IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DRFP, L.L.C., d/b/a SKYE VENTURES,	:	
	:	**Case No. 2:04-cv-793**
Plaintiff,	:	**Judge Holschuh**
v.	:	**Magistrate Judge Kemp**
THE REPUBLICA BOLIVARIANA DE VENEZUELA, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

Plaintiff DRFP, L.L.C., d/b/a Skye Ventures ("Plaintiff") sued Defendant The Republica Bolivariana de Venezuela and the Venezuelan Ministry of Finance (collectively, "Defendants") for default on two promissory notes allegedly guaranteed by Defendants. Defendants moved to dismiss the case on the grounds of foreign sovereign immunity and *forum non conveniens*, but on February 13, 2009 this Court denied Defendants' motion and found that 1) assuming the promissory notes in question are valid, the Court has subject matter jurisdiction pursuant to the commercial activity exception to foreign sovereign immunity contained in 28 U.S.C. § 1605(a)(2); and 2) the case could not be dismissed pursuant to the doctrine of *forum non conveniens* because Venezuela is not a currently available alternative forum. (Mem. Op. & Order p. 24, doc. # 144.)

This matter is before the Court on Defendants' Motion for Certification. (Doc. # 145.) Defendants can appeal this Court's denial of foreign sovereign immunity as of right under the collateral order doctrine pursuant to 28 U.S.C. § 1291, see O'Bryan v. Holy See, 556 F.3d 361, 372 (6th Cir. 2009), and Defendants represent that they intend to exercise this right (Mot. Certification p. 3, doc. # 145). Defendants' Motion asks the Court to certify for an interlocutory appeal, pursuant

to 28 U.S.C. § 1292(b), this Court's refusal to dismiss the case for *forum non conveniens*. Defendants also ask the Court to certify an issue this Court alluded to, but did not actually rule on, in its February 13, 2009 Memorandum Opinion and Order: the issue of whether this Court should recognize and enforce a decision of the Venezuelan Supreme Court in the interests of international comity. (See Mem. Op. and Order p. 23 n. 5, doc. # 144.)

I. Applicable Legal Standard

Ordinarily, an appeal may only be taken following a final judgment. See 28 U.S.C. § 1291. However, limited exceptions exist. One of these exceptions provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). "Exceptional circumstances must exist . . . before leave is granted for an interlocutory appeal," W. Tenn. Chapter of Associated Builders and Contractors, Inc. v. City of Memphis, 138 F. Supp. 2d 1015, 1018 (W.D. Tenn. 2000), and the decision lies within the discretion of the Court. To certify an issue or order for an interlocutory appeal under § 1292(b), the Court must be satisfied that "(1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation." In re City of Memphis, 293 F.3d 345, 350 (6th Cir. 2002).

If this Court certifies an issue for an interlocutory appeal, the Sixth Circuit also has discretion over whether to hear the appeal, see 28 U.S.C. § 1292(b), and Defendants would bear "the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic

policy of postponing appellate review until after the entry of a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

II. Analysis

A. Certification of the *Forum Non Conveniens* Issue

Defendants ask the Court to certify this issue for an interlocutory appeal because, in Defendants' view, *forum non conveniens* is an important threshold issue that is well-suited for an interlocutory appeal because a *forum non conveniens* dismissal has the potential to avoid an unnecessary trial. Defendants also point out that there will already be an appeal in this case on the foreign sovereign immunity issue, and that certifying the *forum non conveniens* issue will promote judicial economy by giving the Sixth Circuit the opportunity to review this Court's disposition of this issue along with the disposition of the foreign sovereign immunity issue. Plaintiff, however, opposes certification and argues that allowing an interlocutory appeal will not materially advance the ultimate termination of the litigation because, even if the Sixth Circuit disagreed with the Court's analysis of the *forum non conveniens* issue, the case would be remanded for further consideration of that issue.

The Court agrees with Defendants, and finds that the requirements for certifying this issue for an interlocutory appeal have been satisfied. This Court found that a *forum non conveniens* dismissal would be inappropriate because a recent decision by the Venezuelan Supreme Court "conclusively decided an issue central to Plaintiff's case adversely to Plaintiff's stated position[,]" rendering Venezuela unavailable as an alternative forum. (Mem. Op. and Order p. 22, doc. # 144.) This Court's interpretation of that decision and of Venezuelan law is a pure question of law that is reviewed de novo on appeal, see Johnson v. Ventra Group, Inc., 191 F.3d 732, 738 (6th Cir. 1999),

and thus the issue involves a question of law.

This question of law, moreover, is controlling because its resolution "could materially affect the outcome of the case." See In re City of Memphis, 293 F.3d at 351. Plaintiff is correct that, if the Sixth Circuit disagrees with this Court's finding that Venezuela is not an available forum, the Sixth Circuit would remand the case for a consideration of the Gulf Oil public and private factors, see Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-9 (1947), rather than immediately dismiss the case. However, such a remand could still impact the outcome and resolution of the case by presenting the possibility of avoiding protracted and expensive litigation. See Kraus v. Bd. of County Comm'ns. for Kent County, 364 F.2d 910, 922 (6th Cir. 1966). Absent review or a contrary decision from the Sixth Circuit, the parties would proceed to litigating the remainder of Defendants' motion to dismiss and to merits discovery related to the validity of the promissory notes at issue. Given the already extensive history of this case, such litigation would certainly qualify as "protracted and expensive." However, if the Sixth Circuit disagreed with this Court on the availability issue, balancing the Gulf Oil factors could be quickly accomplished because the parties have already briefed this issue. If the Court concluded that the balance of those factors favored dismissal, the case would be quickly terminated and its outcome affected by the *forum non conveniens* issue.

The Court also finds that there are substantial grounds for a difference of opinion as to the correct interpretation of the Venezuelan Supreme Court's opinion, as Defendants articulate in their motion (see Mot. Certify pp. 11-15). Interpreting a foreign country's law presents issues about which reasonable jurists may certainly disagree, and this case is no exception. Moreover, for many of the reasons articulated above, an immediate appeal may materially advance the ultimate termination of this litigation. Considerable time and expense may be saved by allowing the Sixth

Circuit to review this issue along with Defendants' appeal as of right of the foreign sovereign immunity issue.

The Court thus concludes that an interlocutory appeal on the issue of *forum non conveniens* is appropriate, and hereby certifies that issue pursuant to 28 U.S.C. § 1292(b). Defendants now bear the burden of convincing the Sixth Circuit to agree to hear this issue.

B. Certification of the Issue of Whether or Not to Recognize and Enforce the Venezuelan Supreme Court Opinion

The Court, however, cannot reach the same conclusion with respect to Defendants' second requested issue for certification. Defendants ask the Court to certify the issue of whether or not this Court must follow the holding of the Venezuelan' Supreme Court's recent opinion. But as Plaintiff correctly points out (Resp. p. 17, doc. # 152) and Defendant also acknowledges (Mot. Certify p. 16, doc. # 145), this Court has not yet ruled on this issue and certifying it for "review" by the Sixth Circuit would be nonsensical.

In a footnote to the Court's holding that the Venezuelan Supreme Court's opinion rendered Venezuela an unavailable forum, the Court stated that "[t]his ruling should not be construed to conclusively resolve the issue of what binding effect the Venezuelan Supreme Court opinion may have on *this* Court," and noted that federal courts may recognize and enforce foreign judgments out of comity and respect, but that federal courts are by no means required to do so. (Mem. Op. & Order p. 23 n. 5, doc. # 144.) The Court expressed no opinion as to whether it would actually enforce or decline to enforce the Venezuelan Supreme Court opinion, and clearly left that decision for another day. Defendant now asks the Court to certify for review "the issue flagged by footnote 5" (Mot. Certify p. 16, doc. # 145), but there is simply nothing for the Sixth Circuit to review with respect to this issue. The Court made no ruling on it, so there can be no substantial ground for a difference

of opinion on a nonexistent ruling. To the extent that Defendants are questioning the actual *ability* of this Court to, at some point in the future, decide this issue against them, there can be no ground for debate. The law is clear that "a foreign country's judgments are not subject to the Full Faith and Credit Clause[,]" Taveras v. Taveraz, 477 F.3d 767, 783 (6th Cir. 2007) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 322 (1981)), and that recognition in the interests of comity is not an absolute command, id.

Defendants, in effect, are asking the Sixth Circuit to decide this issue in the first instance, but that is not how the federal judicial system works. Issues must be first litigated and passed on in the district courts before they are ready for review on appeal; in this case neither party has briefed the question of whether or not to recognize and enforce the holding of the Venezuelan Supreme Court, and the issue is not ripe for a decision by this Court or review by the Sixth Circuit.

III. Conclusion

For the reasons stated above, Defendants' Motion to Certify is **GRANTED IN PART** and **DENIED IN PART**. The Court certifies its denial of Defendants's request for dismissal due to *forum non conveniens* for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), but declines to certify the question of whether or not to recognize and enforce the recent Venezuelan Supreme Court decision.

IT IS SO ORDERED.

Date: April 1, 2009

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court