

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BAHRAIN MARITIME & MERCANTILE INTERNATIONAL B.S.C. DbA BMMI,)	
)	
Plaintiff,)	No. 09-739 C
)	(Judge Merow)
v.)	
)	
THE UNITED STATES,)	
)	
Defendant.)	
)	

**DEFENDANT’S REPLY TO PLAINTIFF’S RESPONSE TO
DEFENDANT’S MOTION FOR A MORE DEFINITE STATEMENT**

Pursuant to Rules 7, 12(b)(1), 12(h)(3), and 12(e) of the Rules of the United States Court of Federal Claims (“RCFC”), defendant, the United States, respectfully replies to the objection of plaintiff Bahrain Maritime & Mercantile International B.S.C. (“BMMI”) to defendant’s Motion for a More Definite Statement (“Pl. Obj.”). For the reasons set forth below and for the reasons stated in our moving brief, defendant requests that this Court grant our motion for a more definite statement and issue an order requiring BMMI to amend its complaint to set forth a basis for the Court’s jurisdiction that satisfies 28 U.S.C. § 2502(a) (the “Reciprocity Act”). Alternatively, the Court should dismiss BMMI’s complaint for lack of jurisdiction.

To establish this Court’s jurisdiction to entertain BMMI’s complaint against the United States, BMMI must show that citizens of the United States may prosecute claims against the Kingdom of Bahrain in the courts of that country on the same terms as native citizens. See 28 U.S.C. § 2502. To date, BMMI has yet to make this required showing of reciprocity. Instead, BMMI objects to our motion, arguing that: (1) BMMI’s complaint is sufficiently specific and not vague; (2) the Reciprocity Act is not applicable in this case since jurisdiction is based here upon the Contract Disputes Act (“CDA”); (3) the Election Doctrine precludes application of the

Reciprocity Act in CDA cases; and (4) the Reciprocity Act is inapplicable in cases in which the claim being disputed is a Government claim. For the reasons that follow, these arguments are without merit.

I. A Rule 12(e) Motion For A More Definite Statement Is Entirely Appropriate

In response to a Rule 12(e) motion, the Court has previously ordered foreign litigants to amend pleadings that failed to properly allege reciprocity. See Humphries v. United States, 44 Fed. Cl. 81, 83 (1999). Similarly, a Rule 12(e) motion is entirely appropriate here. BMMI's complaint is "vague" on the issue of reciprocity because it is completely silent on the matter. And instead of responding to our motion by pleading reciprocity and supporting it with sufficient evidence, BMMI's objection remains silent as to reciprocity and makes the arguments listed above. The Court would be justified in granting our Rule 12(e) motion, just as it would in granting a Rule 12(b)(1) motion to dismiss. BMMI has failed to carry its 28 U.S.C. § 2502 pleading burden.

II. The Reciprocity Act Applies To Plaintiffs Asserting CDA Claims

BMMI is wrong when it argues that the Reciprocity Act is not applicable in cases where jurisdiction¹ is based upon the CDA, 41 U.S.C. § 609(a)(1). Pl. Obj. at pp. 10-13; cf. id. at p. 12 (conceding that the Reciprocity Act is applicable to cases filed in the Court of Federal Claims

¹ The court's consideration of the Reciprocity Act has not been entirely clear. The court has viewed the Reciprocity Act in terms of personal jurisdiction (Atamirzayeva v. United States, 77 Fed. Cl. 378, 379 n.2 (2007) ("Defendant's motion does not raise the issue of whether the Court has personal jurisdiction over Plaintiff as required by the Reciprocity Act.") (citing 28 U.S.C. § 2502)) and standing (Paradissiotis v. United States, 49 Fed. Cl. 16, 18 n.1 (2001) ("Because plaintiff is a citizen of a foreign country, the court must determine whether he has standing to bring a claim before this court.") (citing 28 U.S.C. § 2502)). The Reciprocity Act should be viewed, however, more as a "condition precedent" to the Court's jurisdiction. Aktiebolaget Imo-Industri v. United States, 54 F. Supp. 844, 848 (Ct. Cl. 1944) (considering 28 U.S.C. § 251, reenacted with minor changes as 28 U.S.C. §2502); cf. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134 (2008) ("As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as 'jurisdictional.'").

other than those brought under the CDA). More specifically, BMMI argues that the Reciprocity Act is a general jurisdiction statute, whereas the CDA, as implemented by the Tucker Act, is a specific jurisdictional statute. Pl. Obj. at pp. 10-13. Noting that in statutory interpretation “specific provisions control over more general provisions,” BMMI continues, the “strictures of the Reciprocity Act . . . are inconsistent with the unconditional right afforded Federal Government Contractors” to contest CDA claims in the Court of Federal Claims under the CDA. Id.

The Reciprocity Act, however, “assumes that the alien’s claim is one which satisfies the jurisdictional specifications of the statute defining the jurisdiction of the court as to ‘subject matter and character.’” Aktiebolaget Imo-Industri v. United States, 54 F. Supp. 844, 848 (Ct. Cl. 1944) (considering 28 U.S.C. § 251, reenacted with minor changes as 28 U.S.C. §2502); see also 28 U.S.C. § 2502 (“Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court’s jurisdiction.”) (emphasis added). Ultimately, the Reciprocity Act “denies consent to an alien, who does not show the reciprocal right to sue in the courts of his country, to sue on any claim in this court, unless the statute consenting to the suit on his particular type of claim is interpreted as not being qualified by [the Reciprocity Act].” Aktiebolaget Imo-Industri, 54 F. Supp. at 848.

Despite BMMI’s assertion to the contrary, the CDA has not been – nor should it be – interpreted as not being qualified by the Reciprocity Act. BMMI’s reliance upon Brickwood Contractors, Inc. v. United States, 77 Fed. Cl. 624, 629-30 (2007) is misplaced. The court in Brickwood held that the specific statute of limitations set forth in the CDA trumped the general

statute of limitations for claims filed in the Court of Federal Claims. Id. at 629-30. The court also noted that 28 U.S.C. § 2501 is the general statute of limitation applicable to all cases filed in the Court of Federal Claims “in the absence of a specific statutory provision, such as that found in the CDA.” Id. No specific statutory provision is set forth in the CDA, however, addressing suits by foreign plaintiffs. Such silence may be sufficient in other situations, but here BMMI is asking the Court to expand a statutory limit to the United States’ waiver of sovereign immunity (i.e., to exempt all plaintiffs filing CDA claims from satisfying the Reciprocity Act).²

Although not dealing with the Reciprocity Act, Furash & Company v. United States, 252 F.3d 1336 (Fed. Cir. 2001) is instructive. In Furash, the Federal Circuit considered whether the non-appropriated funds doctrine bars the Court of Federal Claims from exercising jurisdiction over plaintiff’s CDA claim, brought pursuant to the Tucker Act. Id. The Federal Circuit held that Congress “did not intend for the CDA to expand the court’s jurisdiction to reach non-appropriated fund activities other than those specifically identified in the Tucker Act and incorporated by reference in the CDA.” Id. at 1343-44.

As Congress has not unequivocally expressed either in the CDA a waiver of sovereign immunity for foreign plaintiffs or in the Reciprocity Act a waiver of sovereign immunity for plaintiffs filing CDA claims, no such waiver should be read into those acts. In contrast, Congress unequivocally expressed an exception to the Reciprocity Act in the act itself. See 28 U.S.C. § 2502(b) (“See section 7422(f) of the Internal Revenue Code of 1986 for exception with

² The Court of Federal Claims’ jurisdiction to entertain a suit is circumscribed by the extent to which the United States has waived its sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976); see also Brickwood, 77 Fed. Cl. at 626 (case cited approvingly by BMMI). A waiver of sovereign immunity of the United States cannot be implied, but must be unequivocally expressed by Congress. Testan, 424 U.S. at 399; Brickwood, 77 Fed. Cl. at 626. Such waivers are to be strictly construed. Brickwood, 77 Fed. Cl. at 626 (citing United States v. Sherwood, 312 U.S. 584, 590 (1941)).

respect to suits involving internal revenue taxes.”). In its opposition, BMMI argues that the CDA “makes no distinction between Federal Government Contractors who are citizens of the United States and [those] who are citizens of foreign Governments.” Pl. Obj. at p. 12. Such silence, however, does not amount to an unequivocal expression by Congress. Even in cases involving CDA claims, the Reciprocity Act’s pleading requirements must be satisfied.

III. The Election Doctrine Has No Bearing On The Application Of The Reciprocity Act To CDA Claims

BMMI next asserts that, because the CDA permits government contractors to elect to proceed in this Court instead of before the Board of Contract Appeals, procedural requirements that ordinarily would apply to cases in this Court – such as the Reciprocity Act – are inapplicable in a contract dispute if the Board of Contract Appeals would not be bound by those same procedural requirements. Pl. Obj. at p. 15. To support this argument, BMMI cites 41 U.S.C. § 609(a)(1), which permits government contractors to litigate contract disputes in the Court of Federal Claims “notwithstanding any rule of law to the contrary.” Pl. Obj. at p. 15. Rules applicable to the Board of Contract Appeals, however, do not necessarily translate to similar rules in the Court of Federal Claims. For example, RCFC 83.1(c)(8) requires that “[a] corporation may only be represented by counsel.” No such rule exists in the Boards of Contract Appeals. See, e.g., Protest of Computer Lines, 1986 WL 20239 (G.S.B.C.A. Oct. 9, 1986) (corporation proceeding without representation by counsel); In re Mell, Brownell & Baker, 2001 WL 41189 (D.C.C.A.B. Jan. 18, 2001) (same). Notwithstanding the Board’s more permissive approach, the Court of Federal Claims strictly adheres to Rule 83.1(c)(8) and requires corporations to be represented by counsel. See, e.g., Curtis v. United States, 61 Fed. Cl. 511, 511-12(2004) (noting prior dismissal of complaint upon a motion to dismiss for failure of corporation to be represented by counsel) (citing RCFC 83.1(c)(8)). Furthermore, 41 U.S.C. §

609(a)(3) states that any such action “shall proceed de novo in accordance with the rules of the appropriate court.” BMMI’s election doctrine argument is without merit. Statutes addressing this Court’s jurisdiction over litigants – such as the Reciprocity Act – apply in this case, regardless of the fact that BMMI elected to raise its CDA claims in the Court of Federal Claims.

IV. Plaintiff’s Attempt To Distinguish *Mexican Intermodal Equipment* Fails

BMMI next asserts that this Court has only applied the Reciprocity Act in one CDA case, *Mexican Intermodal Equipment S.A. de C.V. v. United States*, 61 Fed. Cl. 55 (2004), a case BMMI attempts to distinguish by noting that it involved a claim by the contractor against the Government, while the instant case involves a claim by the Government against the contractor. This distinction is irrelevant to the application of the Reciprocity Act because *Mexican Intermodal Equipment* held that the Reciprocity Act is applicable in CDA cases. Id. at 61 (“The jurisdiction of this court over claims brought by a foreign plaintiff . . . is governed by the reciprocity provision in 28 U.S.C. § 2502.”). The individual facts underlying the CDA case are of no import.

Moreover, the United States’ decision to “voluntarily” “deal with Plaintiff BMMI,” Pl. Obj. at pp. 14 and 18, does not alleviate BMMI’s burden to demonstrate reciprocity. The fact that the Marine Corps in *Mexican Intermodal Equipment* had “voluntarily” entered into a contract with a foreign entity had no bearing on the alien’s sole burden of “affirmatively demonstrating reciprocal rights to sue the alien sovereign in its courts.” Id. at 61. The Court in *Mexican Intermodal Equipment* still performed a Reciprocity Act analysis. The jurisdiction question here is not about whose claim is at issue or what subject matter³ is being disputed, but

³ The Court has considered the impact of the Reciprocity Act in cases in which the subject matter related to the Fifth Amendment’s Takings Clause (*El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 756 (2003)), a claim for unpaid treaty annuities (*Pottawatomie Nation in Canada v. United States*, 27 Fed. Cl. 388, 390 (1992)), a claim for unpaid monies

rather about whether the conditions precedent to the Court of Federal Claims' jurisdiction have been met. Despite BMMI's attempt to distinguish Mexican Intermodal Equipment; the case remains controlling authority.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant our motion for a more definite statement and issue an order requiring BMMI to amend its complaint to set forth a basis for the Court's jurisdiction that satisfies 28 U.S.C. § 2502(a). In the alternative, the Court should dismiss BMMI's complaint for lack of jurisdiction.

Respectfully submitted,

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under an alleged informant agreement with the FBI and INS (Humphries v. United States, 44 Fed. Cl. 81 (1999) and 51 Fed. Cl. 35, 35 (2001)), and contract claims (Mexican Intermodal Equip., S.A. de C.V. v. United States, 61 Fed. Cl. 55 (2004)).

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CERTIFICATE OF FILING

I hereby certify that, on this 18th day of March, 2010, a copy of the foregoing DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Russell J. Upton
RUSSELL J. UPTON