

**D.C. CIRCUIT CONFIRMS RULE FOR APPLICATION OF DIRECT EFFECT EXCEPTION TO SOVEREIGN IMMUNITY**

On August 29, 2014, a three-judge panel of the United States Court of Appeals for the District of Columbia issued a 2-1 decision in *Odhiambo v. Republic of Kenya*,<sup>1</sup> which affirmed the dismissal of claims against the Republic of Kenya, finding that the Court lacked jurisdiction under the Foreign Sovereign Immunities Act (“FSIA”). The majority opinion is important because it reaffirms the test for determining whether there is jurisdiction under the direct effect clause of the commercial activity exception of the FSIA, a commonly invoked exception to sovereign immunity. The decision is also important because many cases against foreign sovereigns are litigated in the D.C. Circuit; by statute, it is the default venue for cases against foreign sovereigns, where cases may be brought even when the alleged underlying acts or omissions occurred elsewhere.<sup>2</sup>

**BACKGROUND**

The case involved a breach of contract claim against the government of Kenya. Plaintiff, Odhiambo, responded to an ad issued by the Kenyan Revenue Authority promising monetary rewards in exchange for information about tax evasion. The rewards program provided that Kenya would pay people who provided information a small percentage of the amount of undisclosed

taxes either identified or recovered. The payments would be made in Kenyan schillings. Op. 2.

Odhiambo, an auditor at a private bank in Kenya, provided information on hundreds of account holders with potential deficiencies. In exchange, Kenya made some rewards payments to Odhiambo, but he believed he was entitled to more. *Id.*

At some point, Odhiambo’s role as an informant became known. He received phone calls telling him to leave Kenya and was also the victim of alleged police harassment. As a result, Odhiambo, supported by Kenyan officials, applied for, and was granted asylum in the United States. *Id.*

After relocating to the United States, Odhiambo continued to assert that Kenya owed him more money for the information that he had provided. To that end, he had several in-person meetings with Kenyan officials in the United States. *Id.* When he was unable to resolve the dispute, he sued Kenya for breach of contract in federal court in Washington, D.C., seeking \$24.5 million in damages.

Kenya moved to dismiss under the FSIA, which provides foreign sovereigns with immunity from the jurisdiction of courts in the United States unless one of the statutory exceptions to immunity applies.<sup>3</sup> Odhiambo claimed that there was jurisdiction under the commercial activity

<sup>1</sup> No. 13-7100, \_\_\_F.3d\_\_\_, 2014 WL 4251156, (D.C. Cir. Aug. 29, 2014) [hereinafter, “Op.”].

<sup>2</sup> See 28 U.S.C. § 1391(f).

<sup>3</sup> See 28 U.S.C. §§ 1604-5.

exception, which, generally speaking, provides an exception to immunity for cases based upon commercial activity that either occurred in or has some connection to the United States.<sup>4</sup>

The District Court dismissed the case, finding that no exception to sovereign immunity applied.<sup>5</sup> The Court of Appeals agreed.

#### THE COURT OF APPEALS' DIRECT EFFECT ANALYSIS

The most important aspect of the Court of Appeals' opinion is its analysis of the third clause of the commercial activity exception, the direct effect clause. That provision extends the jurisdiction of United States courts to activity in a foreign state if that activity is performed in connection with commercial activity and causes a direct effect in the United States as follows:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—in which the action is based . . . [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

The Court began by considering whether Odhiambo's suit satisfied the first part of clause

three, the requirement that the case be "based upon an act" outside the United States "in connection with the commercial activity of the foreign state." *Id.* The Court explained that it did because the claim was "based upon the 'act' of Kenya's alleged breach of contract, which happened outside the United States in connection with the rewards offer – presumptively commercial activity of the Kenyan government." Op. 6. The remaining question was whether the alleged breach caused a "direct effect in the United States." *Id.*

To answer that question, the Court reviewed the relevant case law from the Supreme Court and the D.C. Circuit. It concluded that these cases "draw a very clear line: For purposes of clause three of the FSIA commercial activity exception, breaching a contract that establishes or necessarily contemplates the United States as a place of performance causes a direct effect in the United States, while breaching a contract that does not establish or necessarily contemplate the United States as a place of performance does not cause a direct effect in the United States." *Id.* at 8. In short, the majority opinion "require[es] an express or implied place-of-performance clause specifying the United States" for there to be jurisdiction under the direct effect clause in a breach of contract case. *Id.* at 12 (Pillard, J., dissenting in part).

With respect to Odiambo's claim, the Court therefore focused on the terms of the rewards offer. The events that had occurred in the United

<sup>4</sup> See 28 U.S.C. § 1605(a)(2). Plaintiff also claimed that there was jurisdiction under the waiver exception, 28 U.S.C. § 1605(a)(1). Both the District Court and the Court of Appeals rejected that assertion.

<sup>5</sup> 930 F. Supp. 2d 17, 31-33 (D.D.C. 2013).



States, such as Odhiambo’s relocation and his meetings with Kenyan officials, were simply irrelevant to the direct effect analysis. Instead, based on the terms of the rewards offer, the Court concluded that the alleged breach could not have caused a direct effect because it could not be inferred that “Kenya promised to perform specific obligations in the United States or was supposed to pay recipients in the United States.” *Id.* at 8 (internal quotation marks omitted). As a result, the Court held that the alleged breach of the rewards offer could not have caused a direct effect in the United States. *Id.* at 8-9.

**IMPLICATIONS**

The decision in *Odhiambo* confirms the rule, established by prior case law, that in order for the breach of a contractual obligation to cause a direct effect in the United States, the contract must have necessarily contemplated performance of that obligation in the United States. This decision should therefore aid sovereign clients both in structuring their contracts and in resolving contract-based claims in the United States.

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