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Business Law

Non-U.S. Corporations: Do You Know One When You See It?

It's an especially important question for lawyers and courts, because corporations are often treated differently than other business entities for federal jurisdictional purposes.

By Stephen Proctor

Corporations and other limited liability entities have been praised as the engines driving the success of modern economies around the world. Some writers even forecast that increasing use of corporations by China and India may help them overtake the United States and European nations.

But do we know one when we see one? This seemingly abstract question is actually critical to how we represent, deal with, and sue business entities, particularly those based overseas. And it is an especially important question for lawyers and courts, because business entities are treated differently for federal jurisdictional purposes.

A corporation or joint-stock company?

This is illustrated in the recent seventh circuit case, *White Pearl Inversiones SA (Uruguay) and Sanlo Corp v Cemusa, Inc*, (No. 10-2739 decided July 26, 2011), written by Judge Easterbrook. The case was a business dispute brought in federal court under international diversity jurisdiction. For this purpose, one of the parties, White Pearl, was assumed by the parties (and their attorneys) to be a "corporation" of Uruguay.

Not so fast, said Judge Easterbrook, who on his own asked whether the parties should even be in U.S. federal court. He discussed how business entities are treated for jurisdictional purposes. Ordinary business corporations are created under state law, so they have citizenship of their state of organization.

But, said Judge Easterbrook, other entities, such as limited liability companies and limited partnerships, do not have separate citizenship. Rather, they are "disregarded" for jurisdictional purposes. For example, to create diversity with a limited liability company for federal jurisdiction, the citizenship of all of its members must also be diverse. Many attorneys, unaware of this distinction, have found their cases bounced from federal court.

Judge Easterbrook required the *White Pearl* attorneys to determine what type of entity White Pearl actually is. It turned out to be a "sociedad anomima" (or S.A.), equivalent to a joint-stock company.

The U.S. Supreme Court (in 1889!) held that a joint-stock company is not a corporation for diversity jurisdiction and should be treated as a partnership. So the citizenship of every owner had to be separately evaluated. In the end, no doubt to the relief of counsel for both parties, the court found that it could retain jurisdiction since the two investors of White Pearl were diverse, both being Brazilian citizens.

A corporation or a state-owned enterprise?

More recently, especially in developing countries, we have seen the rise of another form of entity, the state-owned enterprises (SOE). SOEs seem to have come full circle from original corporate entities.

In their excellent 2005 book, *The Company, A Short History of a Revolutionary Idea*, John Micklethwait and Adrian Woodridge provided a history of the joint-stock corporation. According to the authors, originally corporations were created by governments. The concept then expanded so that corporations could be established by individuals, and could even compete with their own governments.

The trend in the Western economies, such as the United States and Europe, is privatization - limiting the role of government in private enterprise and even expanding private enterprise to assume traditional public functions. But many countries take a different approach, using state-owned enterprises to advance their economies.

Here also, how we view these entities has critical legal implications. This is illustrated by a recent case written by Judge Friedman out of the U.S. District Court, District of Columbia. *GSS Group Ltd v National Port Authority*, 774 F Supp 2d 134 (DDC 2011).

Like *White Pearl*, this was a case about jurisdiction. National Port Authority (NPA) was a public corporation registered under the laws of Liberia. NPA hired GSS Group to build and operate a new container park at the Freeport in Monrovia, Liberia. In a dispute that went to arbitration in London (as provided in the parties' contract), GSS Group won an arbitration award of more than $44 million and sought to enforce it in U.S. courts.

The case hinged on whether NPA was a corporation or a foreign sovereign entity. If it is a corporation, NPA must have had "minimum contacts" with the United States to satisfy the Due Process Clause and be subject to jurisdiction in our courts. However, a foreign sovereign nation is not protected by the Due Process Clause.

Judge Friedman dismissed GSS Group's petition, since GSS Group failed to show that NPA had sufficient minimum contacts for jurisdiction or that NPA was so closely associated with Liberia that NPA should be treated as a foreign entity.

Essential questions

So, in the end, how we view business entities is an important legal question. Are they only creatures of their owners or members and to be disregarded? Or, if owned by a government, should they be treated as sovereign entities? How these questions are answered may determine who our client is, who our contract should be with, who we sue, and whether we are even in the right court.

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