencies and departments of states are entitled to the same

1 sovereign immunity as the state." [Maj. Op. at 22.] I
2 respectfully submit that this characterization overstates
3 the reach of the Eleventh Amendment and allocates
4 insufficient weight to the presumption "that government
5 instrumentalities established as juridical entities distinct
6 and independent from their sovereign should normally be
7 treated as such." First National City Bank v. Banco Para el
8 Comercio Exterior de Cuba, 462 U.S. 611, 626-27 (1983)
9 ("Bancec"); see generally, id. at 623-33.

10 The Court in Bancec recognized that separate juridical
11 status ought to be respected in most cases, but nonetheless
12 allowed Citibank to take an offset for assets expropriated
13 by Cuba against the proceeds of a letter of credit presented
14 to Citibank by a bank created and operated by the Cuban
15 government. Id. at 633. The Court applied principles of
16 federal common law and international law--rather than Cuban
17 law--to resolve the issue of the bank's status vis-à-vis
18 the Cuban government, because "to give conclusive effect to
19 [Cuban] law . . . in determining whether the separate
20 juridical status of its [bank] should be respected would
21 permit the state to violate with impunity the rights of
22 third parties under international law while effectively

1 insulating itself from liability in foreign courts." Id. at
2 621-22. In this case, therefore, even though the Federation
3 may be "interpos[ing] its separate juridical status" (id. at
4 623) to defeat a legitimate claim for arbitral confirmation,
5 Bancec requires that we start with a robust presumption that
6 the Government and the Federation are separate juridical
7 entities.

8 I agree with the majority opinion that the Russian
9 Government would share in any (hypothetical) Eleventh
10 Amendment immunity the Russian Federation would enjoy under
11 federal law, but I do not think the Government's immunity is
12 a forgone conclusion. "[T]he [Supreme] Court has
13 consistently refused to construe the [Eleventh] Amendment to
14 afford protection to political subdivisions . . . even
15 though such entities exercise a 'slice of state power.'"
16 Lake Tahoe Country Estates, Inc. v. Tahoe Regional Planning
17 Agency, 440 U.S. 391, 401 (1979). It is only when a state-
18 created entity functions as a "arm of the state" that it
19 takes on the state's Eleventh Amendment immunity. Thus, if
20 the Russian Government would share in the Federation's
21 (hypothetical) immunity under the Eleventh Amendment, the
22 Federation is a proper party to Noga's § 207 confirmation

1 proceeding.

2 This Court revamped its application of the arm-of-the-
3 state doctrine in Mancuso v. New York State Thruway
4 Authority, 86 F.3d 289 (2d Cir. 1996). In the first of two
5 steps, we examine the six factors derived from Lake Tahoe:

6 (1) how the entity is referred to in the documents that
7 created it; (2) how the governing members of the entity
8 are appointed; (3) how the entity is funded; (4)
9 whether the entity's function is traditionally one of
10 local or state government; (5) whether the state has a
11 veto power over the entity's actions; and (6) whether
12 the entity's obligations are binding upon the state.

13 Mancuso, 86 F.3d at 293. If these factors point in
14 different directions, we ask: "(a) will allowing the entity
15 to be sued in federal court threaten the integrity of the
16 state? and (b) does it expose the state treasury to risk?"
17 Id.; accord Hess v. Port Auth. Trans-Hudson Corp., 513 U.S.
18 30, 47-52 (1994)).

19 Applying the Lake Tahoe factors to this case, it is
20 clear enough that the Russian Government is an arm of the
21 Russian Federation.

22 Creating Documents. The Government is given life
23 through the Constitution of the Russian Federation. Under
24 Article 10, "State power in the Russian Federation [is]
25 exercised on the basis of the separation of the legislative,

1 executive and judiciary branches," Konst. RF art. 10; it is
2 exercised "by the President of the Russian Federation, the
3 Federal Assembly (Council of the Federation and State Duma),
4 the government of the Russian Federation and courts of the
5 Russian Federation." Id. art. 11(1) (emphasis added). The
6 Government's role as an executor of state power is
7 reiterated in Article 78: "[t]he President of the Russian
8 Federation and the government of the Russian Federation
9 shall, under the Constitution [of the Russian Federation],
10 exercise the authority of federal state power throughout the
11 territory of the Russian Federation. Id. art. 78(4)
12 (emphasis added).

13 Chapter 6 of the Russian Constitution deals
14 specifically with the Government and its objects. Under
15 Article 110:

16 (1) Executive power in the Russian Federation
17 shall be exercised by the Government of the
18 Russian Federation.

19 (2) The Government of the Russian Federation shall
20 consist of the Chairman of the Government of the
21 Russian Federation, Deputy Chairmen of the
22 Government and federal ministers.

23 Id. at art. 110. Taken together, the Constitutional
24 description of the Government as a repository and designated
25 executor of "state" power weighs in favor of immunity.

1 Appointment of governing members. The President of the
2 Federation (himself an executor of state power) appoints the
3 Chairman of the Government with the consent of the State
4 Duma. Id. art. 83(a). The President also has the right to
5 "preside" over meetings of the Government and can "decide on
6 resignation of the Government." Id. arts. 83(b), (c).
7 Moreover, the President has plenary power to "appoint and
8 dismiss deputy chairmen of the Government . . . and federal
9 ministers as proposed by the Chairman of the
10 Government . . ." Id. art. 83(e). These provisions suggest
11 that the members of the Government serve entirely at the
12 pleasure of the president, who is a separate (and by
13 implication, hierarchically superior) executor of state
14 power. These circumstances militate in favor of immunity.
15 Compare Lake Tahoe, 440 U.S. at 401-02 (finding no immunity
16 and noting that six of ten governing members of the Tahoe
17 Regional Planning Agency ("TRPA") are appointed by counties
18 and cities; only four are appointed by Nevada and
19 California); Mancuso, 86 F.3d at 295 ("This factor . . .
20 favors a finding of immunity: all three board members are
21 appointed by the Governor of New York with the advice and
22 consent of the state Senate.")

1 Funding: The record on this factor is not voluminous.
2 Still, the Federation's own expert adduces facts that would
3 favor immunity:

4 According to the 1964 Civil Code (article 24),
5 which was still in force in 1991-92 when the Loan
6 agreements were signed, there were State
7 institutions, which generally could freely dispose
8 of money received from the state budget within
9 their estimates. The Government is such an
10 institution. Similarly, certain assets are
11 conceded to the Government's management for the
12 Government's need. The Government receives
13 funding from the State in accordance with its
14 budget. And it can use that funding, among other
15 things, to pay salaries to personnel, to pay for
16 electricity, water supply and waste removal, and
17 to enter into certain civil contracts.

18 (Opinion of Alexei Avtonomov at ¶ 9.) The Government's
19 financial dependency on the Federation favors immunity.
20 Compare Lake Tahoe, 440 U.S. at 402 (funding provided by
21 counties [i.e., non-immune political subdivisions], not the
22 States of California and Nevada); Mancuso, 86 F.3d at 295
23 (noting that New York state was not required to fund the New
24 York State Thruway Authority; finding no immunity and
25 observing that "the limited nature of [any] instances of
26 state funding establish that in general the Thruway
27 Authority is self-funded").

28 The entity's functions. This factor weighs heavily in
29 favor of immunity. The duties of the Russian Government,

1 set forth below in extenso, are enumerated in the Russian
2 Constitution:

3 (1) The Government of the Russian Federation shall:

4 (a) develop and submit the federal budget to the
5 State Duma and ensure compliance therewith; submit
6 a report on the execution of the federal budget to
7 the State Duma;

8 (b) ensure the implementation in the Russian
9 Federation of a uniform financial, credit and
10 monetary policy;

11 (c) ensure the implementation in the Russian
12 Federation of a uniform state policy in the field
13 of culture, science, education, health, social
14 security and ecology;

15 (d) manage federal property;

16 (e) adopt measures to ensure the country's
17 defense, state security and the implementation of
18 the foreign policy of the Russian Federation;

19 (f) implement measures to ensure legality, the
20 rights and freedoms of citizens, protect property
21 and public law and order and control crime;

22 (g) exercise any other powers vested in it by the
23 Constitution of the Russian Federation, federal
24 laws and the decrees of the President of the
25 Russian Federation.

26 (2) The work of the Government of the Russian
27 Federation shall be regulated by federal constitutional
28 law.

29 RF Konst. art. 114 (emphasis added). These mandates are
30 obligations of a state. Local governments do not make
31 monetary policy, implement foreign policy, or provide for

1 national defense. Compare Lake Tahoe, 440 U.S. at 402 ("The
2 regulation of land use is traditionally a function performed
3 by local governments."); Mancuso, 86 F.3d at 295 (noting
4 that the New York State Thruway operates and constructs
5 roads and bridges throughout the entire state, "a function
6 the state would normally provide"). Broad objects of state
7 government in the Federation are set forth in Article 7:

8 The Russian Federation shall protect the work and
9 health of its people, establish a guaranteed
10 minimum wage, provide state support for family,
11 motherhood, fatherhood and childhood, and also for
12 the disabled and for elderly citizens, develop a
13 system of social services and establish government
14 pensions, benefits and other social security
15 guarantees.

16 Konst. RF art. 7(2). As the district court noted, the loan
17 agreements underlying this arbitration dispute

18 extended credits and loans totaling \$550,000,000
19 to the [Government] for the purchase of durable
20 goods, consumer goods, agro-industrial products,
21 and foodstuffs On January 29, 1992, Noga
22 and the Government . . . entered into a loan
23 agreement in which Noga extended \$400,000,000 of
24 credit for the purchase of pesticides and other
25 agro-chemical products.

26 Compagnie Noga D'Importation et D'Exportation S.A. v.
27 Russian Federation, No. 00 Civ. 0632, 2002 WL 31106345 at *2
28 (S.D.N.Y. Sept. 19, 2002). The products purchased (and the

1 magnitude of the loans) suggest that the Government entered
2 into these agreements for the benefit of the Russian people
3 and economy.

4 Veto power. Article 115 of the Russian Constitution
5 provides that:

6 The decrees and executive orders of the Government
7 of the Russian Federation may be repealed by the
8 President of the Russian Federation if they
9 contravene the Constitution of the Russian
10 Federation, federal laws and the decrees of the
11 President of the Russian Federation.
12

13 Konst. RF art. 115(3). This language suggests that the
14 Government can enact decrees and orders, independent of the
15 President, that are not subject to presidential veto. But
16 the President's power to fire Government ministers at will
17 and call for the Government's resignation is a veto de
18 facto, i.e., the Government is not going to do anything the
19 President opposes. Compare Lake Tahoe, 440 U.S. at 402
20 (noting that the TRPA's authority "within its jurisdiction
21 is not subject to veto at the state level"); Mancuso, 86
22 F.3d at 295 (noting that once appointed, the actions of
23 Thruway officials are "essentially unreviewable either by
24 other state officers, or by the Legislature"). The
25 Federation's expert agrees with this view: "[t]he President
26 may also dismiss in any moment the Government. The

1 Government is politically dependent upon the President and
2 the Parliament and the Government's authority is limited."
3 (Opinion of Alexei Avtonomov at ¶ 12.)

4 Whether the Entities Obligations are binding on the
5 State. This inquiry is somewhat circular here; nonetheless:
6 (i) the Government appears to be entirely dependent on the
7 State for funding (see discussion of the funding factor,
8 supra); and (ii) according to Noga's expert, "the national
9 internal debt of the Russian Federation [was] defined as the
10 liabilities of the Russian Federation Government in the
11 currency of the Russian Federation (hereinafter 'the
12 liabilities of the Russian Federation') to legal entities
13 and individuals'" through at least the year 2000. (Opinion
14 of Mikhail Issakovich Braginsky (quoting Art. 1 Russian
15 Federation Law No. 3877-1 of the 13th of November 1992).)

16 The Federation's expert counters that the Government's loan
17 agreement with Noga was denominated in U.S. dollars and
18 notes that the law has been repealed, but offers no evidence
19 that the Government's debts are its own, independent of the
20 Federation.

1 Taken together, all of the Lake Tahoe factors as
2 applied to the Russian Government militate in favor of
3 hypothetical Eleventh Amendment immunity; that analysis
4 indicates that the Federation is properly liable as a
5 "party" against whom Noga's arbitration award can be
6 enforced. The majority opinion reaches essentially the same
7 conclusion in its analysis of Russian law. See [**Maj. Op.**
8 **at 16-18.**] But in the context of a confirmation action
9 under the FAA, the status of the Government under its
10 creating documents and the other "arm of the state" criteria
11 is properly examined under federal common law.

12 * * *

13 I subscribe to the majority opinion's discussion of
14 federal common law in all other respects, and concur in the
15 result that the Russian Federation is a proper party to the
16 underlying § 207 confirmation proceeding and should be
17 liable for any recovery to which Noga may be entitled
18 pending resolution of the issues remanded for further
19 consideration.