1ST CASE of Level 1 printed in FULL format.

CARGILL INTERNATIONAL S.A., CARGILL B.V., Plaintiff,
-against- M/T PAVEL DYBENKO, her engines, tackle, in rem,
and NOVOROSSIYSK SHIPPING CO., in personam, Defendants.

90 Civ. 3176 (CES)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1992 U.S. Dist. LEXIS 2329

February 26, 1992, Decided
February 27, 1992, Filed

JUDGES: [*1] Stewart

OPINIONBY: CHARLES E. STEWART

OPINION: MEMORANDUM DECISION

STEWART, District Judge:

Defendant Novorossiysk Shipping Company (hereinafter "Novorossiysk") n1 moves to Dismiss the Complaint and/or for Summary Judgment on the basis of lack of subject matter jurisdiction. n2 Defendant argues that plaintiffs have failed to establish jurisdiction as required by the Foreign Sovereign Immunities Act, 28 U.S.C. sections 1602-1611. n3 For the reasons that follow, the motion is granted.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Defendant vessel the M/T Pavel Dybenko does not sail into American waters, and no service of process has been effectuated against the vessel or any representative.

n2 Plaintiffs have also cross-moved to amend the complaint. The allegations of the amended complaint are used to establish subject matter jurisdiction. Granting the motion to amend, pursuant to Fed. R. Civ. P. 15, and because documents outside the pleadings have been considered, we consider this as a motion for summary judgment with respect to the amended complaint.

n3 The parties have entered into a stipulation in which CISA agreed to stay its claims against Novorossiysk pending the outcome of the London arbitration which was instituted by CISA, pursuant to the arbitration clause in the Charter Party. That stay is still in effect and this motion is only directed against plaintiff Cargill B.V.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*2]

FACTS

On June 14, 1988, plaintiff Cargill B.V., a Netherlands trading corporation with its principal offices located in Amsterdam, purchased 7000 tons of crude

United States
Page 1 of 8

WWW.NEWYORKCONVENTION.ORG

LEXIS NEXIS LEXIS NEXIS

Argentine degummed soyabean oil from plaintiff Cargill International S.A., (hereinafter "CISA") a corporation incorporated under the laws of the Netherlands Antilles with its principal place of business in Geneva, Switzerland. On June 22, 1988, CISA entered into a Charter Party with Novorossiysk, an entity wholly owned by the government of the former Soviet Union. The Charter Party called for the transport of the soyabean oil from Argentina and Brazil to the Netherlands aboard defendant vessel the M/T Pavel Dybenko, a ship owned and operated by Novorossiysk.

Clause 24 of the Charter Party provides that in the event of a dispute between the contracting parties, arbitration is to take place in either New York or London, "whichever place is specified in Part 1 of this charter pursuant to the laws relating to arbitration there in force." In Part 1, the contracting parties opted for London as the site for any arbitration proceedings. In addition, Clause 28 of the Special Provisions appended to the Charter Party provides that [*3] the bills of lading should "incorporate particulars of Charter Party i.e.-- . . . Arbitration in London should be stated in the Bill of Lading."

Furthermore, Clause 20(1) of the Charter Party provides:

This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Acts of the United States . . . except that if this Bill of Lading is issued at a place where any other Act, ordinance or legislation gives statutory effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels . . . then this Bill of Lading shall have effect, subject to the provisions of such Act, ordinance or legislation.

Subsequently, between July 16-18, 1988, 9,100 metric tons of degummed soyabean oil was loaded aboard defendant vessel the M/T Pavel Dybenko in San Lorenzo, Argentina, while an additional 5,750 metric tons were loaded on board in Rio Grande, Brazil on July 23, 1988. At that time, pursuant to the terms of the Charter Party, plaintiff Cargill S.A., through its Argentine agents/shippers, had the bills of lading presented to the master of defendant vessel for his signature. Despite Clause 28 of the Charter Party, no reference [*4] was made in the bills of lading to the Charter Party or to the arbitration clause contained therein.

Upon arrival in Amsterdam, the cargo of soyabean oil was off-loaded from the M/T Pavel Dybenko. Subsequent chemical testing of the oil purportedly showed that it had been contaminated with hydrocarbons during the course of the voyage from South America to the Netherlands. As a result, plaintiff Cargill B.V. claimed monetary damages in the amount of $ 920,000.

The claim was presented to the insurance authorities in London, the West of England Shipowners Mutual Insurance Association. The insurance association issued a letter of guarantee in which it agreed to appear and pay any judgment rendered by a Dutch court having jurisdiction in this case. Plaintiffs have never submitted the dispute to a court in the Netherlands, and apparently, the statute of limitations has expired in that forum. From July, 1989 through April, 1990, the London insurance representatives of the parties entered into several agreements whereby the one year time frame within which to commence legal proceedings against defendants was extended. The last extension granted by defendants was to expire on May 9, 1990.

WWW.NEWYORKCONVENTION.ORG

LEXIS NEXIS LEXIS NEXIS

On [*5] May 7, 1990, plaintiffs requested a further three month extension beyond the initial expiration date of May 9. The request was telexed to defendant Novorossiysk's headquarters in Moscow apparently arriving there on a state holiday. No response to the renewed extension request was ever forthcoming. As a result, on May 9, 1990, plaintiff Cargill S.A. designated its arbitrator in London as per the terms of the Charter Party, while plaintiff Cargill B.V., along with CISA, instituted this action in an attempt to protect whatever rights it might possess in the United States with regard to its claims against defendants. The complaint alleges damages in the amount of $ 920,000 for cargo contamination.

As of August 9, 1991, following the inception of this lawsuit, plaintiff Cargill B.V. also planned to institute a lawsuit against defendant Novorossiysk in a British court, seeking essentially the same relief. The status of the British lawsuit at the present time is not known.

LEGAL DISCUSSION

The sole legal issue is whether defendant Novorossiysk, a foreign sovereign, is subject to the jurisdiction of this Court. The Foreign Sovereign Immunities Act [hereinafter "FSIA"], 28 U.S.C. 1601, [*6] et seq., is the exclusive source of subject matter jurisdiction in suits involving foreign states. Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991); Letelier v. Republic of Chile, 748 F.2d 790, 793 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985). The FSIA confers original jurisdiction on district courts "without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. section 1330(a). n4 28 U.S.C. section 1604 sets forth the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607 of this chapter."

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 "Subsection (b) of 28 U.S.C. section 1330 provides that 'personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under subsection (a) where service has been made under [28 U.S.C. section 1608].' Thus, personal jurisdiction, like subject matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity applies." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 435, n.3 (1989).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*7]

It is undisputed that defendant Novorossisyk, an entity wholly owned by the government of the former Soviet Union, is a "foreign state" within the meaning of the FSIA, 28 U.S.C. section 1603(a). As a result, unless one of the statutory exceptions applies, this Court is without subject matter jurisdiction to hear the instant case. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494 (1983); Shapiro v. Republic of Bolivia, 930 F.2d 1013,1017 (2d Cir. 1991). Plaintiffs have the burden of going forward with evidence that the FSIA does not apply in these circumstances. See Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F. Supp. 289, 293-294 (S.D.N.Y. 1987). If plaintiffs meet this burden, defendant must prove by a preponderance of the evidence that it is entitled to

WWW.NEWYORKCONVENTION.ORG

LEXIS® NEXIS® LEXIS® NEXIS®

the protection of the FSIA and that none of the exceptions are applicable. See Letelier v. Republic of Chile, 748 F.2d 790, 795 (2d Cir. 1984); Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F. Supp. 289, 294 (S.D.N.Y. 1987).

The three exceptions raised by plaintiffs are the waiver exception, the arbitration [*8] exception and the maritime lien exception, found in 28 U.S.C. sections 1605 (a)(1), 1605 (a)(6)(b) and 1605(b). Each will be discussed in turn.

I. Waiver

Plaintiffs argue that defendant Novorossisyk both expressly and implicitly waived its sovereign immunity in a number of ways. n5 Insofar as they claim that there was an explicit waiver, they rely on the affidavit of Mrs. Georgievna Tormosina, Chief of the legal department of Novorossisyk, dated February 15, 1991 and submitted in support of the Motion to Dismiss. [the "Tormosina Aff."]. Paragraph 7 states,

that Novorossisyk Shipping Company has appeared in an arbitration commenced in London by Cargill International S.A., and further agrees to appear and answer in connection with any suit brought by Cargill International S.A. or Cargill B.V. before the Courts of the Union of Soviet Socialist Republics, or in any Court where it may be validly and properly served, upon dismissal of lawsuit pending in the United States District Court for the Southern District of New York . . . .

Plaintiffs contend that these excerpts explicitly demonstrate an intent to waive sovereign immunity. This argument is not persuasive.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 As Section 1605(a)(1) provides, "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication."

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*9]

The Tormosina affidavit states that defendant Novorossiysk will only answer and appear in a court in which the company can be validly or properly served; it is clear that defendant does not believe it can validly or properly be served in the United States. Moreover, the affidavit specifically notes that Novorossiysk will only submit to the jurisdiction of a court where it may validly and properly be served after the dismissal of the action now before this Court. This in no way constitutes an explicit waiver.

Plaintiffs further assert that defendant Novorossisyk implicitly waived its sovereign immunity by incorporating into the terms of Clause 20 of Part II of the Charter Party between CISA and Novorossisyk the following language:

(b) The carriage of cargo under this Charter Party and under all Bills of Lading issued for the cargo shall be subject to the statutory provisions and other terms set forth or specified in sub-paragraph (i) through (vii) of this clause

WWW.NEWYORKCONVENTION.ORG

LEXIS® NEXIS® LEXIS® NEXIS®

. . . .
(i) CLAUSE PARAMOUNT. This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Acts of the United States, approved April 16, 1936, except that if this Bill of Lading [*10] is issued at a place where any other Act, ordinance or legislation gives statutory effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels, August 1924, then this Bill of Lading shall have effect, subject to the provisions of such Act, ordinance or legislation.

It is plaintiffs' position that since the bills of lading in this case were issued in Argentina, purportedly a non-signatory to the Brussels convention, the Carriage of Goods by Sea Act of the United States is applicable to the Charter Party and bills of lading in the present case. As a result, plaintiffs state that incorporation of American law within the Charter Party constitutes an implicit waiver of sovereign immunity by defendant Novorossisyk. We disagree.

First, the Charter Party that purports to constitute the waiver is between CISA and Novorossisyk. Regardless of whether the purported incorporation of the U.S. Carriage of Goods by Sea Act within the Charter Party can constitute an implicit waiver of sovereign immunity, Cargill B.V. was not a signatory. Plaintiff essentially argues that the bills of lading to which Cargill B.V. was a signatory incorporated [*11] the terms of the Charter Party. This argument is so attenuated that it can hardly be said to constitute an implied waiver.

Federal courts have repeatedly held that the implied waiver provision of 28 U.S.C section 1605(a)(1) must be construed narrowly. See, e.g., Shapiro v. Republic of Bolivia, 930 F.2d 1013,1017 (2d Cir. 1991); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985); L'Europeene de Banque v. La Republica de Venezuela, 700 F.Supp. 114, 123 (S.D.N.Y. 1988). The legislative history of the FSIA gives examples of implicit waivers:

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitrate in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

H.R.Rep. No. 1487, 94th Cong., 2d Sess. [*12] 18, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6617.

There is some case law to support the view that the selection of American law to govern disputes can constitute an implicit waiver of sovereign immunity. See, e.g., Marlowe v. Argentine Naval Commission, 604 F. Supp. 703, 709 (D. D.C. 1985); M.B.L. International Contractors, Inc. v. Republic of Trinidad and Tobago, 725 F. Supp. 52, 55 n.3 (D.D.C. 1989). Nevertheless, not only are some of these cases criticized, but they are easily distinguished on their facts. Whether or not the Charter Party and the Bills of Lading can be said to have clearly selected COGSA to govern the claims is disputable. Moreover, London was clearly chosen as the place of arbitration, making the claim that COGSA was an implicit waiver of sovereign immunity in the United States not at all compelling.

LEXIS® NEXIS® LEXIS® NEXIS®

WWW.NEWYORKCONVENTION.ORG

Plaintiffs further contend that defendant Novorossiysk implicitly waived its sovereign immunity when it agreed to submit all disputes arising under the Charter Party to arbitration in London. As noted previously, the legislative history of the FSIA states that implicit waiver can occur when a foreign state agrees [*13] to arbitration in another country or that the laws of a particular nation should govern a contract. See H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 18, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6617.

The blind application of the legislative history to this case is inappropriate. As was noted by Judge Conner in the case of Maritime Ventures International, Inc. v. Caribbean Trading & Fidelity, Ltd., 689 F. Supp. 1340, 1351 (S.D.N.Y. 1988):

A literal interpretation of the House Report would subject a foreign government to jurisdiction in the United States whenever it agreed to be governed by the laws or to arbitrate in the forum of any other country other than its own, even when the contract makes no mention of the United States. This would result in a vast increase in the jurisdiction of the federal courts over matters involving sensitive foreign relations.

Similarly, Judge Weinfeld observed that:

because the Act's (U.S. Carriage of Goods by Sea Act) waiver provision is written as broadly as it is, it is incumbent upon the Court to narrow that provision's scope . . . We only hold that when a foreign state agrees to submit its disputes with [*14] another, non-American private party to the laws of a third country, or to answer in the tribunals of such country, it does not implicitly waive its immunity to the jurisdiction of the courts of the United States.

Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1302 (S.D.N.Y. 1980), aff'd, 647 F.2d 320 (2d Cir. 1981), rev'd on other grounds, 461 U.S. 480 (1983); accord, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 n.10 (7th Cir. 1985); Ohntrup v. Firearms Center, Inc., 516 F. Supp. 1281, 1284-85 (E.D. Pa. 1981), aff'd, 760 F.2d 259 (3d Cir. 1985). Defendant Novorossiysk has neither explicitly nor implicitly waived its sovereign immunity.

II. Arbitration exception

Plaintiffs separately seek to establish jurisdiction based on the arbitration exception to the FSIA. Cargill B.V. seeks to compel arbitration with defendant in London, pursuant to the terms of the Charter Party. They argue that jurisdiction can be based on the Arbitration Act, 9 U.S.C. section 201. We disagree.

First, the arbitration exception to the FSIA is not applicable. [*15] n6 As previously noted, none of the parties ever agreed to arbitration in the United States, and the Charter Party that provided for arbitration in London was not signed by Cargill B.V. The Convention on the Recognition and Enforcement of Foreign Arbitral Award, 9 U.S.C. section 201, upon which plaintiffs rely to bring this case under the exception in 28 U.S.C. section 1605(6)(B), is not applicable. Unlike the case of Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978), no foreign arbitral award exists which this Court can enforce.

LEXIS NEXIS LEXIS NEXIS
WWW.NEWYORKCONVENTION.ORG

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 28 U.S.C. section 1605 provides, in pertinent part, that,

(a) A foreign state shall not be immune from the jurisdiction of the United States or of the States in any case . . .

(6)(A) in which the arbitration takes or is intended to take place in the United States

(B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards . . ."

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*16]

Nor can plaintiffs rely on 9 U.S.C. 203 as a basis for jurisdiction to compel arbitration in London. Plaintiffs' amended complaint seeks to reform the bills of lading to incorporate the Charter Party; the bills of lading would then provide for a London arbitration between Cargill B.V. and defendant. Regardless of the merits of the new cause of action, and even accepting the amendment to the complaint, there must be a basis for subject matter jurisdiction in the United States before this Court can compel arbitration in another country.

III. Enforcement of a maritime lien.

Plaintiffs rely on 28 U.S.C. section 1605(b) which states, in summary, that a foreign state shall not be immune from American jurisdiction in any case brought to enforce a maritime lien. n7 A caveat is contained in section 1605(b)(1) which provides that notice of suit must be "given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted."

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n7 28 U.S.C. Section 1605 (b) states that,

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States

in any case in which a suit in admiralty is brought

to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based

upon commerical activity of the foreign state . . .

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*17]

It is plaintiffs' position that service upon the alleged general agent of defendant Novorossisyk, Sovfracht (USA), Inc., constitutes sufficient service under section 1605(b)(1) and that section 1605(b) is applicable in this case

WWW.NEWYORKCONVENTION.ORG

LEXIS® NEXIS® LEXIS® NEXIS®

despite the acknowledged fact that defendant vessel the M/T Pavel Dybenko does not call at American ports. These arguments are without merit.

Section 1605(b) of the FSIA provides a substitute for the usual in rem proceeding utilized to enforce a maritime lien, while the notice requirements replace the conventional requirement that attachment of the foreign vessel precede the exercise of jurisdiction. See Castillo v. Shipping Corp. of India, 606 F. Supp. 497, 503 (S.D.N.Y. 1985) (citing China Nat. Chemical Import & Export Corp. v. M/V Lago Hualaihue, 504 F. Supp. 684, 689, n.1 (D. Md. 1981) and Jet Line Services, Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1174 (D. Md. 1978)). Thus once service has been made, the suit is deemed to be an in personam claim limited to the value of the vessel. 28 U.S.C. section 1605(b).

Service must be made on the master of the vessel or his second in command. [*18] See Castillo v. Shipping Corp. of India, 606 F. Supp. 497, 503 (S.D.N.Y. 1985). Service on Sovfracht was not sufficient: "Service on the general agent of the corporate owner is insufficient. Moreover, although Congress has changed the procedures for obtaining jurisdiction, it has not altered the fundamental requirement that the ship be present in the forum when service is effected." Id. Thus, plaintiffs' defective service and the absence from this forum of the defendant vessel, the M/T Pavel Dybenko, make the maritime lien exception as a basis for jurisdiction irrelevant.

CONCLUSION

None of plaintiffs' bases for subject matter jurisdiction withstand scrutiny. Defendant's Motion for Summary Judgment as to Cargill B.V. is granted.

SO ORDERED.

Charles E. Stewart
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
February 26, 1992

WWW.NEWYORKCONVENTION.ORG

LEXIS® NEXIS® LEXIS® NEXIS®