United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7057 **September Term, 2018**

FILED ON: MAY 28, 2019

PAO TATNEFT,

APPELLEE

v.

UKRAINE, C/O MR. PAVLO PETRENKO, MINISTER OF JUSTICE,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00582)

Before: WILKINS and KATSAS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

JUDGMENT

[1] This case was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is

[2] **ORDERED** and **ADJUDGED** that the judgment of the United States District Court for the District of Columbia be affirmed.

[3] This case arises from a dispute among the shareholders of Ukrtatnafta, a Ukrainian oil company. The primary shareholders were Ukraine, Tatarstan (a republic of the Russian Federation), and Tatneft (a Tatarstan oil company). When Ukrainian courts invalidated Tatneft's shares, Tatneft sought arbitration under the Russia-Ukraine Bilateral Investment Treaty. An arbitral tribunal in Paris awarded Tatneft $112 million in damages against Ukraine.

[4] Tatneft petitioned the district court to confirm and enforce the award under the New York Convention—a treaty in which signatories agree to enforce arbitral awards made in other signatory countries. Ukraine moved to dismiss the petition on sovereign-immunity and *forum non conveniens* grounds. The district court concluded that the waiver and arbitration exceptions to the Foreign Sovereign Immunities Act (FSIA) apply to this case. The court also rejected the *forum non conveniens* defense. Ukraine sought interlocutory review of the immunity question under the collateral-order doctrine. We affirm based on the waiver exception.

[5] Ukraine contends that Tatneft failed to timely raise the waiver exception before the district court. But that court excused the forfeiture because Ukraine had ample opportunity to respond and thus suffered no prejudice. This decision was not an abuse of discretion, so we decline to revisit it. *See Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014).

[6] Ukraine next argues that an arbitration agreement cannot constitute an implied waiver of foreign sovereign immunity. Otherwise, Ukraine reasons, the general waiver exception, which applies whenever a foreign state "has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1), would swallow up the more specific arbitration exception, which applies only to actions to enforce certain arbitration agreements, and only under certain conditions, *id.* § 1605(a)(6).

[7] Ukraine is mistaken. To begin, the waiver exception requires a foreign sovereign to give up its immunity defense intentionally, whereas the arbitration exception does not. *See Creighton Ltd. v. Qatar*, 181 F.3d 118, 126 (D.C. Cir. 1999). So, while the exceptions partially overlap, each contains its own unique elements. Ukraine responds that the arbitration exception incorporates an intentionality requirement by stating, as one of its four conditions, that "paragraph (1) of this subsection [*i.e.*, the waiver exception] is otherwise applicable." 28 U.S.C. § 1605(a)(6)(D). But the conditions in the arbitration exception are disjunctive—listed and linked by the word "or." *Id.* § 1605(a)(6). And none of the other conditions, which turn on the place of arbitration, the kind of governing treaty, and the nature of the underlying claims, requires an intentional waiver. *Id.* § 1605(a)(6)(A)–(C). Because the overlap is incomplete, no structural considerations justify narrowing the waiver exception.

[8] The waiver exception applies to this case. In *Creighton*, we concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states. 181 F.3d at 123. Because Ukraine and the United States have both signed the Convention, Ukraine falls within the waiver exception as *Creighton* construed it.

[9] Ukraine fails to distinguish *Creighton*. It invokes *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), in which the Supreme Court refused to find a waiver from the signing of an international agreement "contain[ing] no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." *Id.* at 442–43. But *Creighton* specifically distinguished *Amerada Hess* on the ground that signatories to the New York Convention must have contemplated arbitration-enforcement actions in other signatory countries, including the United States. 181 F.3d at 123. Ukraine contends that, because the United States afforded foreign countries absolute sovereign immunity until the FSIA was enacted in 1976, Ukraine could not have anticipated being subjected to enforcement in the United States when it signed the Convention in 1958. But the United States transitioned from an absolute to a "restrictive" view of foreign sovereign immunity in 1952—six years earlier. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–87 (1983). In any event, Ukraine raises an argument not that *Creighton* is distinguishable, but that it was wrongly decided. Because *Creighton* controls, the waiver exception applies here.

[10] Finally, we decline to exercise pendent jurisdiction over the *forum non conveniens* issue, which is neither "inextricably intertwined" with the immunity issues nor "necessary to ensure meaningful review" of those issues. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 199 (D.C. Cir. 2004) (quotation marks omitted).

[11] Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk