NEDAGRO B.v. v. KONVERSBANK

United States District Court, Southern District of New York

January 21, 2003

NEDAGRO B.V., PETITIONER
v.
ZAO KONVERSBANK AS DEBTOR, AND BANKERS TRUST COMPANY AND CITIBANK, N.A., AS STAKEHOLDERS, RESPONDENTS.

The opinion of the court was delivered by: Harold Baer, Jr., United States District Judge:

OPINION & ORDER

Zao Konversbank ("respondent" or "Konversbank") moves to dismiss the petition to confirm a foreign arbitration award ("petition") filed by petitioner Nedagro B.V. ("petitioner" or "Nedagro"), pursuant to (i) Fed.R.Civ.P. 12(b)(1) and 12(b)(2) for lack of subject matter jurisdiction and lack of personal jurisdiction, respectively; and (ii) the doctrine of forum non conveniens. In the alternative, respondent seeks to defer a decision pursuant to Article VI of the Convention on the Recognition and Enforcement of Arbitral Awards ("Convention"), implemented by 9 U.S.C. § 201 et seq. For reasons detailed more fully below, respondent's motion to dismiss is denied and the proceeding is adjourned pending resolution of this matter in Russia.

I. FACTUAL and PROCEDURAL BACKGROUND

Pursuant to a joint venture agreement between the parties dated October 10, 2000, ("agreement"), Konversbank, a commercial Russian bank with its principal place of business in Moscow, obtained capital and technological contributions from Nedagro, a Dutch corporation. (Ovechlin Decl. ¶ 7). Konversbank does not advertise in the United States and derives no revenues from goods used or consumed or services rendered in the United States. (Id. ¶ 4). Konversbank does not own, possess, lease, use or have any interest in any real estate in the United States; nor does Konversbank transact any business or banking business in the United States. (Id. ¶¶ 5-6). However, Konversbank does maintain certain correspondent accounts in New York with Citibank and Deutsche Bank, which accounts are used to facilitate international banking transactions on behalf of Konversbank' s Russian customers. (Resp.'s memorandum of law at 3). The funds in these accounts do not belong to Konversbank but rather are the property of its Russian customers. (Id.). Paragraph 5.5 of the agreement provides that any dispute relating to the agreement will be governed by the law of the Russian federation. (Id. ¶ 12). All business related to the agreement between the parties was transacted in Russia. Nedagro, although a Dutch corporation, engaged in extensive business activities in Russia, in accordance with the agreement.

On or about November 22, 2000, Konversbank unilaterally cancelled the agreement and suspended all payments to Nedagro without justification. (Petition ¶ 10). On May 21, 2001, Nedagro filed an arbitration claim against Konversbank with the International Court of Commercial Arbitration ("ICCA") at the Chamber of Commerce and Industry of the Russian Federation. (Id.). On January 14, 2002, the ICCA issued an award in favor of Nedagro in the amount of approximately $1.9 million in damages plus interest. (Id. ¶ 12). Specifically, the Russian arbitration panel found that Konversbank unilaterally breached the agreement by ceasing payments to Nedagro for goods and services provided, without justification. (Kondrashin Decl. Ex. A). The panel also found that Konversbank's breach forced Nedagro into bankruptcy in The Netherlands. (Id.). On March 29, 2002, following the ICCA arbitration's panel's finding, petitioner applied to the Moscow City Court for confirmation and execution of the damage award. (Id. Ex. B). However, on April 29, 2002, on the very last day of the three-month period in which to move to set aside an ICCA award, Konversbank filed a petition in the Moscow City Court to set aside the award. (Id. ¶¶ 5 (a-d)). Specifically, Konversbank challenged Nedagro's right to file for arbitration on the following four grounds: (1) that Nedagro assigned its right to do so to another entity; (2) that Nedagro did not validly execute the arbitration agreement; (3) that Nedagro did not validly execute its claim for arbitration; and (4) that the parties' dispute was outside the scope of the governing arbitration clause. (Ovechklin Decl. ¶ 20). Konversbank also challenged enforcement of the award as a violation of public policy under the Russian foreign exchange law and on the grounds that the arbitrators were not impartial and failed to timely disclose material conflicts of interest in violation of the Rules of the ICCA and Russian law. (Id.). Although Konversbank filed its application within the three-month time period, it failed to pay the appropriate fee; consequently, the Moscow City Court permitted Konversbank to re-file the application or else it would be dismissed. (Id.). Rather than comply with this ruling, Konversbank appealed this decision to the Supreme Court of Russia on the ground that it could not pay its court fees; the Supreme Court upheld the Moscow City Court's ruling. (Id.). These challenges to the award as well as Nedagro's actions to enforce it were eventually consolidated in the Moscow City Court on July 5, 2002. (Id.). Although a hearing was held on both July 8 and July 24, 2002, no decision was made because in each instance Konversbank made additional demands for documents. (Id.). At the postponed hearing that was held on August 2, 2002, the new judge ordered that the case be transferred to the Moscow Commercial Court, otherwise known as the "Arbitrazh" Court. Although a Dutch bankruptcy court judge had originally appointed a receiver, W.E. Merens, to initiate arbitration proceedings in Russia, the Dutch receiver subsequently retained the law firm of Herrick, Feinstein to assist in confirming and executing on the arbitration award in the United States, where Konversbank was believed to have assets.

Prior to the hearing in the Moscow City Court on August 2, Nedagro sought a provisional remedy of attachment of Konversbank' s assets pending the determination of the enforceability of the ICCA award. By decision dated May 13, 2002, the court dismissed Nedagro's application for provisional remedies on the following grounds: (i) the award was not yet executable as a judgment in Russia; (ii) Nedagro was bankrupt and therefore could not provide an undertaking; and (iii) Konversbank had sufficient assets in Russia to satisfy the award. (Ovechkin Decl. ¶¶ 17-18). Nevertheless, on May 23, 2002, Nedagro filed a petition in this Court and obtained an ex parte order of attachment freezing Konversbank's funds in two New York bank accounts, Citibank and Deutsche Bank. At a preliminary conference with the Court on June 10, 2002, Konversbank agreed to increase the attachment amount from $1.9 million to $2.1 million in the Deutsche Bank account to cover interest due,

and the attachment on the Citibank account was released. (Pet.'s memorandum of law at 5). No mention was made at the June 10, 2002 conference that the funds did not belong to Konversbank. (Id.). Konversbank consented to increasing the attached amount and consented to the attachment remaining in place pendente lite. Ultimately, an agreement between the parties with respect to a briefing schedule was submitted and signed by Judge Batts, sifting in Part I of this Court, on June 28, 2002.*fn1

Konversbank's motion to dismiss became sub judice on September 25, 2002, oral argument was heard on November 8, 2002, and supplemental memoranda were received on November 18 and November 22, 2002. By letter dated December 2, 2002, petitioner informed the Court that, by decision dated November 5, 2002, the Arbitrazh Court of the City of Moscow concluded that "there are no grounds for setting aside the Award of the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation of 14th January 2002," and issued a writ of execution for enforcement of the award. (Letter dated December 2, 2002 from Marianne Yen). Konversbank responded on the same day by informing the Court that it had filed a writ of appeal of this decision on November 15, 2002 to the Russian Federal Arbitration Court of the Moscow District and that, for this reason, the award was not yet enforceable under the Convention. (Letter dated December 2, 2002 from Raymond L. Vandenberg). However, on December 19, 2002, the Russian Federal Arbitration Court reversed and remanded the case to the Arbitrazh Court of the City of Moscow to retry a number of issues, including: (1) whether the ICCA's decision was made within the framework of the arbitration clause; (2) whether the ICCA violated Russian law by directing that the award be paid to the account of a person who was not a party to the proceedings; and (3) whether the ICCA had jurisdiction "for the examination of all claims" made by the petitioner. (Determination of the Federal Arbitration Court of the Moscow District Court, at 4). On January 3, 2003, I directed the parties to submit supplemental memoranda on the issues of subject matter and personal jurisdiction, particularly in light of the Russian Federal Arbitration Court's reversal of the lower court's decision, by January 10, 2003.

II. ANALYSIS

1. Lack of Subject Matter Jurisdiction under Article V of the Convention or in the alternative, Adjournment Pursuant to Article V. of the Convention

Among its many stated grounds for dismissal, Konversbank moves to dismiss the petition under Rule 12(b)(1), which provides that a complaint may be dismissed for lack of subject matter jurisdiction pursuant to this Rule "when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). The burden is on the party asserting jurisdiction to prove by a preponderance of the evidence that jurisdiction is proper. See Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994). Here, Konversbank contends that this Court lacks subject matter jurisdiction under the Convention because the arbitral award is not yet enforceable in Russia, that is, under the law of the arbitral forum. For this reason, Konversbank requests that this Court not only dismiss the petition for lack of subject matter jurisdiction, but also vacate its order of attachment in recognition of the decisions of the Moscow City Court dated May 13 and May 16, 2002, which dismissed Nedagro's application for the provisional remedy of attachment. (Resp.'s memorandum of law at 6). Alternatively, Konversbank requests that this

Court adjourn the petition under Article VI of the Convention until the action is fully adjudicated, and a final decision rendered, in the Russian courts.

Under the Convention and 9 U.S.C. § 201, a contracting state "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." (Convention, Article III). Under the Convention, the district court's role in reviewing a foreign arbitration award is strictly limited, so that "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, (2d Cir. 1997), citing 9 U.S.C. § 207. Under Article V, a district court may refuse to confirm a foreign arbitration award only upon a showing that one or more of the following five enumerated grounds exist:

(a) The parties to the agreement were, under the applicable law, under some incapacity; or the subject agreement is not valid under the applicable law;

(b) The party opposing the award was not given proper notice or was otherwise unable to present its case;

(c) The subject of the award falls outside the scope of the arbitration agreement;

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or in accordance with the law of the country; or

(e) The award has not yet become binding on the parties. (Convention, Article V). Recognition and enforcement may also be refused if the competent authority in the country where recognition is sought finds that "(1) [t]he subject matter of the dispute is not capable of settlement by arbitration under the law of that country; or (2) [t]he recognition of enforcement of the award would be contrary to the public policy of that country." (Convention Article VI(1) — (2)). See also Yusuf, 126 F.3d at 23 (stating that "the Convention is . . . clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention").

In Yusuf, the Second Circuit recognized that "[t]he primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad, the so-called requirement of `double exequatur.'" 126 F.3d at 22. And, as this Court has remarked, "[t]he Convention clearly manifests a `general pro-enforcement bias.'" Overseas Cosmos, Inc. v. NR Vessel Corp., 1997 WL 757041, at *2 (S.D.N.Y. Dec. 8, 1997) (citing Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974)); accord American Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pakistan Ltd., 659 F. Supp. 426, 428 (S.D.N.Y.), aff'd, 828 F.2d 117 (2d Cir. 1987), cert. denied, 484 U.S. 1064 (1988)). The Yusuf court continued that the double exequatur requirement "was an unnecessary time-consuming hurdle . . . and greatly limited [the Geneva Convention's] utility." 126 F.3d at 22.*fn2 Finally, the party opposing confirmation — here, Konversbank — bears the burden of proving that one of the grounds enumerated in Article V applies. See Overseas Cosmos, 1997 WL 757041, at *2.

In the alternative, respondent seeks to defer a decision on the petition pursuant to Article VI of the Convention, which states that

[i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security. (Convention Article VI).

The crux of the instant dispute with respect to subject matter jurisdiction derives from the parties' interpretation of Article V(1)(e). More precisely, according to Konversbank, the arbitral award is not yet binding — and therefore not enforceable in this Court under Article V(1)(e) of the Convention — because it has not yet been reduced to judgment in Russia. Although the Arbitrazh Court of the City of Moscow concluded that there were no grounds for setting aside the award and issued a writ of execution for enforcement of the award on November 5, 2002, the Federal Arbitration Court of the Moscow District reversed and remanded the case to the Arbitrazh Court of the City of Moscow on December 19, 2002 to retry a number of unsettled issues, including whether the ICCA even had jurisdiction to examine all of the claims asserted by the petitioner in the first instance. Petitioner, by contrast, contends that the award is binding under both Russian and United States law. Specifically, petitioner cites to two sections of a Russian statute, the Law of Russian Federation on International Commercial Arbitration, both of which interpret awards rendered in the ICCA as final and binding. First, Annex 1 to this statute, entitled Statute of the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation, Clause 5, states that

[t]he award of the International Court of Commercial Arbitration shall be executed by the parties within the time-limits determined by it. If the time-limit of execution is not indicated in the award it shall be subject to immediate execution. Awards which have not been executed within the time-limit shall be enforced in compliance with the law and international agreements. (Kondrashin Decl. ¶ 7, Ex. C at 6).*fn3

Second, petitioner adverts to Article 35 (Recognition and Execution of Arbitral Award) of Section VIII of that same statute, which states that

[a]n arbitral award, regardless of the country it was adopted in, shall be considered binding and in the event of submitting a written application to a competent court shall be executed with account of the provisions of this Article and Article 36. (Id. Ex. C at 2).

Although I am mindful of petitioner's concerns as well as of the pro-enforcement bias of the Convention, the most recent decision of the Federal Arbitration Court of the Moscow District reversing the lower court's decision confirming the award on a variety of grounds gives me pause. For this reason, I turn instead to respondent's alternative request that this matter be adjourned under Title VI of the Convention.

The question of whether enforcement may be deferred under Article VI was addressed by this Court in a case similar to the one at bar, Spier v. Calzaturificio Tecnica, S.p.A. 663 F. Supp.

871 (S.D.N.Y. 1987). In that case, petitioner brought a petition under the Convention for enforcement of an arbitral award rendered in its favor in Italy. The respondent, an Italian corporation, asserted, inter alia that the petition should be dismissed for lack of subject matter jurisdiction under Article V of the Convention because the corporation had commenced a separate action in Italy to set aside the award. See id. In the alternative, the respondent sought to have the court stay its decision under Article VI of the Convention pending the determination of the challenges posed in the Italian court. See id.

In light of the pendency of the Italian proceeding, the federal district court was reluctant to consider the arbitral award "binding" under the Convention. Consequently, rather than rule on an unresolved issue, Judge Haight turned instead to Article VI of the Convention, reasoning that

[t]he positions of the parties in the case at bar are entirely predictable. Spier condemns Tecnica's Italian litigation as frivolous and intended solely for the purpose of harassment and delay. Tecnica says that its challenges under Italian law to the award are meritorious and will undoubtedly prevail. One would be astonished if trial counsel for either party in this country said anything else.

Without plumbing the speeches of the Convention delegates to their depths, it seems fair to assume that the Convention would have failed of achievement if it did not provide for a successful challenge in the country of issuance as a ground for non-enforcement in a foreign country. But that basis for refusal of enforcement would have been nullified if the Convention did not also empower the courts of the country where enforcement is sought to at least consider the pendency of a challenge in the country of issuance. That is the office performed by Article VI. 663 F. Supp. at 875.

Unable to determine whether the respondent's "litigation position in Italy was transparently frivolous" id., the court decided instead to defer the enforcement proceedings in federal district court under Article VI. See also Caribbean Trading and Fidelty Corp. v. Nigerian Nat'l Petroleum Corp., 1990 WL 213030, at *8 (S.D.N.Y. Dec. 18, 1990) (staying enforcement proceedings pending the outcome of proceedings in Nigeria and stating that "Nigerian courts are better equipped than this Court to determine the proper application of [Nigerian] law"). Similarly, in Fertilizer Corporation of India, the United States District Court for the Southern District of Ohio deferred its decision on the enforcement of a petitioner's award under Article VI on the ground that the petitioner had brought a parallel proceeding to enforce the award in India, reasoning that

in order to avoid the possibility of an inconsistent result, this Court has determined to adjourn its decision on enforcement of the [arbitral award] until the Indian courts decide with finality whether the award is correct under Indian law . . . .

When we are informed that the Indian courts have reviewed the Nitrophosphate Award and rendered a decision, we will proceed to either grant or deny enforcement, based on that decision. Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948, 962 (S.D. Ohio 1981).

However, while adjournment is appropriate in certain situations, a district court should not automatically stay enforcement proceedings on the ground that parallel proceedings are pending in the originating country. See Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 317 (2d Cir. 1998); Sarhank Group v. Oracle Corp., 2002 WL 31268635 (S.D.N.Y. Oct. 9, 2002). In Europear, the Second Circuit provided a list of factors that a district court should weigh when deciding whether to adjourn a petition, including

(1) the general objectives of arbitration — the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;

(2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;

(3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;

(4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;

(5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive `suitable security' and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country, see also Berg, 61 F.3d at 105 (noting that insolvency of one party may play role [sic] in determining relative hardships); and

(6) any other circumstances that could tend to shift the balance in favor of or against adjournment. While this is not an exhaustive list, we think it adequately represents the various concerns that come into play when a district court is asked to adjourn enforcement proceedings to await the outcome of parallel foreign proceedings. 156 F.3d 310, 317-18 (2d Cir. 1998) (citations omitted).
Echoing the concerns of both the Spier and Fertilizer Corporation courts, the Europcar court cautioned that

where a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be set aside, a district court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings. Moreover, where, as here, it is the plaintiff who first sought to enforce his award in the originating country, the argument for enforcement by the plaintiff in the district court loses force because the possibility of conflicting results and the consequent offense to international comity can be laid at the plaintiffs door. 156 F.3d at 317.

Here, I find that deferment of the petition is appropriate in light of the pendency of the action in Russia. With respect to the fourth, and perhaps most important Europcar factor, it was petitioner who first sought to enforce its award in the originating country — Russia — on March 29, 2002, thus raising "concerns of international comity" vis-a-vis its petition to confirm the ICCA award in this Court. Indeed, the "finality" of the ICCA's arbitral award is far from established, particularly in light of the Russian Federal Arbitration Court's most recent reversal of the lower court's findings. As with the court in Fertilizer Corporation of India, I am loath to risk "the possibility of an inconsistent result," and therefore have determined to adjourn my decision on the enforcement of petitioner's ICCA award. Accordingly, this matter will be placed on my suspense calendar until a final decision has been rendered in Russia.

Finally, under Article VI of the Convention, the district court may "on the application of the party claiming enforcement of the award, order the other party to give suitable security." (Convention Art. VI). In Caribbean Trading, this Court, in adjourning the petition, directed the respondent to post security in the amount set forth in the petition. See 1990 WL 213030, at *1. Here, petitioner has demanded a money judgment in the sum of $1.9 million plus interest. Because petitioner has already attached $2.1 million — $1.9 million plus interest due — respondent has already provided "suitable security" pending the resolution of this matter.

2. Lack of Personal Jurisdiction over Konversbank and Forum Non Conveniens

Konversbank also moves to dismiss the petition pursuant to Rule 12(b)(2) on the ground that this Court lacks jurisdiction over either the respondent's person or property, as well as that New York is an inadequate forum and the action may therefore be transferred to Russia under the doctrine of forum non conveniens. Because I have placed this matter in suspense pending its resolution in the Russian courts, I need not reach the question of whether this case may be dismissed on these grounds. In Caribbean Trading, the respondent moved to dismiss a petition to confirm an arbitration award under the Convention on the grounds of lack of subject matter and personal jurisdiction, as well as insufficiency of process, pursuant to Rule 12(b)(1), (2), and (5). See 1990 WL 213030, at *1. In considering the motion to dismiss the petition, Judge Keenan expressed doubt with respect to the existence of both subject matter and personal jurisdiction over the respondent under the Foreign Sovereign Immunity Act. Nevertheless, because the respondent in that case had moved to set aside the award in Nigeria, Judge Keenan stayed the proceeding under article VI of the Convention and declined to resolve the jurisdictional issues on the petition for enforcement before him. Rather, he placed the action on his suspense calendar and ordered the respondent to post security in the amount set forth in the arbitration award and demanded in the petition. See 1990 WL 213030, at *6.

That said, I am uncertain in any event whether there is any distinction between "Konversbank" and the correspondent accounts and consequently whether quasi in rem jurisdiction is present. Should the matter become active, discovery may be appropriate, and if so I will permit limited discovery on this issue.

III. CONCLUSION

For the aforementioned reasons, that arm of respondent's motion that seeks to defer proceedings in this Court under Article VI pending the exhaustion of this matter in Russia is granted. The clerk of the court is instructed to place this case on my suspense calendar until a final judgment is rendered in Russia. The parties are to advise the Court of the status of the Russian proceedings monthly beginning in March 2003.

IT IS SO ORDERED.