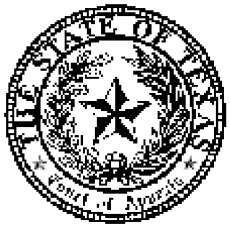
Affirmed and Opinion filed May 4, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00706-CV

EA OIL SERVICE, INC. AND SMITH EA ENERGY, INC., Appellant

V.

MOBIL EXPLORATION & PRODUCING TURKMENISTAN, INC., Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 98-14778

O P I N I O N

EA Oil Service, Inc. and Smith EA Energy, Inc. (collectively EAI) sued Mobil Exploration & Producing Turkmenistan, Inc. (MEPTI) for tortious interference with contract and prospective business advantage. MEPTI moved for, and was granted, summary judgment on the grounds that the law of Turkmenistan, rather than Texas, applied, and that Turkmen law did not provide a remedy. On appeal, EAI brings two issues: first, whether the court below erred in concluding that Turkmen law, rather than Texas law, applied; second, and in the alternative, whether it erred in concluding that Turkmen law did not provide a remedy.

EAI, while pursuing business opportunities in the countries of the former Soviet Union, allegedly entered into a series of written and oral contracts with the Turkmen government. Pursuant to those contracts, EAI completed a feasibility study to determine which idle oil wells in Turkmenistan could and should be repaired. They then allegedly entered into a "field service and management agreement" with the Turkmen government which granted EAI exclusive rights in a portion of the *Barsa Gelmes* oil field.

MEPTI and the Turkmen government, meanwhile, entered into a protocol which led to a memorandum of understanding pertaining to the entire *Barsa Gelmes* field. Finally, MEPTI and the Turkmen government entered a production sharing agreement for a larger area, which included the *Barsa Gelmes* field.

EAI was subsequently informed by the Turkmen government that their situation "was changing." They were then told that the only work available for them would be the workover of shut-in wells on a service basis. Appellants brought suit against MEPTI in Texas alleging tortious interference with existing contracts and prospective business relations.

The Applicable Law

The issue of whether Texas or foreign law applies to a particular controversy is a question of law that we review de novo. *See* TEX. R. EVID. 203; *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). Our analysis will be governed by the principles enunciated in the Restatement (Second) of Conflict of Laws. *See Minnesota Min. and Mfg. Co. v. Nishika Ltd.*, 955 S.W.2d 853, 856 (Tex. 1996); *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979).

For an issue sounding in tort, the rights and liabilities of the parties are determined by the local law which, with respect to that issue, has the most significant relationship to the occurrence and the parties. *See Minnesota Min. and Mfg. Co.* , 955 S.W.2d at 856; *Duncan*, 665 S.W.2d at 420-21. In our analysis we consider such factors as: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. *See Parra v. Larchmont Farms, Inc.*, 942 S.W.2d 6, 12 (Tex. App.–El Paso 1996), *rev'd*

on other grounds, 941 S.W.2d 93, 95 (Tex. 1997) (expressly agreeing with the El Paso court's resolution of the choice of law issue); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 (1971).

While the state with the "most significant relationship" is, as a matter of law, the source of law for the controversy, we must bear in mind certain overarching principles. *See Duncan v. Cessna,* 665 S.W.2d 414, 421. These principles include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. *See Minnesota Min. and Mfg. Co.*, 953 S.W.2d at 736; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §6 (1971). These principles will guide our analysis of the § 145 factors.

The first factor, the place where the injury occurred, is disputed by the parties. EAI argues that the injury occurred in both Turkmenistan, where MEPTI acted, and Texas, where EAI's financial operations were centered. MEPTI argues that the site of the injury was Turkmenistan, where EAI's contracts were lost. Turkmenistan is clearly the locale where the injury occurred, even though its effects were also felt by EAI's Texas headquarters. *See CPS Intern., Inc. v. Dresser Industries, Inc*., 911 S.W.2d 18, 29 (Tex. App.–El Paso 1995, writ denied) (holding that any financial harm in Texas flowing from the tortious interference was "a mere measurement of and produced by" the injury in Saudi Arabia); *State Nat. Bank v. Academia, Inc.*, 802 S.W.2d 282, 291 (Tex. App.–Corpus Christi 1990, writ denied) (holding that Illinois law applied to a claim for tortious interference arising from a Bank's actions in seizing property in Chicago despite the economic impact on the Texas corporation).

The second factor is the place where the conduct causing the injury occurred. MEPTI argues that all of the negotiations, meetings and communications between themselves and the Turkmen officials that led to the agreement took place in Turkmenistan. EAI alleges that at least some of the pertinent conduct

occurred in Texas. They point to two specific instances: Mobil's[1] act of bringing several Turkmen engineers (e.g. geologists and geophysicists) to Dallas for training; and a Mobil representative's meeting with Turkmen officials during a petroleum industry conference in Houston.

The training of the Turkmen engineers was apparently part of a commitment by Mobil to certain "social programs" as a part of the commercial framework between MEPTI and Turkmenistan. It occurred, therefore, after the agreements were already in place and is not relevant to this analysis. As for the petroleum industry conference, the record reflects that a Mr. Sabathier, to whom the president of MEPTI reported, and an unnamed Turkmen official "met" while attending the conference. According to EAI's own evidence, however, Mr. Sabathier was attending the conference for public relations reasons, not to negotiate future business. Furthermore, there is no indication of whether Mr. Sabathier merely met the Turkmen official (i.e., was introduced to him) or had a meeting with him (i.e., more formal business discussions). Finally, there is no indication of whether the conference was held prior to or after the MEPTI agreements were finalized. Thus, while a Mobile official may have attended the same Texas oil conference as a Turkmen official, the vast bulk of any negotiations occurred in Turkmenistan. *See Academia, Inc.*, 802 S.W.2d at 291; *see also America's Favorite Chicken Co. v. Cajun Enterprises*, 130 F. 3d 180, 184 (5th Cir. 1997) (finding that the acts underlying a claim for tortious interference, an overpricing scheme, occurred in Louisiana).

We turn now to the third factor, the domicile, residence, nationality, place of incorporation and place of business of the parties. This factor is concerned with the several places a party might be said to be located. For corporate parties, residence is immaterial and nationality is determined by the place of incorporation.[2] Since domicile, place of incorporation and place of business are listed separately in the

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[1] EAI does not distinguish between Mobil Corp., which is not a party to this suit, and MEPTI. These acts, based upon EAI's evidence, are apparently attributable to Mobil.

[2] A corporation may have multiple domiciles, usually its place of incorporation and its principle place of business. *See Miller v. Windsor Ins. Co.*, 923 S.W.2d 91, 95 (Tex. App.–Fort Worth 1996, writ denied) (citing *Tri-County Elec. Coop. v. Thompson*, 226 S.W.2d 511, 512 (Tex. Civ. App.–Fort Worth 1950, no writ). Furthermore, the corporation's principal place of business may be either its headquarters , i.e. the "nerve center" test; or where its operations are located, i.e. the "corporate activity" test. *Cf. Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 776 (9th Cir.1992)*; Scot Typewriter Co. v. Underwood* (continued...)

Restatement, it is logical to presume they have distinct meanings. For our purposes, "place of business" will refer to where the bulk of a corporation's physical operations are located, and "domicile" will refer to the corporate headquarters or nerve center.

Smith EA Energy, Inc. and MEPTI are both Delaware corporations; while EA Oil Service, Inc. is a Texas corporation. Smith EA Energy, Inc. and EA Oil Service, Inc. are both headquartered in Houston. MEPTI claims its headquarters and all of its employees are located in Turkmenistan. EAI disputes this claim and contends that MEPTI is headquartered in Texas.[3] EAI and MEPTI have their place of business in Turkmenistan. MEPTI, as is clear from the name, was created solely to do business in Turkmenistan. Smith EA Energy, Inc. was formed for a specific workover and repair program in Turkmenistan. EA Oil Service, Inc. has a broader purpose, but still focuses on the countries of the former Soviet Union. Thus the third factor is mixed.

The last factor is the place where the relationship between the parties is centered. The relationship between MEPTI and EAI, if any, could only be characterized as a competitive relationship. As such, it was centered in Turkmenistan. *See CPS Intern., Inc. v. Dresser Industries, Inc.*, 911 S.W.2d 18, 30 (Tex. App.–El Paso 1995, writ denied).

The above factors must be analyzed in the context of the broader principles of §6 of the Restatement. Turning to those broad principles we find the following:

- The primary need of the interstate and international systems is simply to have choice-of-law rules that work well and further harmonious relations between nations and states. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §6 comment d (1971).
- Texas has an interest in providing a tort remedy for two resident corporations, while Turkmenistan's interest is in controlling its oil wealth.[4]

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[2] (...continued)
Corp., 170 F.Supp. 862, 864-65 (S.D.N.Y.1959) (explaining the corporate domicile rules for Federal diversity purposes).

[3] The record reflects the president of MEPTI "made several trips" to Turkmenistan, suggesting that he was not stationed in that country. Furthermore, his direct supervisor, Mr. Sabathier, worked in Dallas.

[4] The record contains a letter from the Ministry of Foreign Affairs of Turkmenistan to the United States embassy in Turkmenistan; that letter says, in part that the "government of Turkmenistan believes that (continued...)

- While MEPTI's contracts did contain non-Turkmen choice of law provisions, this is a tort case and it is reasonable to conclude that any party doing business in Turkmenistan would justifiably expect that they would have to conform to Turkmen law.
- Texas, as the forum state, would surely find that Texas law is more certain, predictable, and uniform than Turkmen law.
- The basic policies underlying tort law have little import here because the laws of Turkmenistan and the laws of Texas are so different that policy differences have little effect. *See id*. at comment h.
- Finally, the principle of ease in the determination and application of the law to be applied does not, as both parties argue, refer to the *contents* of the laws of the alternative jurisdictions. Instead, it refers to the simplicity of the choice-of-law rules themselves. *See id.* at comment j (saying that "[i]deally, choice-of-law rules should be simple and easy to apply). Texas' choice of law rules in this area are simple, i.e., the state with the "most significant relationship" is the source of law for the controversy.

In a tort context, the place where the injury occurred and the place where the conduct causing the injury occurred are the most crucial factors. These factors clearly point to Turkmenistan. The relationship between EAI and MEPTI is also centered in Turkmenistan. The third factor, which focused on the locations of the parties, is mixed. However, considering the nature of the tort alleged, the place of business is more decisive than the place of incorporation or location of the headquarters. Finally, the relationship between the parties is centered in Turkmenistan. Accordingly, we find Turkmenistan has the most significant relationship to the underlying dispute and should therefore be the source of law for this controversy.

Analysis of Turkmen Law

Having determined that Turkmen law is the proper source of law for this controversy, we must determine if it provides a remedy. According to Texas Rule of Evidence 203, "[t]he court, and not a jury, shall determine the laws of foreign countries." TEX. R. EVID. 203. Both parties submitted expert affidavits as to the substance of Turkmen law. A court may "consider any material or source, whether or not

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[4] (...continued)
any disputes involving agreements that it enters into should be litigated in Turkmenistan, especially where the dispute, over access to and control of natural resources, vitally affects the sovereign rights of Turkmenistan."

submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises." *Id.* We review the issue de novo.[5] *Id.*

According to both parties, the bulk of Turkmen law is composed of Soviet-era codes that continue in force when they do not conflict with the constitution, laws, or interests of Turkmenistan. EAI argues that Article 445 of Turkmenistan's Civil Code, a general tort provision, provides a remedy for tortious interference with contract and prospective business advantage. According to the affidavit of EAI's expert, Michael Newcity, article 445 provides:

> Harm caused to the person or property of a citizen as well as harm caused to an organization, shall be subject to compensation by the person who caused the harm in full measure, except in cases provided for by the legislation of the USSR.
>
> The person causing the harm shall be released from his compensation if he proves that the harm was caused through no fault of his.
>
> Harm caused by lawful actions shall be subject to compensation only in cases provided by law.

The translation of MEPTI's expert, Sarah J Reynolds, is substantially similar.

MEPTI argues that EAI fails to state a claim under Art 445 for three reasons. First, they contend that the "harm" contemplated under the article must be harm to a person or physical property, and that the Turkmen understanding of "property" has never included rights based on contracts. Second, they contend that Turkmen law only recognizes direct causation, and that MEPTI's actions could only be an indirect cause of EAI's harm. Finally, they contend that MEPTI's alleged acts were legal and, thus, there is no provision under Turkmen law which provides for compensation in this situation.

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[5] A number of courts have referred to rule 203 as a "hybrid" rule. *See, e.g., Gardner v. Best Western Int'l, Inc.*, 929 S.W.2d 474, 483 (Tex. App.–Texarkana 1996, writ denied); *Volkswagen, AG v. Valdez*, 897 S.W.2d 458, 461 (Tex. App.–Corpus Christi 1995, orig. proceeding). This is due, however, to the pseudo-evidentiary nature of the court's initial inquiry. *See Ahumada v. Dow Chemical Co.*, 992 S.W.2d 555, 559 (Tex. App.–Houston[14th Dist.] 1999, pet. denied) (noting that "presentation of the law to the court resembles presentment of evidence"). Our review of the court's decision is explicitly the review of a question of law. *See* TEX. R. EVID. 203 (holding that "[t]he court's determination shall be subject to review as a ruling on a question of law"); *Ahumada*, 992 S.W.2d at 559 (holding that "the court ultimately decides as a matter of law" the content of the foreign law); *Reading & Bates Const. Co. v. Baker Energy Resources Corp.*, 976 S.W.2d 702, 708 (Tex. App.–Houston[1st Dist.] 1998, pet. denied); *CPS Int'l, Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 22 (Tex. App.–El Paso 1995, writ denied).

EAI concedes in its brief that no Turkmen court has ever found a claim for tortious interference with contract under article 445. Their expert similarly concedes that this would be a question of first impression for a Turkmen court. He argues in his affidavit, however, that as Turkmenistan adapts to a free market, "it will, or should" recognize the torts; that there is no reason that a court "could not construe [article 445] to be sufficiently broad so as to grant the causes of action;" and that no one has shown that article 445 "expressly or by obvious implication precludes" the causes. He also argues that other counties have interpreted civil code provisions similar to 445 so as to encompass the actions.

Appellant, in essence, concedes that Turkmen law does not recognize the torts of tortious interference with contract and tortious interference with prospective advantage. Appellant's argument that the torts would be recognized by a Turkmen court, if given our facts, only emphasizes the fact that they are not recognized presently. The state of Turkmen law in the future, even if it is the immediate future, is not relevant to our analysis. We are concerned only with determining its present scope. We therefore find that article 445 of Turkmenistan's Civil Code does not currently provide a remedy for tortious interference with contract or tortious interference with prospective business advantage.

EAI argues, in the alternative, that a remedy is provided by Article 474 of Turkmenistan's Civil Code. According to the affidavit of EAI's expert, this article provides that "[a] person who has acquired property at the expense of another person without any basis in law or transaction is obligated to return the unjustly acquired property to that other person." This statue is inapplicable to the present facts.

First, MEPTI's acquisition of the contract rights, the property at issue here, necessarily had its basis in a transaction.

Second, as discussed above, the Turkmen concept of property does not include intangibles such as contract rights.[6] This interpretation is reinforced by the Code's mandate that any property so acquired be *physically* returned. *See* THE CIVIL CODE OF THE RUSSIAN FEDERATION 375, 376 (Peter B.

[6] EAI argues that this interpretation of the Turkmenistan concept of "property" is flawed in that it would mean that they do not recognize currency as property – which they do. Currency, however, is a tangible res; even in a "sophisticated" western legal and economic system. *See* U.C.C. § 9-305.

Maggs and A. N. Zhiltsov eds. and trans.) (1997) (the Russian and Turkmen codes, at least in this narrow area, are substantially similar).

Third, this part of the code deals with "a subject matter covered in non-soviet jurisdictions by quasi-contracts, unjust enrichment, or specific cases of restitution." VLADIMIR GSOVSKI, SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME 202 (1949). It is "designed to apply to situations where the enrichment of one person at the expense of another, and the loss of the latter, do not appear just, and nevertheless, no remedy is available under the law of contracts or that of torts." *Id*. Here, however, EAI has a remedy under contract law, they may sue the government of Turkmenistan for breach of contract.

Fourth, any remedy under this article requires that the enrichment "cannot be attributed to the fault of the person enriched." *Id.* According to EAI, the enrichment of MEPTI is attributable solely to MEPTI's fault.

Thus, article 474 of Turkmenistan's Civil Code is inapplicable to the facts, and does not provide a remedy for EAI.

Finally, EAI argues, in the alternative, that remedies are provided by the Law on the Limitation of Monopolistic Practices in the USSR. This Soviet-era law, apparently imposed by Premiere Gorbachev less than six months before the collapse of the Soviet Union, remains in effect in Turkmenistan.

The law, according to the affidavit of EAI's expert, prohibits "acts by business persons holding dominant market position" that have the effect of restraining competition or the realization of "the legitimate interests of other business persons or consumers." Again, this law does not apply to the present facts. The law itself is concerned only with the market for goods within Turkmenistan. *See* COLLECTED LEGISLATION OF RUSSIA: RESTRICTIVE PRACTICES §VI, 1 (W. E. Butler) (1992). It forbids actions such as the withholding of goods from market to drive up prices, conditioning the sale of a good on the sale of some other (unwanted) good, forming price-fixing agreements with competitors, etc. *See id.* at 2, 3. It does not regulate agreements with the government of Turkmenistan regarding the export of raw natural resources. The letter from the Ministry of Foreign Affairs of Turkmenistan to the United States embassy in Turkmenistan makes it clear that the Turkmen government has exclusive ownership and control over the

country's natural resources. There is no free market in that area. The Turkmen government "has adopted a comprehensive scheme to strictly regulate all efforts at developing, producing, transporting, disposing of and utilizing" its natural resources. All of those functions "must be approved by the government." It seems clear that any contract with a foreign corporation concerning Turkmenistan's petroleum reserves would be a part of that comprehensive scheme and approved by the Turkmen government. This law does not provide a remedy for EAI.

Having found the law of Turkmenistan applies to this dispute and having that it provides no remedy, we affirm the trial court's grant of summary judgment.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed May 4, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
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