CONCORD REINSURANCE COMPANY, LTD., Plaintiff, v. CAJA NACIONAL DE AHORRO Y SEGURO, Defendant.

CONCORD REINSURANCE CO. v. CAJA NACIONAL DE AHORRO Y SEGURO

93 Civ. 6606 (JSM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1994 U.S. Dist. LEXIS 2964

March 15, 1994, Decided
March 16, 1994, Filed

COUNSEL: [*1] For CONCORD REINSURANCE COMPANY, LTD., plaintiff: Brendan Kennedy, Werner & Kennedy, New York, NY.

JUDGES: Martin, Jr.

OPINIONBY: JOHN S. MARTIN, JR.

OPINION: MEMORANDUM AND ORDER AND OPINION

JOHN S. MARTIN, JR0♥#§k•GW-,]PJudge:

Defendant Caja Nacional de Ahorro y Seguro ("Caja") has moved to vacate an attachment previously entered in this action to enforce a foreign arbitral award, and to dismiss for lack of personal jurisdiction. The award was obtained by plaintiff Concord Reinsurance Company, Ltd. ("Concord"), a Bermudian corporation, against Caja, which claims that it is an agency of the Argentinian government, in an arbitration held in Bermuda pursuant to an arbitration clause contained in a General Retrocession Agreement between the parties (the "Agreement"). Caja defaulted in the underlying arbitration and an award was entered in Concord's favor in the amount of $ 503,988.79 on February 15, 1993.

Concord commenced this action on September 22, 1993, by filing its Complaint and an ex parte motion for an order of attachment of a bank account of the defendant located at the Banco de la Nacion de Argentina in New York City. An Order of Attachment was entered on September 22, 1993, and was confirmed at a hearing before Judge Pierre Leval on October 14, 1993. At that hearing, and in the papers in [*2] support of its motion for attachment, plaintiff did not advise Judge Leval that Caja was, or arguably might be, an agency or instrumentality of the Argentinian government.

Defendant's first communication with the Court was a letter dated October 27, 1993, in which an officer of Caja stated that the defendant first received documents in this case on October 25, 1992; that Caja is an entity wholly owned by the government of Argentina; that he understood that consequently Caja was entitled to 60 days to answer the Complaint; and that Caja had not yet chosen New York counsel to represent it in this action. Caja was given additional time to answer the Complaint, retained counsel and, on January 7, 1994, made the motions now before the Court.

The Foreign Sovereign Immunities Act, 28 U.S.C. @@ 1602-1611 ("FSIA"), governs actions against foreign states and agencies or instrumentalities of foreign states. Section 1603(b) of the FSIA defines an agency or instrumentality of a foreign state as "any entity (1) which is a separate legal person, corporate or otherwise, and (2) . . . a majority of whose shares or other ownership interest is owned by a foreign state [*3] or political subdivision thereof, and (3) which is neither a citizen of a State of the United States. . . , nor created under the laws of a third country." Caja has submitted an affidavit stating that it is a "monetary authority" wholly owned by the Republic of Argentina, and a copy of its Charter, which states that Caja is "an independent entity of the government with autonomous budget and administration," and whose operations are guaranteed by the Argentine government. Plaintiff states that this is insufficient since Caja has not specifically stated that it is neither a citizen of a State of the United States nor created under the laws of a third country. However, plaintiff has not provided the Court with any evidence that would indicate that Caja fails to meet this third condition. Moreover, plaintiff itself submitted a letter as an exhibit to an affidavit in support of its motion for the order of attachment in which plaintiff's Argentinian counsel stated that the officers of Caja "are public officials." See Mynors Affidavit, Exhibit G, letter of M. Bomchil, dated Feb. 22, 1989. The Court is satisfied, therefore, that Caja is an agency or instrumentality of the state of Argentina [*4] under the Foreign Sovereign Immunities Act. Thus, the propriety of the attachment previously entered in this case and the question of whether this Court has jurisdiction over Caja are governed by the FSIA.

Caja argues that it is immune from prejudgment attachment of its property under @@ 1611 and/or 1610(d) of the FSIA. Section 1611(b) states that the property of a "foreign central bank" or "monetary authority" held for its own account is immune from attachment and from execution unless the bank or monetary authority or its parent foreign government has explicitly waived its immunity from attachment in aid of execution, or from execution." Thus, the property of such entities is absolutely immune from prejudgment attachment, and that immunity cannot be waived. Banque Compafina v. Banco de Guatemala, 583 F. Supp. 320, 322 (S.D.N.Y. 1984). It appears, however, that @ 1611 was intended to refer to a central bank or central monetary authority. The legislative history of the section states that it is intended to protect funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial [*5] transactions of other entities or of foreign states. 1976 U.S. Code Cong. & Ad. News 6604, 6630. Since Caja appears to be an insurance and economic development agency, rather than a central banking agency, it is not protected absolutely from prejudgment attachment by @ 1611(b).

Alternatively, Caja argues that it also is protected from the instant attachment by @ 1610(d). That section states that the property of a foreign state or agency or instrumentality thereof shall not be immune from prejudgment attachment if such immunity has been explicitly waived. According to Caja, Argentina has never made such a waiver. Plaintiff argues that Article 6 of the Convention on Recognition and Enforcement of Arbitration Awards (codified as 9 U.S.C. @@ 201-208), to which both the United States and Argentina are signatories, constitutes the required waiver by Argentina. That section provides that a defendant must post a bond when it makes an application to set aside an arbitration award. This provision, however, concerns a situation in which the party against whom an award has been entered seeks affirmative relief from the court. That situation is not at all the [*6] same as that here, in which the party that obtained an award seeks prejudgment security in a court of its own choosing. See also Banque Compafina, 583 F. Supp. at 324 (citing S & S Machinery Co. v. Masinexportimport, 706 F.2d 411 (2d Cir.), cert. denied, 464 U.S. 850, 78 L. Ed. 2d 147 (1983)). Therefore, at least in this case, Caja is immune from prejudgment attachment of its property located in New York.

The final question before this Court is whether it has personal jurisdiction over Caja in this case, such that this case would continue even though the attachment has been vacated. Under 28 U.S.C. @ 1330(a), the district courts have jurisdiction over a foreign state whenever the foreign state is not entitled to immunity under either the FSIA or any applicable

international agreement. Section 1605(b) of the FSIA provides that a foreign state shall not be immune from jurisdiction in a case brought to enforce an agreement to arbitrate or to confirm an award made pursuant to such an agreement if the agreement or award is governed by a treaty [*7] in force for the United States calling for the recognition and enforcement of arbitral awards. The Convention on Recognition and Enforcement of Arbitral Awards is exactly the sort of treaty Congress intended to include in this exception to immunity. Cargill Int'l, S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1018 (2d Cir. 1993). See also Seetransport Wiking Trader v. Navimpex Centrala Navala, 989 F.2d 572, 579 (2d Cir. 1993). Thus, Caja has waived its immunity from suit in this case and this Court has subject matter jurisdiction.

Under 28 U.S.C. @ 1330(b), personal jurisdiction exists whenever subject matter jurisdiction exists and service of process has been made under @ 1608 of the FSIA. That section provides that, absent a "special arrangement for service between the plaintiff and the foreign state", delivery to an agent for service of process in the United States, or delivery pursuant to an applicable international convention on service of judicial documents, specific detailed requirements for service must be met, including translation of the summons and complaint into the official [*8] language of the foreign state.

Since plaintiff did not comply with the specific statutory requirements for service set out in @ 1608, Argentina has appointed no agent for service of process in the United States, and no international convention on service of documents applies, this case must be dismissed unless plaintiff can show that it served Caja with the papers in this action pursuant to a special arrangement for service between itself and Caja. To meet this requirement, plaintiff points to Article XXI of the Agreement. That section states that "all notices or communications relating to this Agreement addressed by the Retrocedant [Concord] to the Retrocessionaire [Caja] shall be deemed to be duly received in the course of post if sent by prepaid letter post properly addressed to the Retrocessionaire." Although such a clause in an arbitration agreement might, arguably, be considered a "special arrangement", see Marlowe v. Argentine Naval Commission, 604 F. Supp. 703, 707 (D.D.C. 1985), the Court finds this particular provision to be inadequate to serve as such. It contains no address to which notices are to be sent, and Caja states that the address [*9] used was incorrect and disputes that it received notice of this action and the attachment in a timely fashion.

In reaching this conclusion, the Court has considered Caja's claim that it did not receive notice of this suit until after the attachment had been confirmed, the ease with which plaintiff could have complied with the specific terms of @ 1608(b)(3) and the courts' admonitions that the terms of @ 1608 are to be strictly enforced, see, e.g., Harris Corp. v. National Iranian Radio, 691 F.2d 1344, 1352 n.16 (11th Cir. 1982). Therefore, this Court finds that it lacks personal jurisdiction over Caja.

In accord with the foregoing, the Order of Attachment of Caja's property entered on September 22, 1993 and confirmed on October 14, 1993 is vacated, and this action is dismissed for lack of personal jurisdiction.

SO ORDERED.

Dated: March 15, 1994

John S. Martin, Jr.

U.S.D.J.