NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDALL R. MELTON,	) No. 97-15395
	) D.C. No. CV-96-00492-DLJ
Plaintiff-Appellant,	)
	) MEMORANDUM[1]
vs.	)
	)
OY NAUTOR AB, a foreign corporation,	)
	)
Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern Division of California
D. Lowell Jensen, District Judge, Presiding

Submitted August 10, 1998[2]
San Francisco, California

Before: BRUNETTI, TASHIMA, and GRABER, Circuit Judges.

In 1990, Randall Melton purchased a 90 foot Swan yacht from a Finnish manufacturer, Oy Nautor Ab, through a sales agent in California. The yacht was financed by a limited liability company, Flawless Adventures, which Melton formed on the British Isle of Guernsey. As a result of a manufacturing defect, Melton obtained a $400,000 arbitration award against Nautor from an arbitrator in Finland. He filed this action to enforce the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 (the "Convention"). The district court dismissed the action for forum non conveniens. This appeal followed. We have jurisdiction, 28 U.S.C. § 1291, and affirm.

Appellant argues for the first time on appeal that the venue provision of the Convention precludes application of forum non conveniens. As this argument was not raised below, it is waived. See, e.g., Crawford v. Lungren, 96 F.3d 380, 389 n.6 (9th Cir. 1996). Our decision is limited to the application of the doctrine of forum non conveniens to the specific facts of this case. We express no opinion as to interpretation of the Convention on the Recognition of Foreign Arbitral Awards.

Under the doctrine of forum non conveniens, the court may grant dismissal if (1) an adequate alternative forum exists, and (2) the balance of relevant private and public interest factors favors dismissal. Creative Tech. Ltd. v. Aztech System PTE. Ltd., 61 F.3d 696, 699 (9th Cir. 1995). In this case, Oy Nautour Ab and

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2]The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Melton are subject to, or have submitted to, jurisdiction in Finland. An adequate alternative forum exists.

The private interest factors concern the logistics of assembling a case. They are:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947). Public interest factors include: judicial administrative difficulties; the burden of jury duty on the community; the local interest in adjudicating the matter; and avoidance of unnecessary conflict of law problems by having a forum apply law foreign to itself. Id. at 509. The fact that the law in the current forum is more favorable to the plaintiff than the law in other forums should not preclude dismissal. Piper Aircraft Co. v. Reyno, 454 U.S. 257, 261 (1981).

The district court addressed the evidence presented and weighed the relevant private and public factors. The district court did not abuse its discretion in concluding that the balance of private and public interests pointed toward dismissal.

AFFIRMED.

Melton v. Oy Nautor Ab, No. 97-15395

TASHIMA, Circuit Judge, dissenting:

The majority refuses to consider appellant's argument that the venue provision of the statute implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 204, precludes application of forum non conveniens to cases arising under the Convention, because it is raised for the first time on appeal. The doctrine that a litigant who has not raised an issue below has waived it is one of discretion. See Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 912 (9th Cir. 1995). We may consider a newly-raised issue if it is one of law. Id. The issue tendered by appellant is such an issue.

Here, the circumstances counsel in favor of considering the issue, which is one of first impression. It seems to me unwise to apply forum non conveniens to an action to enforce a foreign arbitration award under the Convention, in the absence of any law that forum non conveniens applies to cases arising under the Convention. I would, thus, first decide the underlying legal issue before applying a non-existent rule to this case.

If I were to reach the merits of the forum non conveniens issue, I cannot agree with the majority's analysis and would, therefore, reverse on that issue. First, the majority concludes that "[a]n adequate forum exists," but the record is bare of any showing as to the adequacy of Finland as a forum; all that the record shows is that a forum does exist there, and nothing more. It is the moving party's burden to make a showing of this factor

and Oy Nautor Ab simply has not done so. I would, thus, hold that the first factor required by the caselaw, see, e.g., Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696, 699 (9th Cir. 1995), is not present.

On the balancing of the private and public interest factors, the majority, like the district court, mistakenly relies on factors inapplicable to this case to conclude that those factors support dismissal for forum non conveniens. For example, all of the Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947), factors discussed by the majority are factors that are "practical problems that make trial of a case easy, expeditious and inexpensive." Id. (emphasis added). In this case, however, we are not dealing with a potential trial, but with a summary proceeding to confirm an arbitration award.[1] See, e.g., Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986). Thus, the proof and logistics factors attendant to trial are non-existent. The Gulf Oil analysis simply does not apply to proceedings to enforce an arbitration award. I would thus find these private interest factors to weigh against defendant.

The same is largely true of the public interest factors. In a proceeding to enforce a foreign arbitration award, most of them weigh against invoking forum non conveniens -- they (e.g., the "burden of jury duty on the community") simply are inapplicable. The only public interest factor weighing in favor of defendant is any potential problem in applying foreign law. Federal district

[1] In most cases, petitions to confirm arbitration awards are routinely handled as motions on the motions calendar.

courts, however, apply foreign law routinely and our procedures are adequate for the purpose. See Fed. R. Civ. P. 44.1. In a case such as this, where the Convention contemplates an enforcement action in this country, we should not let this single factor, in the absence of all other factors, control the application of forum non conveniens.

For all of these reasons, were I to reach the merits of the forum non conveniens issue, I would reverse the district court's invocation of the doctrine. I, therefore, respectfully dissent.

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