

Claim May Proceed Against Egyptian Defendants Under the “Commercial Activity” Exception to FSIA

The Foreign Sovereign Immunities Act of 1976 (“FSIA”) is a federal law that provides immunity to a foreign state for public acts, but not private acts, from being sued in U.S. courts. (28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611.) Generally, FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the U.S. courts. (*Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).) If a foreign defendant qualifies as a “foreign state” (or its political subdivisions, agencies, or instrumentalities) under the FSIA (§ 1603), then it is immune from being sued in any U.S. court, unless a statutory exception to immunity applies. One such exception is the “commercial activity” exception, which provides that a foreign state will not be able to avail itself of immunity afforded by the FSIA if it conducts “a regular course of commercial conduct or a particular commercial transaction or act” that has “substantial contact” with the U.S. (§1603). “Commercial activity” under the FSIA refers to “only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns.” (*Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993); *Argentina v. Weltover, Inc.*, 405 U.S. 607, 614 (1992).) There must also be a sufficient connection between the asserted cause of action against the foreign state and its commercial activity. (*Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796-97 (9th Cir. 1989).)

The “commercial activity” exception was recently reviewed and analyzed by the United States Ninth Circuit Court of Appeal (“Ninth Circuit”) in *Embassy of the Arab Republic of Egypt, The Arab Republic of Egypt, The Cultural and Educational Bureau v. Lasheen, et al.*, 603 F.3d 1166 (9th Cir. 2010). In this case, Mohamed E. Lasheen (“Lasheen”), an Egyptian national who came to the U.S. as a visiting scholar, was enrolled in the Embassy of Egypt Health Care Benefits Plan (“Plan”), administered by Loomis, an American company that had contracted with the Egyptian Cultural and Educational Bureau to administer the Plan. The contract contained an indemnification clause between Loomis and the Egyptian defendants. While enrolled in this Plan, Lasheen was diagnosed with, and ultimately died of, liver cancer. Loomis denied a liver transplant request on the ground that his health problems resulted from a preexisting condition not covered by the Plan. The decedent’s estate sued Loomis and the Egyptian defendants. Loomis then cross-claimed against the Egyptian defendants based upon the indemnification clause set forth in their contract. The U.S. District Court ruled that the Egyptian defendants could be sued in U.S. court by Loomis (the party with whom the Egyptian defendants had contracted) because the “commercial activity” exception applied. The Egyptian defendants appealed to the Ninth Circuit.

The Ninth Circuit affirmed that the “commercial activity” exception applied, finding that “[b]y contracting with a company to manage [the Plan] and agreeing to indemnify [Loomis], the Egyptian Defendants did not act with the powers peculiar to a sovereign, but instead acted as private players in the market.” (Lasheen, *supra*, 603 F.3d at 1171.) The Court further found that the Egyptian defendants had substantial contact with the United States and that there was a substantial connection between the breach of contract claim and the Egyptian defendants activities in the United States. The Court noted that: i) the Egyptian defendants paid Loomis with funds directly from the Egyptian Government; ii) all Plan documents were authorized and signed by the Egyptian Government; and iii) the Cultural and Educational Bureau and Loomis were both located in the United States during the relevant time periods.

For any foreign state, or any entity associated with a foreign state, that is doing business in the United States, and in particular entering into contracts and business arrangements in the United States, the FSIA and its “commercial activity” exception is an important consideration when analyzing the potential liabilities that can be imposed in the U.S. courts if a dispute arises.

For Further Information, Please Contact:
Nicholas P. Connon, Co-Managing Partner; Chair, Middle East Practice Group
Tel: +1.626.638.1757

Middle East Practice Group

Nicholas P. Connon, +1.626.638.1757, nconnon@connonwood.com
Paro Astourian, +1.626.371.0338, pastourian@connonwood.com

David R. Scheidemantle, +1.626.638.1752, dscheidemantle@connonwood.com
Robert A. de By, +1.626.638.1762 / +44.203.328.9010, rdeby@connonwood.com

www.connonwood.com