ORDERED, that the parties shall file a supplemental Local Rule 206 Report no later than October 6, 1995.

SO ORDERED.

ASIA NORTH AMERICA EASTBOUND RATE AGREEMENT, Petitioner,

v.

BJI INDUSTRIES, INC., Respondent.

Civ. A. No. 94-903 SSH.

United States District Court, District of Columbia.

Aug. 28, 1995.

Conference of ocean common carriers petitioned to confirm arbitral award against a shipper and moved for default judgment, and shipper moved to set aside entry of default and to dismiss. The District Court, Stanley S. Harris, J., held that: (1) default judgment was not warranted by shipper's refusal to participate in arbitration proceeding and failure to file motion or answer with court in response to petition to confirm; (2) standard governing summary judgment applied to determination of whether service contract was duly signed; (3) even if arbitrability issue had been litigated on the merits before arbitrator, court still had to make independent determination of whether there was valid agreement to arbitrate; and (4) shipper ratified agent's signing of contract on its behalf by receiving benefit of favorable rates thereunder.

Motions for default judgment and to dismiss denied; motion to set aside default and petition to confirm granted.

1. Federal Civil Procedure ⇐2444.1, 2450

Though decision to set aside entry of default lies within discretion of trial court, exercise of that discretion entails consideration of whether: default was willful; set-aside would prejudice plaintiff; and alleged defense was meritorious. Fed.Rules Civ. Proc.Rule 55(c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2415

Judgment by default is normally reserved for a totally unresponsive party.

3. Federal Civil Procedure ⇐2444.1, 2450

Default judgment would not be entered against shipper in suit by ocean carriers conference to confirm arbitral award for "deadfreight"; shipper's conduct in refusing to participate in arbitration and not filing any motion or answer with the court in response to petition to confirm was not "willful," in view of claim that it was not party to contract containing arbitration provision and despite fact that arbitrator determined that it was allowed by the contract, only claim of prejudice by conference was delay in entry of relief, and shipper asserted defense on issue of validity of arbitral award that satisfied meritorious defense standard, though it did not ultimately prevail.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Civil Procedure ⇐2451.1

In deciding whether to set aside default or default judgment, record must be construed in light most favorable to the moving party.

5. Arbitration ⇐23.13

Courts, not arbitrators, must decide whether parties before them had valid agreement to arbitrate disputed question, and thus arbitrator's conclusions concerning validity of contract containing arbitration provision are not binding.

6. Federal Civil Procedure ⇐2444.1

Delay of satisfaction of prevailing plaintiff's claim is insufficient to establish prejudice factor against setting aside default.

7. Federal Civil Procedure ⇐2450

In determining existence of "meritorious defense," supporting setting aside of default, likelihood of success is not the measure; respondent's allegations are meritorious if they

contain even a hint of a suggestion which, if proven, would constitute a complete defense, and even broad and conclusory allegations are sufficient.

See publication Words and Phrases for other judicial constructions and definitions.

8. Contracts ⇐127(4)

Contractual provisions relating to jurisdiction will be honored so long as they are reasonable.

9. Arbitration ⇐1.2

There is strong federal policy favoring arbitration as alternative to the "complications of litigation."

10. Arbitration ⇐73.7(1)

Judicial review of arbitration award is extremely limited and great deference is appropriate.

11. Arbitration ⇐23.13

Despite judicial deference to arbitration awards and fact that arbitrator had determined that respondent was party to contract containing arbitration provision, issue of whether contract was validly signed by respondent was a matter of law for the court, so that summary judgment standard applied and court was precluded from enforcing the award until it made the determination as to validity of signing.

12. Federal Civil Procedure ⇐2466, 2543

In considering summary judgment motion, all evidence and inferences to be drawn from it must be considered in light most favorable to nonmoving party, and summary judgment cannot be granted if evidence is such that reasonable jury could return verdict for nonmoving party. Fed.Rules Civ. Proc.Rule 56(c), 28 U.S.C.A.

13. Arbitration ⇐46.1

There was no requirement that party challenging arbitrability seek injunction or move to stay arbitration before arbitration commenced, in order to avoid waiver of defense in confirmation action that dispute was not arbitrable.

14. Federal Civil Procedure ⇐665

Federal litigation system does not quire special jurisdictional appearanc Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C

15. Arbitration ⇐46.1

Even if party contesting arbitration pa ticipates in proceedings, it can preserve arr trability issue for judicial consideration presenting objection to arbitrability to t arbitrator and not thereafter clearly indica ing willingness to forego judicial review.

16. Arbitration ⇐46.1

Party opposing arbitration did not sul mit arbitrability question to arbitrator, or : least made objection to arbitrator's jurisdic tion without subsequent indication that it wa willing to forego judicial inquiry, and thu arbitrability issue was preserved for judicia consideration, even though such party pro vided arbitration agency with sworn state ment from its president denying entry int any agreement binding it to arbitration; fur ther, even if arbitrability issue was litigate on the merits before the arbitrator, court hac to make independent determination, in sub sequent action to confirm decision, as to whether there was valid agreement to arbi trate.

17. Contracts ⇐129(1)

Contractual choice-of-law provisions are usually honored.

18. Principal and Agent ⇐169(2)

Even though shipper contended that agent which signed service contract with conference of ocean common carriers was not authorized to sign on shipper's behalf, shipper ratified the contract by shipping and paying freight with knowledge of draft version of contract imposing same liability as in final contract, thereby receiving benefits of contract's more favorable rates.

19. Principal and Agent ⇐166(1), 169(1)

Key concern in determining whether principal has ratified unauthorized act by agent is principal's knowledge of the act and subsequent actions with that knowledge.

20. Principal and Agent ⇐169(1), 171(1)

Ratification by principal of unauthorized act of agent can be expressed or implied, and can occur when principal retains benefits of transaction after acquiring full knowledge of agent's unauthorized act.

21. Principal and Agent ⇐166(1)

One who asserts ratification by principal of unauthorized act of agent must prove that ratifying party acted upon full knowledge of all material facts.

22. Principal and Agent ⇐166(6), 171(1)

Claim by shipper that it did not know that agent had signed shipper's name as contracting party to service contract with conference of ocean common carriers did not preclude shipper's ratification by shipping under the contract and obtaining its benefits, where shipper admitted that the agent was its agent for purposes of arranging shipment of goods including fixing of freight rates, acknowledged that it knew of multiple contracts in which agent represented that shipper and agent were affiliated and in which agent signed on behalf of shipper, and admitted receiving draft of the contract under which shipper would have been jointly and severally liable with the agent for the same deadfreight liability provided in the final version.

23. Principal and Agent ⇐166(5)

Knowledge to support ratification by principal of unauthorized act of agent may be shown by evidence either of knowledge or of facts from which such knowledge may reasonably be imputed to the principal.

24. Principal and Agent ⇐169(2)

Shipper ratified agent's allegedly unauthorized actions in signing on behalf of shipper a service contract with conference of ocean common carriers, despite claim that it did not know how the shipping rates paid under the contract compared to prevailing tariff rates, where shipper was in the business of importing goods and had history of prior dealings with the conference and it received more than 100 bills of lading containing specific references to the service contract, which bills were paid.

Cindy G. Buys, Jeffrey F. Lawrence, Anne E. Mickey, Sher & Blackwell, Washington, DC, for Petitioner.

Daniel E. Johnson, Gary H. Sampliner, McKenna & Cuneo, Washington, DC, for Respondent.

OPINION

STANLEY S. HARRIS, District Judge.

This matter is before the Court on petitioner's petition to confirm the arbitral award, petitioner's motion for default judgment, respondent's counter-motion to set aside entry of default, petitioner's renewed motion to confirm arbitral award, and respondent's motion to dismiss. Upon consideration of the entire record, the Court grants respondent's motion to set aside entry of default, grants petitioner's petition to confirm the arbitral award, and denies the remaining motions.

Background

In this action to confirm an arbitral award, petitioner Asia North America Eastbound Rate Agreement ("ANERA") seeks to collect liquidated damages from respondent BJI Industries, Inc. ("BJI"), for a shortfall in the quantity of goods that were to be shipped for BJI during the period March 24, 1987, to March 23, 1988.[1] ANERA is a Hong Kong based conference of ocean common carriers established pursuant to the Shipping Act of 1984, 46 U.S.C.App. §§ 1701 *et seq.* ("the Act").

In March of 1987, ANERA allegedly entered into Service Contract No. 262/87 ("the Service Contract") with BJI, a Texas corporation.[2] The Service Contract was allegedly

According to the Texas Secretary of State, Braxton Jeans, Inc., changed its name to BJI Industries, Inc., on February 4, 1991.

"Service contract" is defined in the Act as "a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level . . .; the contract may

signed on BJI's behalf by Eric Ko, an employee of TRC Textile Co., Ltd. ("TRC"), a Taiwanese company. TRC serves as an overseas buying agent that has the authority to find carriers and negotiate shipping rates for BJI. Under the Service Contract, BJI agreed to ship and ANERA agreed to carry a minimum of 150 forty-foot equivalent container units ("FEUs") of garments from ports in the Far East to several ports or points in the United States during the period from March 24, 1987, to March 23, 1988. The Service Contract further provided that if BJI failed to ship the minimum quantity of cargo, then BJI would pay liquidated damages (known as "deadfreight") in the amount of $2,450.00 per FEU.

On March 23, 1988, when the Service Contract expired, BJI had shipped only 127.605 FEUs; thus, there was a shortfall of 22.395 FEUs. In October of 1989, ANERA notified BJI that it owed ANERA $54,867.75 in deadfreight liability.[3] In December of 1989 and February of 1990, counsel for BJI claimed that TRC was never authorized to bind BJI to any contract, and therefore, that no valid contract existed between ANERA and BJI. On March 18, 1993, ANERA demanded arbitration pursuant to Article 17(a) of the Service Contract, and on March 26, 1993, BJI notified ANERA of its refusal to submit to arbitration.[4] On June 1, 1993, the Hong Kong International Arbitration Centre ("HKIAC") appointed Robin S. Peard as arbitrator. The following day, counsel for BJI wrote to the HKIAC disputing the validity of the arbitration and the appointment of an arbitrator. Included in this correspondence was a sworn statement, taken in September of 1992, in which BJI's president stated that TRC was not authorized to sign the Se Contract on BJI's behalf. BJI did no further submissions thereafter.

In order to determine the validity c arbitration agreement, the arbitrator c ered whether TRC had authority to sig Service Contract on behalf of BJI, and c mined that it did. On February 28, 199 arbitrator awarded ANERA $94,3 which BJI did not pay.[5] On April 22, ANERA filed the petition to confirm arbitral award against BJI in this court June 28, 1994, the Clerk of the Court en a default against BJI. ANERA now re its efforts to collect the liquidated dam

Discussion

I. Default

[1–3] A court may set aside an en default if good cause exists. Fed.R. 55(c). Although a decision to set asi entry of default lies within the discret the trial court, the "exercise of that d tion entails consideration of whether (default was willful, (2) a set-aside would udice the plaintiff, and (3) the alleged de was meritorious." *Keegel v. Key W Caribbean Trading Co.*, 627 F.2d 37 (D.C.Cir.1980) (citations omitted); c *Jackson v. Beech*, 636 F.2d 831, 8 (D.C.Cir.1980). Moreover, judgment b fault is normally reserved for a "totally sponsive party" because a resolution c merits is preferable to a judgment by de *Jackson*, 636 F.2d at 836; *Pulliam v. liam*, 478 F.2d 935, 936 (D.C.Cir.1973); *Livermore Corp. v. Aktiengesellschaft G der Loepfe*, 432 F.2d 689, 691 (D.C.Cir. In the present case, once the three fact

also specify provisions in the event of nonperformance on the part of either party." 46 U.S.C. app. § 1702(21).

3. The deadfreight liability was calculated as follows:

	Minimum Quantity Commitment:	150.000 FEUs
−	Quantity Shipped:	127.605 FEUs
=	Deadfreight	22.395 FEUs.

At a rate of $2,450.00 per FEU—$2,450.00 × 22.395—the total deadfreight liability equals $54,867.75.

4. Article 17(a) states "[a]ny and all dispute ing out of or in connection with this Co including any failure by the Shipper to pa the Agreement to perform as required here shall be resolved by arbitration in Hong K such other place as the parties to the dispu mutually agree."

5. This amount consists of $54,867.75 for freight liability (*supra* note 3), $23,405. interest thereon, $14,292.32 for ANERA's and $1,822.63 for the arbitrator's fee.

willfulness, prejudice, and the presence of a meritorious defense are weighed, it becomes clear that a default judgment should not be entered against BJI.

A. Willfulness

[4, 5] BJI contends that it did not receive the Clerk's notice of entry of default or ANERA's motion for default judgment until after BJI's counsel discovered on August 11, 1994, that these documents were on file with the Court. BJI further contends that its initial failure to participate in this Court's proceedings was due to its good faith belief that it was not a party to the Service Contract. ANERA, however, argues that BJI has been unresponsive throughout this action by refusing to participate in the arbitration proceeding, and by not filing any motion or answer with the Court in response to the petition to confirm the arbitral award. In deciding whether to set aside a default or default judgment, the record must be construed in the light most favorable to the moving party. *Jackson*, 636 F.2d at 836. Applying this standard of review, the Court finds that BJI's conduct does not rise to the level of "willful" behavior contemplated by *Keegel*. *See Keegel*, 627 F.2d at 374.

ANERA also argues that because the arbitrator had determined that BJI was bound by the Service Contract, including the agreement to arbitrate, BJI could not in good faith remain unresponsive to the petition to confirm the arbitral award. The Court disagrees. It is established that the courts, not arbitrators, must decide whether the parties before them had a valid agreement to arbitrate the dispute in question. *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 647–49, 106 S.Ct. 1415, 1418–19, 89 L.Ed.2d 648 (1986); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 759 (D.C.Cir. 1988); *Weatherly Cellaphonics Partners v. Hueber*, 726 F.Supp. 319, 321 (D.D.C.1989). Thus, the arbitrator's conclusions concerning the validity of the Service Contract are not binding. Moreover, counsel for BJI moved to set aside the entry of default on August 25, 1994, approximately four months after the petition to confirm the arbitral award was filed. Despite its somewhat tardy appearance, BJI cannot be considered a "totally unresponsive party." *See Jackson*, 636 F.2d at 836. As a result, the willfulness factor weighs heavily against an entry of a default judgment.

B. Prejudice to the Petitioner

[6] ANERA contends that setting aside the default will cause it to suffer prejudice by delaying the entry of relief and an award of attorneys' fees in its favor. However, the delay of satisfaction of a prevailing plaintiff's claim is insufficient to establish prejudice. *Keegel*, 627 F.2d at 374. As a result, this factor weighs in favor of BJI.

C. Meritorious Defense

[7] In determining the existence of a meritorious defense, likelihood of success is not the measure. *Id.* A respondent's allegations are meritorious if they contain "even a hint of a suggestion" which, if proven, would constitute a complete defense. *Id.* (citations omitted). Even broad and conclusory allegations meet the meritorious defense criterion for setting aside the default. *Id.* In the present case, because BJI elected not to submit to arbitration, the arbitrator was not presented with the alleged facts and evidence now before this Court. BJI contends that it has defenses available to it under Article II and Article V of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention").[6] 9 U.S.C.A. note § 201. BJI further contends that ANERA had a history of contracting directly with TRC for BJI's shipments, and that it never received a copy of the Service Contract or correspondence relating to it until after the contract had expired. Therefore, BJI's defense on the issue of the validity of the arbitral award satisfies the "hint of a suggestion" standard, even if BJI eventually loses on the merits. Taken together, the

6. Specifically, BJI asserts that the courts are precluded from enforcing foreign arbitral awards without a valid written agreement to arbitrate between the parties, and that the arbitrability question constitutes "... a difference not contemplated by or not falling within the terms of the submission to arbitration." 9 U.S.C.A. note § 201.

balance of considerations weighs against an entry of judgment by default. Accordingly, the motion to set aside the entry of default is granted.

II. Jurisdiction

[8] Before addressing the merits of the confirmation action, the Court must determine whether personal jurisdiction is proper in this Court. Contractual provisions relating to jurisdiction will be honored as long as they are reasonable. *See National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315, 84 S.Ct. 411, 414, 11 L.Ed.2d 354 (1964). ANERA asserts that under Article 17(b) of the Service Contract, BJI expresaly consented to an exercise of personal jurisdiction by the District Court for the District of Columbia in any action to enforce an arbitral decision.[7] BJI has not challenged the reasonableness of the jurisdiction clause, but rather moves to dismiss pursuant to Fed.R.Civ.P. 12(b)(2) on the ground that the clause is invalid because BJI is not a party to the Service Contract. As will be demonstrated, BJI is a party to the Service Contract; thus, the parties' consent to the jurisdiction of this Court is valid. Accordingly, respondent's motion to dismiss is denied.

III. Validity of the Contract

ANERA moves to confirm the arbitral award on the grounds that: (1) the arbitrator's decision that BJI was a party to the Service Contract is entitled to preclusive effect; (2) BJI ratified the Service Contract by slipping under it and receiving benefits; and (3) TRC had apparent authority to sign the Service Contract on BJI's behalf.

A. Standard of Review

[9–11] There is a strong federal policy favoring arbitration as an alternative to the "complications of litigation." *Davis v. Chevy Chase Fin.*, 667 F.2d 160, 164 (D.C.Cir.1981) (quoting *Wilko v. Swan*, 346 U.S. 427, 430, 74 S.Ct. 182, 184, 98 L.Ed. 168 (1953)). As a result, judicial review of an arbitration award is extremely limited, *Kanuth v. Prescott, & Turben*, 949 F.2d 1175, 1178 (D.C. 1991), and great deference is appropr ANERA argues that the award must be firmed unless one of the specified gro for refusing to recognize or enforce a for arbitral award exists. 9 U.S.C.A. note § However, Article II of the Convention st that the arbitral agreement is to be in v ing and signed by the parties or containe an exchange of letters or telegrams. Because the issue before the Court is wh er the Service Contract validly was sig the Court is precluded from enforcing award until it makes this determination matter of law. Thus, the standard gover summary judgment applies here. *Cf. D* 667 F.2d at 160 (applying summary judgm standard in an action to vacate an arbitra award where the arbitrability of a partic issue was disputed).

[12] Summary judgment may be gra only if the pleadings and evidence "show there is no genuine issue as to any mat fact and that the moving party is entitled judgment as a matter of law." Fed.R.C 56(c). In considering a summary judgm motion, all evidence and the inferences t drawn from it must be considered in a l most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith R Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1 89 L.Ed.2d 538 (1986). Summary judgm cannot be granted "if the evidence is that a reasonable jury could return a ver for the nonmoving party." *Anderson v. erty Lobby, Inc.*, 477 U.S. 242, 247, 106 S 2505, 2510, 91 L.Ed.2d 202 (1986).

B. Preclusive Effect of Arbitrator's D sion

[13, 14] As discussed *supra*, it is v settled that only a court may determine finality whether parties have entered in valid agreement to arbitrate. *See AT Technologies*, 475 U.S. at 647–49, 106 S.C 1418–19; *National R.R. Passenger C* 850 F.2d at 759; *Weatherly Cellaphor*

7. Article 17(b) states "[t]he parties hereto expressly consent and agree that the United States District Court for the District of Columbia has personal jurisdiction over each of them in any action to enforce an arbitration decision ent hereunder, concurrently with any other having jurisdiction."

726 F.Supp. at 321. ANERA argues, however, that BJI was obligated to file a motion to stay the arbitration before the proceedings took place, and that BJI's failure to file such a motion acts as a waiver to any defense in a confirmation action. This argument is unpersuasive. There is no procedure under statutory or decisional law that requires a party challenging arbitrability to seek an injunction before the arbitration commences, or suffer the penalty of a waiver.[8] *Local 719, American Bakery & Confectionery Workers of America v. National Biscuit Co.*, 378 F.2d 918, 921 (3d Cir.1967). Furthermore, the federal litigation system does not require special jurisdictional appearances. Fed. Civ.P. 12(b). Thus, BJI has not waived its right to contest arbitral jurisdiction in a judicial forum.

[15, 16] ANERA further contends that BJI submitted to arbitration by providing HKIAC with a sworn statement from BJI's president, and therefore has already litigated the merits of the arbitrability dispute. Even if the party contesting arbitration participates in the proceedings, it can preserve the arbitrability issue for judicial consideration by presenting "its objection to arbitrability to the arbitrator and ... not thereafter clearly indicate its willingness to forego judicial review." *Davis*, 667 F.2d at 167–68 (quoting *Local 719*, 378 F.2d at 922).

Here, ANERA received a letter from BJI's counsel on March 26, 1993, stating that "[w]e can not submit to arbitration ... we will defend our interests in court." On June 2, 1993, after an arbitrator had been appointed, counsel for BJI wrote to HKIAC stating "[m]y client has requested I inform all parties they are not agreeing to submit to arbitration as they have not entered into any agreement which binds them." A copy of that letter was forwarded to the arbitrator. Coupled with BJI's lack of participation in the arbitration proceedings thereafter, these statements demonstrate that BJI did not submit the arbitrability question to the arbitrator, or at least made an objection to the arbitrator's jurisdiction without a subsequent indication that it was willing to forego judicial inquiry. Even if the arbitrability issue has been litigated on the merits, as ANERA argues, the Court must make an independent determination of whether there was a valid agreement to arbitrate in any subsequent action to confirm the arbitrator's decision. *See Mobil Oil v. Local 8-766, Oil, Chem. & Atomic Workers Int'l Union*, 600 F.2d 322 (1st Cir.1979). Accordingly, the Court proceeds to the merits of the ratification issue.

C. *Ratification*

[17] The Service Contract provides that Hong Kong law shall govern the contract. "Under American law, contractual choice-of-law provisions are usually honored." *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 767 (D.C.Cir.1992). However, because the validity of the Service Contract is the central issue in this case, BJI has argued that Texas law should apply because BJI was doing business in Texas. Because ANERA believes the result will be the same in either jurisdiction, the Court applies Texas law in resolving this matter.

[18–21] ANERA contends that BJI ratified the Service Contract by shipping under it and paying the freight, thereby receiving the benefits of the contract's lower rates. "The key concern in determining whether a principal has ratified an unauthorized act by an agent is the principal's knowledge of the act and subsequent actions with that knowledge."[9] *Wyatt v. McGregor*, 855 S.W.2d 5, 13 (Tex.Ct.App.1993) (citing *Land Title Co. of Dallas v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex.1980)). Ratification can be ex-

8. Moreover, the federal policy favoring voluntary commercial arbitration, see Federal Arbitration Act, 9 U.S.C. §§ 1–15, would be undermined by making "interstitial judicial activity mandatory, when the possibility exists that a ... dispute can be settled without any use of the courts...." *Local 719*, 378 F.2d at 921–22; *see also Davis*, 667 F.2d at 168 (noting that a rule requiring parties disputing arbitrability to seek interlocutory review might foster litigation).

9. Because the parties dispute whether TRC had the authority to sign the Service Contract on behalf of BJI, the Court will view this issue in the light most favorable to the respondent, and assume *arguendo* that TRC was not authorized to enter into the Service Contract on BJI's behalf.

pressed or implied. *Id.* (citation omitted). It can occur when the principal retains the benefits of a transaction after acquiring full knowledge of the agent's unauthorized act. *Id.* (citing *Land Title*, 609 S.W.2d at 756); *Methodist Hosps. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 882 (Tex.Ct.App.1991) (citing *Land Title*, 609 S.W.2d at 756). One who asserts ratification must prove that the ratifying party acted upon full knowledge of all material facts. *Land Title Co.*, 609 S.W.2d at 756–57.

[22] BJI argues that it did not have full knowledge of the material facts relating to the Service Contract, and therefore, it could not have ratified the contract. In support of this argument, BJI claims that it did not know that TRC had signed BJI's name as the contracting party. The Court finds this argument unpersuasive. As discussed *supra*, the moving party need only show that the principal had knowledge of the material facts. Here, BJI admits that TRC was its agent for the purpose of arranging shipment of goods including the fixing of freight rates. BJI also acknowledges that it knew of multiple contracts in which TRC represented that BJI and TRC were affiliated and in which TRC signed on behalf of BJI.

More importantly, BJI admits that it received a copy of the first version of the Service Contract in which BJI was listed as an affiliate, and TRC represented that it was authorized to sign on behalf of BJI.[10] Under that contract, BJI also would have been entitled to ship cargo at the contract rates and would have been liable for deadfreight. Article 9 of the first version of the Service Contract unambiguously provides that:

> [I]n lieu of all damages, which are di to calculate, deadfreight shall be ass as follows:
>
> (i) If the "Shipper" [defined *supra* 12 as the contract signatory and its iates] fails to tender the Minimum tity Commitment specified in App A to this Contract, the Agreement ERA] shall invoice the Shipper an Shipper agrees to pay deficit charg the difference between the quanti cargo actually shipped and the Mini Quantity Commitment at the lowe rate, specified in Appendix A [$2,45

See Exhibit 8 to Respondent's Oppositi Petitioner's Renewed Motion To Confirm bitral Award. Thus, under the draft ve of the Service Contract which BJI believ be in effect, BJI would have been jointly severally liable with TRC for liquidated ages for any shortfall. Because BJI's r and obligations, including deadfreight li ty, would have been the same under both draft version of the contract and the contract, and BJI had actual knowledg the deadfreight provision in the draft sion, BJI had knowledge of the material of the Service Contract.[11] *Cf. Kari Ro Co. v. Thornburgh* 39 F.3d 1273, 1293 Cir.1994) (principal found to have rat contract where it knew of the substanc the contract if not the details).

[23, 24] Finally, BJI contends it did know it was receiving benefits from the vice Contract; specifically, BJI claims it not know how the shipping rates it under service contracts with ANERA compared to the prevailing tariff rates. Ho er, "the knowledge to support ratific may be shown by evidence either of kn edge or facts from which such knowl may reasonably be imputed to the princi *Wyatt*, 855 S.W.2d at 13 (citations omitte

10. Article 1 of the Service Contract states: "The term 'Shipper' means the entity signing this Contract and affiliates/subsidiaries named on the signature page hereof. The person signing this Contract on behalf of the Shipper warrants and represents that he has authority to enter into this Contract on behalf of the Shipper and its affiliates/subsidiaries listed on the signature page."

11. BJI asserts that it did not perform any unequivocal acts to indicate that it considered itself to be a party to the Service Contract. However, because BJI would have been liable for deadfreight under both versions of the contract acceptance and payment for shipments under Service Contract are unequivocal acts not su to other interpretations.

12. BJI cites an 1863 Texas Supreme Court to support the proposition that ratification quires actual knowledge of the material f *See Reese v. Medlock*, 27 Tex. 120, 124 1863). Although the case vaguely refers to rule of law, the recent *Wyatt* decision dem strates that knowledge can be inferred from

ANERA is a Hong Kong based conference of ocean common carriers that offers bulk rates to shippers in exchange for high volume commitments. The record shows that BJI is in the business of importing goods and has a history of prior dealings with ANERA. Moreover, under the Service Contract, more than one hundred bills of lading containing specific references to "ANERA Service Contract No. 262/87" or "ANERA Service Contract E.T. No. 262/87" were received by BJI.[13] These bills of lading also showed BJI, its affiliate Cashe Braxton, and TRC as the consignee or notify party, and the bills were paid by BJI or Cashe Braxton. Taken together, these facts demonstrate that BJI knew, or in the exercise of reasonable observation, should have known, that it was benefiting from the Service Contract. Thus, even when viewed in the light most favorable to BJI, ratification is inferred from BJI's actions in shipping under the Service Contract and receiving the benefit of its more favorable rates.[14] Accordingly, ANERA's petition to confirm the arbitral award is granted in the amount of $94,388.01, plus interest from the date of the arbitral award to the date of the entry of judgment.[15]

Conclusion

For the reasons stated above, the Court denies ANERA's motion for default judgment, grants BJI's motion to set aside entry of default, and denies BJI's motion to dismiss. The Court finds that there is no genuine issue of material fact in dispute and that ANERA is entitled to judgment as a matter of law, and, accordingly, grants ANERA's petition to confirm the arbitral award. An appropriate Order accompanies this Opinion.

ORDER

For the reasons stated in the accompanying Opinion, it hereby is

ORDERED, that petitioner's motion for default judgment is denied. It hereby further is

ORDERED, that respondent's motion to set aside the entry of default is granted. It hereby further is

ORDERED, that respondent's motion to dismiss is denied. It hereby further is

ORDERED, that petitioner's petition to confirm the arbitral award is granted, and that judgment is entered for the petitioner in the amount of $94,388.01. It hereby further is

ORDERED, that, within 14 days of the date of this Order, the parties shall submit supplemental briefs on the appropriate interest rate (unless agreement can be reached on this question).

SO ORDERED.

KEY NUMBER SYSTEM

COMSAT CORPORATION, Plaintiff,

v.

FINSHIPYARDS S.A.M., et al., Defendants.

Civ. No. 94-0165 PLF.

United States District Court, District of Columbia.

Sept. 15, 1995.

American satellite telecommunications provider (COMSAT) sued Republic of Zaire

13. Other references include "ANERA S/C No. 262/87," "Service Contract No. 262/87," or "ANA87262."

14. In view of the finding of implied ratification, the Court does not reach the issue of apparent authority.

15. Under Hong Kong law, interest is to accrue on an arbitral award until it is paid: "A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt." Hong Kong Arbitration Ordinance, Chapter 341, Section 22. ANERA asserts that the applicable rate is the 7¾% prime rate published in the Wall Street Journal on September 7, 1994. However, because the rate of interest on a "judgment debt" is not clear, the Court will need additional briefs from the parties to resolve this issue (unless, of course, the parties are able to reach agreement on the narrow—and sole remaining—question).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
AUG 28 1995
Clerk, U.S. District Court
District of Columbia

ASIA NORTH AMERICA EASTBOUND RATE AGREEMENT,

Petitioner,

v.

BJI INDUSTRIES, INC.,

Respondent.

Civil Action No. 94-903 SSH

ORDER

For the reasons stated in the accompanying Opinion, it hereby is

ORDERED, that petitioner's motion for default judgment is denied. It hereby further is

ORDERED, that respondent's motion to set aside the entry of default is granted. It hereby further is

ORDERED, that respondent's motion to dismiss is denied. It hereby further is

ORDERED, that petitioner's petition to confirm the arbitral award is granted, and that judgment is entered for the petitioner in the amount of $94,388.01. It hereby further is

ORDERED, that, within 14 days of the date of this Order, the parties shall submit supplemental briefs on the appropriate interest rate (unless agreement can be reached on this question).

SO ORDERED.

Stanley S. Harris
United States District Judge

Date: AUG 28 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
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Clerk, U.S. District Court
District of Columbia

ASIA NORTH AMERICA EASTBOUND RATE AGREEMENT,

Petitioner,

v.

BJI INDUSTRIES, INC.,

Respondent.

Civil Action No. 94-903 SSH

OPINION

This matter is before the Court on petitioner's petition to confirm the arbitral award, petitioner's motion for default judgment, respondent's counter-motion to set aside entry of default, petitioner's renewed motion to confirm arbitral award, and respondent's motion to dismiss. Upon consideration of the entire record, the Court grants respondent's motion to set aside entry of default, grants petitioner's petition to confirm the arbitral award, and denies the remaining motions.

Background

In this action to confirm an arbitral award, petitioner Asia North America Eastbound Rate Agreement ("ANERA") seeks to collect liquidated damages from respondent BJI Industries, Inc. ("BJI"), for a shortfall in the quantity of goods that were to be shipped for BJI during the period March 24, 1987, to March 23, 1988.[1] ANERA is a Hong Kong based conference of ocean common carriers

[1] According to the Texas Secretary of State, Braxton Jeans, Inc., changed its name to BJI Industries, Inc., on February 4, 1991.

MEALEY PUBLICATIONS, INC., WAYNE, PA
C-1
VOL. 10, #10, 10/95
INTERNATIONAL ARBITRATION REPORT

MEALEY PUBLICATIONS, INC., WAYNE, PA

Stanley S. Harris
United States District Judge

Date: AUG 28 1995

established pursuant to the Shipping Act of 1984, 46 U.S.C. app. §§ 1701 et seq. ("the Act").

In March of 1987, ANERA allegedly entered into Service Contract No. 262/87 ("the Service Contract") with BJI, a Texas corporation.[2] The Service Contract was allegedly signed on BJI's behalf by Eric Ko, an employee of TRC Textile Co., Ltd. ("TRC"), a Taiwanese company. TRC serves as an overseas buying agent that has the authority to find carriers and negotiate shipping rates for BJI. Under the Service Contract, BJI agreed to ship and ANERA agreed to carry a minimum of 150 forty-foot equivalent container units ("FEUs") of garments from ports in the Far East to several ports or points in the United States during the period from March 24, 1987, to March 23, 1988. The Service Contract further provided that if BJI failed to ship the minimum quantity of cargo, then BJI would pay liquidated damages (known as "deadfreight") in the amount of $2,450.00 per FEU.

On March 23, 1988, when the Service Contract expired, BJI had shipped only 127.605 FEUs; thus, there was a shortfall of 22.395 FEUs. In October of 1989, ANERA notified BJI that it owed ANERA

[2] "Service contract" is defined in the Act as "a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level . . . ; the contract may also specify provisions in the event of nonperformance on the part of either party." 46 U.S.C. app. § 1702(21).

Inc., changed its name to BJI Industries, Inc., on February 4, 1991.

$54,867.75 in deadfreight liability.[3] In December of 1989 and February of 1990, counsel for BJI claimed that TRC was never authorized to bind BJI to any contract, and therefore, that no valid contract existed between ANERA and BJI. On March 18, 1993, ANERA demanded arbitration pursuant to Article 17(a) of the Service Contract, and on March 26, 1993, BJI notified ANERA of its refusal to submit to arbitration.[4] On June 1, 1993, the Hong Kong International Arbitration Centre ("HKIAC") appointed Robin S. Paard as arbitrator. The following day, counsel for BJI wrote to the HKIAC disputing the validity of the arbitration and the appointment of an arbitrator. Included in this correspondence was a sworn statement, taken in September of 1992, in which BJI's president stated that TRC was not authorized to sign the Service Contract on BJI's behalf. BJI did not file further submissions thereafter.

In order to determine the validity of the arbitration agreement, the arbitrator considered whether TRC had authority to sign the Service Contract on behalf of BJI, and determined that it did. On February 28, 1994, the arbitrator awarded ANERA

[3] The deadfreight liability was calculated as follows:

	Minimum Quantity Commitment:	150.000 FEUs
-	Quantity Shipped:	127.605 FEUs
=	Deadfreight	22.395 FEUs.

At a rate of $2,450.00 per FEU -- $2,450.00 x 22.395 -- the total deadfreight liability equals $54,867.75.

[4] Article 17(a) states "[a]ny and all disputes arising out of or in connection with this Contract, including any failure by Shipper to pay or by the Agreement to perform as required hereunder, shall be resolved by arbitration in Hong Kong, or such other place as the parties to the dispute may mutually agree."

$94,388.01, which BJI did not pay.[1] On April 22, 1994, ANERA filed the petition to confirm the arbitral award against BJI in this court. On June 28, 1994, the Clerk of the Court entered a default against BJI. ANERA now renews its efforts to collect the liquidated damages.

Discussion

I. Default

A court may set aside an entry of default if good cause exists. Fed. R. Civ. P. 55(c). Although a decision to set aside an entry of default lies within the discretion of the trial court, the "exercise of that discretion entails consideration of whether (1) the default was willful, (2) a set-aside would prejudice the plaintiff, and (3) the alleged defense was meritorious." Keegel v. Key West & Caribbean Trading Co., 627 F.2d 372, 373 (D.C. Cir. 1980) (citations omitted); accord Jackson v. Beech, 636 F.2d 831, 837-38 (D.C. Cir. 1980). Moreover, judgment by default is normally reserved for a "totally unresponsive party" because a resolution on the merits is preferable to a judgment by default. Jackson, 636 F.2d at 836; Pullian v. Pullian, 478 F.2d 935, 936 (D.C. Cir. 1973); H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970). In the present case, once the three factors of willfulness, prejudice, and the presence of a meritorious defense are weighed, it becomes clear that a default judgment should not be entered against BJI.

[1] This amount consists of $54,867.75 for deadfreight liability (supra note 3), $23,405.31 for interest thereon, $14,292.32 for ANERA's costs, and $1,822.63 for the arbitrator's fee.

A. b.

BJI contends

entry of default or ANE

BJI's counsel discovered on

were on file with the Court. BJI fa

failure to participate in this Court's p

good faith belief that it was not a party to these documents

ANERA, however, argues that BJI has been unresponsi

this action by refusing to participate in the arbi

proceeding, and by not filing any motion or answer with the Cou

in response to the petition to confirm the arbitral award. In deciding whether to set aside a default or default judgment, the record must be construed in the light most favorable to the moving party. Jackson, 636 F.2d at 836. Applying this standard of review, the Court finds that BJI's conduct does not rise to the level of "willful" behavior contemplated by Keegel. See Keegel, 627 F.2d at 374.

ANERA also argues that because the arbitrator had determined that BJI was bound by the Service Contract, including the agreement to arbitrate, BJI could not in good faith remain unresponsive to the petition to confirm the arbitral award. The Court disagrees. It is established that the courts, not arbitrators, must decide whether the parties before them had a valid agreement to arbitrate the dispute in question. AT&T Technologies, Inc. v. Communications Workers of America, 106 S. Ct. 1415, 1418-19 (1986); National R.R. Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756, 759 (D.C.

MEALEY PUBLICATIONS, INC., WAYNE, PA

INTERNATIONAL ARBITRATION REPORT

C-1

Cir. 1988); Weatherly Cellaphonics Partners v. Hueber, 726 F. Supp. 319, 321 (D.D.C. 1989). Thus, the arbitrator's conclusions concerning the validity of the Service Contract are not binding. Moreover, counsel for BJI moved to set aside the entry of default on August 25, 1994, approximately four months after the petition to confirm the arbitral award was filed. Despite its somewhat tardy appearance, BJI cannot be considered a "totally unresponsive party." See Jackson, 636 F.2d at 836. As a result, the willfulness factor weighs heavily against an entry of a default judgment.

B. Prejudice to the Petitioner

ANERA contends that setting aside the default will cause it to suffer prejudice by delaying the entry of relief and an award of attorneys' fees in its favor. However, the delay of satisfaction of a prevailing plaintiff's claim is insufficient to establish prejudice. Keegal, 627 F.2d at 374. As a result, this factor weighs in favor of BJI.

C. Meritorious Defense

In determining the existence of a meritorious defense, likelihood of success is not the measure. Id. A respondent's allegations are meritorious if they contain "even a hint of a suggestion" which, if proven, would constitute a complete defense. Id. (citations omitted). Even broad and conclusory allegations meet the meritorious defense criterion for setting aside the default. Id. In the present case, because BJI elected not to submit to arbitration, the arbitrator was not presented with the

alleged facts and evidence now before this Court. BJI contends that it has defenses available to it under Article II and Article V of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention").[4] 9 U.S.C.A. note § 201. BJI further contends that ANERA had a history of contracting directly with TRC for BJI's shipments, and that it never received a copy of the Service Contract or correspondence relating to it until after the contract had expired. Therefore, BJI's defense on the issue of the validity of the arbitral award satisfies the "hint of a suggestion" standard, even if BJI eventually loses on the merits. Taken together, the balance of considerations weighs against an entry of judgment by default. Accordingly, the motion to set aside the entry of default is granted.

II. Jurisdiction

Before addressing the merits of the confirmation action, the Court must determine whether personal jurisdiction is proper in this Court. Contractual provisions relating to jurisdiction will be honored as long as they are reasonable. See National Equip. Rental, Ltd. v. Szukhent, 84 S. Ct. 411, 414 (1964). ANERA asserts that under Article 17(b) of the Service Contract, BJI expressly consented to an exercise of personal jurisdiction by the District Court for the District of Columbia in any action to enforce an

[4] Specifically, BJI asserts that the courts are precluded from enforcing foreign arbitral awards without a valid written agreement to arbitrate between the parties, and that the arbitrability question constitutes " . . . a difference not contemplated by or not falling within the terms of the submission to arbitration." 9 U.S.C.A. note § 201.

arbitral decision.[7] BJI has not challenged the reasonableness of the jurisdiction clause, but rather moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) on the ground that the clause is invalid because BJI is not a party to the Service Contract. As will be demonstrated, BJI is a party to the Service Contract; thus, the parties' consent to the jurisdiction of this Court is valid. Accordingly, respondent's motion to dismiss is denied.

III. Validity of the Contract

ANERA moves to confirm the arbitral award on the grounds that: (1) the arbitrator's decision that BJI was a party to the Service Contract is entitled to preclusive effect; (2) BJI ratified the Service Contract by shipping under it and receiving benefits; and (3) TRC had apparent authority to sign the Service Contract on BJI's behalf.

A. Standard of Review

There is a strong federal policy favoring arbitration as an alternative to the "complications of litigation." Davis v. Chevy Chase Fin., 667 F.2d 160, 164 (D.C. Cir. 1981) (quoting Wilko v. Swan, 74 S. Ct. 182, 184 (1953)). As a result, judicial review of an arbitration award is extremely limited, Kanuth v. Prescott, Ball & Turben, 949 F.2d 1175, 1178 (D.C. Cir. 1991), and great deference is appropriate. ANERA argues that the award must be affirmed unless one of the specified grounds for refusing to recognize or

[7] Article 17(b) states "[t]he parties hereto expressly consent and agree that the United States District Court for the District of Columbia has personal jurisdiction over each of them in any action to enforce an arbitration decision entered hereunder, concurrently with any other court having jurisdiction."

enforce a foreign arbitral award exists. 9 U.S.C.A. note § 201. However, Article II of the Convention states that the arbitral agreement is to be in writing and signed by the parties or contained in an exchange of letters or telegrams. Id. Because the issue before the Court is whether the Service Contract validly was signed, the Court is precluded from enforcing the award until it makes this determination as a matter of law. Thus, the standard governing summary judgment applies here. Cf. Davis, 667 F.2d at 160 (applying summary judgment standard in an action to vacate an arbitration award where the arbitrability of a particular issue was disputed).

Summary judgment may be granted only if the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a summary judgment motion, all evidence and the inferences to be drawn from it must be considered in a light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986). Summary judgment cannot be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986).

B. Preclusive Effect of Arbitrator's Decision

As discussed supra, it is well-settled that only a court may determine with finality whether parties have entered into a valid agreement to arbitrate. See AT&T Technologies, 106 S. Ct. at 1418-

JURLEY PUBLICATIONS, INC., WAYNE, PA

VOL. 10, #10, 1995

19; National R.R. Passenger Corp., 850 F.2d at 759; Weatherly Cellaphonics, 726 F. Supp. at 321. ANERA argues, however, that BJI was obligated to file a motion to stay the arbitration before the proceedings took place, and that BJI's failure to file such a motion acts as a waiver to any defense in a confirmation action. This argument is unpersuasive. There is no procedure under statutory or decisional law that requires a party challenging arbitrability to seek an injunction before the arbitration commences, or suffer the penalty of a waiver.[5] Local 719, American Bakery & Confectionery Workers of America v. National Biscuit Co., 378 F.2d 918, 921 (3d Cir. 1967). Furthermore, the federal litigation system does not require special jurisdictional appearances. Fed. R. Civ. P. 12(b). Thus, BJI has not waived its right to contest arbitral jurisdiction in a judicial forum.

ANERA further contends that BJI submitted to arbitration by providing HKIAC with a sworn statement from BJI's president, and therefore has already litigated the merits of the arbitrability dispute. Even if the party contesting arbitration participates in the proceedings, it can preserve the arbitrability issue for judicial consideration by presenting "its objection to arbitrability to the arbitrator and . . . not thereafter clearly

[5] Moreover, the federal policy favoring voluntary commercial arbitration, see Federal Arbitration Act, 9 U.S.C. §§ 1-15, would be undermined by making "interstitial judicial activity mandatory, when the possibility exists that a . . . dispute can be settled without any use of the courts . . . ." Local 719, 378 F.2d at 921-22; see also Davis, 667 F.2d at 168 (noting that a rule requiring parties disputing arbitrability to seek interlocutory review might foster litigation).

indicate its willingness to forego judicial review." Davis, 667 F.2d at 167-68 (quoting Local 719, 378 F.2d at 922).

Here, ANERA received a letter from BJI's counsel on March 26, 1993, stating that "[w]e can not submit to arbitration . . . we will defend our interests in court." On June 2, 1993, after an arbitrator had been appointed, counsel for BJI wrote to HKIAC stating "(m)y client has requested I inform all parties they are not agreeing to submit to arbitration as they have not entered into any agreement which binds them." A copy of that letter was forwarded to the arbitrator. Coupled with BJI's lack of participation in the arbitration proceedings thereafter, these statements demonstrate that BJI did not submit the arbitrability question to the arbitrator, or at least made an objection to the arbitrator's jurisdiction without a subsequent indication that it was willing to forego judicial inquiry. Even if the arbitrability issue has been litigated on the merits, as ANERA argues, the Court must make an independent determination of whether there was a valid agreement to arbitrate in any subsequent action to confirm the arbitrator's decision. See Mobil Oil v. Local 8-766, Oil, Chem. & Atomic Workers Int'l Union, 600 F.2d 322 (1st Cir. 1979). Accordingly, the Court proceeds to the merits of the ratification issue.

C. Ratification

The Service Contract provides that Hong Kong law shall govern the contract. "Under American law, contractual choice-of-law provisions are usually honored." Milanovich v. Costa Crociere,

S.P.A., 954 F.2d 763, 767 (D.C. Cir. 1992). However, because the validity of the Service Contract is the central issue in this case, BJI has argued that Texas law should apply because BJI was doing business in Texas. Because ANERA believes the result will be the same in either jurisdiction, the Court applies Texas law in resolving this matter.

ANERA contends that BJI ratified the Service Contract by shipping under it and paying the freight, thereby receiving the benefits of the contract's lower rates. "The key concern in determining whether a principal has ratified an unauthorized act by an agent is the principal's knowledge of the act and subsequent actions with that knowledge."[9] Wyatt v. McGregor, 855 S.W.2d 5, 13 (Tex. Ct. App. 1993) (citing Land Title Co. of Dallas v. F.M. Stigler, Inc., 609 S.W.2d 754, 756 (Tex. 1980)). Ratification can be expressed or implied. Id. (citation omitted). It can occur when the principal retains the benefits of a transaction after acquiring full knowledge of the agent's unauthorized act. Id. (citing Land Title, 609 S.W.2d at 756); Methodist Hosps. of Dallas v. Corporate Communicators, Inc., 806 S.W.2d 879, 882 (Tex. Ct. App. 1991) (citing Land Title, 609 S.W.2d at 756). One who asserts ratification must prove that the ratifying party acted upon full knowledge of all material facts. Land Title Co., 609 S.W.2d at 756-57.

[9] Because the parties dispute whether TRC had the authority to sign the Service Contract on behalf of BJI, the Court will view this issue in the light most favorable to the respondent, and assume arguendo that TRC was not authorized to enter into the Service Contract on BJI's behalf.

BJI argues that it did not have full knowledge of the material facts relating to the Service Contract, and therefore, it could not have ratified the contract. In support of this argument, BJI claims that it did not know that TRC had signed BJI's name as the contracting party. The Court finds this argument unpersuasive. As discussed supra, the moving party need only show that the principal had knowledge of the material facts. Here, BJI admits that TRC was its agent for the purpose of arranging shipment of goods including the fixing of freight rates. BJI also acknowledges that it knew of multiple contracts in which TRC represented that BJI and TRC were affiliated and in which TRC signed on behalf of BJI.

More importantly, BJI admits that it received a copy of the first version of the Service Contract in which BJI was listed as an affiliate, and TRC represented that it was authorized to sign on behalf of BJI.[10] Under that contract, BJI also would have been entitled to ship cargo at the contract rates and would have been liable for deadfreight. Article 9 of the first version of the Service Contract unambiguously provides that:

> [I]n lieu of all damages, which are difficult to calculate, deadfreight shall be assessed as follows:
>
> (i) If the "Shipper" [defined supra note 12 as the contract signatory and its affiliates] fails to tender the Minimum Quantity Commitment specified in Appendix A to this Contract, the Agreement [ANERA] shall invoice the

[10] Article 1 of the Service Contract states: "The term 'Shipper' means the entity signing this Contract and affiliates/subsidiaries named on the signature page hereof. The person signing this Contract on behalf of the Shipper warrants and represents that he has authority to enter into this Contract on behalf of the Shipper and its affiliates/subsidiaries listed on the signature page."

> Shipper and the Shipper agrees to pay deficit charges on the difference between the quantity of cargo actually shipped and the Minimum Quantity Commitment at the lowest 40' rate, specified in Appendix A [$2,450.00].

See Exhibit 8 to Respondent's Opposition to Petitioner's Renewed Motion To Confirm Arbitral Award. Thus, under the draft version of the Service Contract which BJI believed to be in effect, BJI would have been jointly and severally liable with TRC for liquidated damages for any shortfall. Because BJI's rights and obligations, including deadfreight liability, would have been the same under both the draft version of the contract and the final contract, and BJI had actual knowledge of the deadfreight provision in the draft version, BJI had knowledge of the material facts of the Service Contract.[11] Cf. Karl Rove & Co. v. Thornburgh 39 F.3d 1273, 1293 (5th Cir. 1994) (principal found to have ratified contract where it knew of the substance of the contract if not the details).

Finally, BJI contends it did not know it was receiving benefits from the Service Contract; specifically, BJI claims it did not know how the shipping rates it paid under service contracts with ANERA compared to the prevailing tariff rates. However, "the knowledge to support ratification may be shown by evidence either of knowledge or facts from which such knowledge may reasonably be imputed to the principal." Hyatt, 855 S.W.2d at 13 (citations omitted).[12] ANERA is a Hong Kong based conference of ocean common carriers that offers bulk rates to shippers in exchange for high volume commitments. The record shows that BJI is in the business of importing goods and has a history of prior dealings with ANERA. Moreover, under the Service Contract, more than one hundred bills of lading containing specific references to "ANERA Service Contract No. 262/87" or "ANERA Service Contract E.T. No. 262/87" were received by BJI.[13] These bills of lading also showed BJI, its affiliate Cashe Braxton, and TRC as the consignee or notify party, and the bills were paid by BJI or Cashe Braxton. Taken together, these facts demonstrate that BJI knew, or in the exercise of reasonable observation, should have known, that it was benefiting from the Service Contract. Thus, even when viewed in the light most favorable to BJI, ratification is inferred from BJI's actions in shipping under the Service Contract and receiving the benefit of its more favorable rates.[14] Accordingly, ANERA's petition to confirm the arbitral award is granted in the amount of $94,388.01, plus interest from the date of the arbitral award to the date of

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[11] BJI asserts that it did not perform any unequivocal acts to indicate that it considered itself to be a party to the Service Contract. However, because BJI would have been liable for deadfreight under both versions of the contract, its acceptance and payment for shipments under the Service Contract are unequivocal acts not subject to other interpretations.

[12] BJI cites an 1863 Texas Supreme Court case to support the proposition that ratification requires actual knowledge of the material facts. See Reese v. Medlock, 27 Tex. 120, 124 (Tex. 1863). Although the case vaguely refers to this rule of law, the recent Hyatt decision demonstrates that knowledge can be inferred from circumstances as well. See Hyatt, 855 S.W.2d at 13.

[13] Other references include "ANERA S/C No. 262/87," "Service Contract No. 262/87," or "ANA87262."

[14] In view of the finding of implied ratification, the Court does not reach the issue of apparent authority.

the entry of judgment.[13]

Conclusion

For the reasons stated above, the Court denies ANERA's motion for default judgment, grants BJI's motion to set aside entry of default, and denies BJI's motion to dismiss. The Court finds that there is no genuine issue of material fact in dispute and that ANERA is entitled to judgment as a matter of law, and, accordingly, grants ANERA's petition to confirm the arbitral award. An appropriate Order accompanies this Opinion.

Stanley S. Harris
United States District Judge

Date: AUG 28 1995

[13] Under Hong Kong law, interest is to accrue on an arbitral award until it is paid: "A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt." Hong Kong Arbitration Ordinance, Chapter 341, Section 22. ANERA asserts that the applicable rate is the 7 3/4% prime rate published in the Wall Street Journal on September 7, 1994. However, because the rate of interest on a "judgment debt" is not clear, the Court will need additional briefs from the parties to resolve this issue (unless, of course, the parties are able to reach agreement on the narrow -- and sole remaining -- question).

IN THE MATTER OF THE HONG KONG ARBITRATION ORDINANCE

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:-

ASIA NORTH AMERICA EASTBOUND RATE AGREEMENT	1ST CLAIMANT
AMERICAN PRESIDENT LINES LTD.	2ND CLAIMANT
WILHELMSEN LINES A/S (as successor-in-interest to Barber Blue Sea)	3RD CLAIMANT
KAWASAKI KISEN KAISHA LTD. (K-LINE)	4TH CLAIMANT
A. P. MOLLER-MAERSK LINE	5TH CLAIMANT
MITSUI OSK LINES LTD.	6TH CLAIMANT
NEPTUNE ORIENT LINES LTD.	7TH CLAIMANT
ORIENT OVERSEAS CONTAINER LINES	8TH CLAIMANT
SEA-LAND SERVICE INC.	9TH CLAIMANT
NIPPON YUSEN KAISHA LTD. (in their own right and as successors-in-interest for:-	10TH CLAIMANT
(a) Japan Line Ltd.	
(b) Yamashita-Shinnihon SS Co. Ltd.)	
and	
BJI INDUSTRIES INC. (formerly trading as Braxton Jeans Inc.) of Texas, United States of America	RESPONDENT

FINAL AWARD

I, Robin Somers Peard of 19th Floor, Prince's Building, 10 Chater Road, Central, Hong Kong was appointed by letter dated 1st June 1993 by the Hong Kong International Arbitration Centre to act as arbitrator under Service Contract No. 262/87 dated 20th March 1987 stated to have been made between the Claimants and the Respondent ("the Service Contract") in respect of all disputes arising out of or in connection with the Service Contract.

1. (a) I received the Claimants' claims submissions in writing contained in a letter dated 8th June 1993 from Richards Butler (the Claimants' lawyers) to myself with enclosures which was copied to the Respondent and its lawyer, Mr. Herb Bucherman by registered airmail post.

(b) By letter dated 8th June 1993 sent by fax and by registered airmail post to the Respondent and its lawyer, I requested the Respondent to provide me with Defence Submissions setting out in detail why it disputed the Claimants' claims and requesting that it serve such Defence Submissions by 29th June 1993.

(c) By copy fax from the Hong Kong International Arbitration Centre to the Respondent's lawyer dated 15th June 1993 enclosing copy correspondence received from the Respondent's lawyer, I was informed that the Respondent took the position that there was no agreement to arbitrate since the person signing the Service Contract on behalf of the Respondent had no authority from the Respondent to do so. Further details of the position taken by the Respondent are contained in the Reasons annexed to and forming part of this Award.

(d) By a fax message dated 18th June 1993 from the Claimants' lawyers to myself copied to the Respondent and its lawyer, the Claimants' lawyers requested the Respondent to indicate whether the Respondent would now agree to participate in this arbitration and asked the Respondent's lawyer to let them know the position by 25th June 1993, failing which they would assume the Respondent was not prepared to submit to arbitration.

(e) By a fax message from the Claimants' lawyers to myself dated 2nd August 1993 copied to the Respondent and its lawyer, the Claimants' lawyers advised me that they had not received a reply to their fax message of 18th June 1993. They requested me to make a final order for Defence Submissions to be filed by 16th August 1993, failing which the Claimants wished me to make an Award on the basis of submissions and documents before me.

(f) By a fax message to the Claimants' lawyers dated 17th August 1993 copied to the Respondent and its lawyer, I noted that it would be necessary for me to decide whether the Service Contract was validly signed on behalf of the Respondent and requested the Claimants to supply me with affidavit evidence as to the authority of the person signing the Service Contract to do so on behalf of the Respondent.

(g) By a fax message to the Claimants' lawyers dated 21st August 1993 copied to the Respondent and its lawyer, I requested the parties to advise me whether or not they agreed that I should decide the question of whether there was an agreement to arbitrate rather than incurring the extra trouble and expense of having the matter decided by the Court in Hong Kong.

(h) By a letter dated 20th November 1993 copied to the Respondent and its lawyer by registered airmail post, the Claimants' lawyers made submissions to me to the effect that the Respondent was a party to and bound by the Service Contract and stated that there was no necessity for Affidavit evidence to be produced on that question.

INTERNATIONAL ARBITRATION REPORT
HEALEY PUBLICATIONS, INC., WAYNE, PA.
C-10
VOL. 10, #10, 1995

(i) By a fax message to the Claimants' lawyers dated 22nd November 1993 copied to the Respondent and its lawyer, I advised the Claimants that, since the Respondent had not replied to my fax messages of 8th June, 17th August and 21st August 1993, I assumed that it did not intend to take any part in this arbitration. I pointed out to the Claimants that, if the Respondent did not agree to my deciding whether there was a valid agreement to arbitrate, the Respondent might use this as a reason for arguing that any award which I might make against it was unenforceable. Accordingly I requested the Claimants to confirm that they wished me to proceed to decide whether there was a valid agreement to arbitrate.

(j) By a fax message dated 24th November 1993 copied to the Respondent and its lawyer, the Claimants' lawyers indicated to me that they wished me to proceed with the arbitration and to determine the validity of the arbitration agreement whether or not the Respondent participated in the arbitration.

(k) By a fax message to the Respondent copied to its lawyer and the Claimants' lawyers dated 29th November 1993, I advised the Respondent that I would be proceeding to deal with the question of whether there was a valid agreement to arbitrate upon the materials before me if the Respondent made no further submissions to me by 10th December 1993.

(l) By a fax message to the Claimants' lawyers dated 15th December 1993 copied to the Respondent and its lawyer, I indicated that I was satisfied that there was a valid agreement to arbitrate bearing in mind the materials before

me and indicated that I would give my reasons in my Final Award. I warned the Respondent that, if it did not provide me with reasons why it disputed the Claimants' claims, I was liable to proceed to make an award upon the documents before me.

(m) By a letter dated 7th January 1994 from the Claimants' lawyers, they provided me with an affidavit verifying the Claimants' claims and copied such affidavit by registered airmail post to the Respondent and its lawyer.

(n) By a letter dated 24th January 1994 copied to the Respondent and its lawyer by post, the Claimants' lawyers made the Costs Submissions.

(o) By a fax message to the Claimants' lawyers dated 31st January 1994 copied to the Respondent and its lawyer, I requested clarification of the Claimants' Costs Submissions and I warned the Respondent that, unless it advised me promptly of the reasons why it disputed the Claimants' claims, I was liable to make an award upon the materials before me.

(p) By a fax message dated 31st January 1994 copied to the Respondent and its lawyer, the Claimants responded to my queries on its Costs Submissions.

2. All the submissions and other materials presented to me by the Claimants have been sent to the Respondent and the Respondent has been invited to participate in this arbitration as indicated above. In the event the Respondent has taken no part whatever in this arbitration.

INTERNATIONAL ARBITRATION REPORT

MEALEY PUBLICATIONS, INC., WAYNE, PA

VOL. 10, #10, 1995

3. The Claimants have asked me to give reasons for my Award. Such reasons are annexed hereto and form part of my Award.

4. Having considered the submissions and other materials before me, I do hereby award and determine that the Respondent do pay to the Claimants the sum of US$54,867.75 together with US$23,405.31 being interest thereon from 24th November 1989 until the date hereof at the rate of 10% per annum.

5. I further award and direct that the Respondent do pay my fees and expenses for this arbitration and Award (which I hereby fix at HK$14,216.50) and the Claimants' costs of the arbitration (which I hereby tax at the sum of HK$111,480.07). If the Claimants shall pay my fees and expenses, they shall be entitled to recover such fees and expenses as part of their costs.

Dated this 28th day of February 1994.

Robin Somers Peard F.C.I. Arb.
Arbitrator

Witness:

c/o 19/F. Prince Building.
Central
Hong Kong.

IN THE MATTER OF THE HONG KONG ARBITRATION ORDINANCE

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:-

ASIA NORTH AMERICA EASTBOUND RATE AGREEMENT	1ST CLAIMANT
AMERICAN PRESIDENT LINES LTD.	2ND CLAIMANT
WILHELMSEN LINES A/S (as successor-in-interest to Barber Blue Sea)	3RD CLAIMANT
KAWASAKI KISEN KAISHA LTD. (K-LINE)	4TH CLAIMANT
A. P. MOLLER-MAERSK LINE	5TH CLAIMANT
MITSUI OSK LINES LTD.	6TH CLAIMANT
NEPTUNE ORIENT LINES LTD.	7TH CLAIMANT
ORIENT OVERSEAS CONTAINER LINES	8TH CLAIMANT
SEA-LAND SERVICE INC.	9TH CLAIMANT
NIPPON YUSEN KAISHA LTD. (in their own right and as successors-in-interest for:- (a) Japan Line Ltd. (b) Yamashita-Shinnihon SS Co. Ltd.)	10TH CLAIMANT
and	
BJI INDUSTRIES INC. (formerly trading as Braxton Jeans Inc.) of Texas, United States of America	RESPONDENT

REASONS ANNEXED TO AND FORMING PART OF FINAL AWARD

Although the Respondent has, as explained in paragraphs 1 and 2 of my Final Award, taken no part in this arbitration, it is my duty to satisfy myself that the Claimants have produced sufficient material to establish that they are entitled to an Award.

First I have to deal with the Respondent's allegation, made in correspondence with the Claimants' US lawyers and the Hong Kong International Arbitration Centre, that Mr. Eric Ko (who signed the Service Contract on behalf of the Respondent) had no authority from the

Respondent to do so. Mr. Ko signed as "authorised signature" under the stamp or chop of the Respondent. The Respondent has not explained why Mr. Ko had such a chop nor have they stated that he had no authority to use it. By a letter addressed to the Respondent's US lawyers Sher & Blackwell by the Respondent dated September 16th 1992 (which letter was subscribed and sworn before a Notary Public), Mr. Chuck Yeas, the President of the Respondent, states that Mr. Ko was an employee of TRC Textile Co. Ltd. of Taiwan ("TRC"). He further confirms, as stated in a previous letter dated 29th April 1992, that TRC had no authority to sign contracts on behalf of the Respondent. It has not been suggested that Mr. Ko did not have authority to sign on behalf of TRC. However there is no evidence to suggest that TRC had actual authority to sign the Service Contract on behalf of the Respondent. So the question at issue is whether or not, as argued by the Claimants, TRC had apparent authority to bind the Respondent when signing the Service Contract. This involves the Respondent in "holding out" the Respondent as having authority to arrange certain transactions on its behalf thereby estopping the Respondent from denying TRC's authority to do so.

TRC according to Mr. Yeas were an overseas buying office for the Respondent and their duties extended to quality inspection of goods being shipped and dealing with shipping of such goods which were being bought by the Respondent. In the words of Mr. Chuck Yeas "I only grade them (i.e. overseas agents of the Respondent) on shipping ability and quality of merchandise". The Claimants have produced to me the first page of a specimen contract in which TRC was described as the agent of the Respondent for the purpose of inspecting merchandise being purchased from a Taiwanese seller. The goods were being sold FOB Taiwan. The Claimants have also produced a more than one hundred copy Bills of Lading which are endorsed with the number of the Service Contract. In thirteen cases (involving shipments from Macau via Hong Kong to the United States of America) TRC's Hong Kong office is a notify party. In

all cases the Respondent and/or Cosha Braxton Corporation (its subsidiary/affiliate named in the Service Contract) are consignees or notify parties and all shipments are on CY/CY "freight collect" terms. I have been involved for more than 20 years in dealing with shipping transactions involving exports from Hong Kong and Macau and the position of TRC is a common one. It would deal on behalf of its principal both with inspection of merchandise before shipment and also would be responsible for arranging shipment from Hong Kong or Macau and trans-shipment of Macau merchandise through Hong Kong on behalf of the principal where the principal has to arrange shipment and to pay the freight as buyer under an FOB contract. This is why TRC's Hong Kong office was named as notify party in the Bills of Lading involving shipments from Macau to the U.S.A.

So far as the Claimants are concerned (and, indeed, anyone else dealing with TRC in its capacity as the Respondent's agent for making shipping arrangements), it is clear that the Respondent held out TRC as its agent for the purposes of arranging shipment of goods including the fixing of freight rates. It does not seem to me to matter one way or the other that, as between TRC and the Respondent, TRC only had authority to act in accordance with specific contracts from time to time. The material before me shows clearly that TRC was held out by the Respondent as being authorised to deal generally with shipment of merchandise on behalf of the Respondent and the Claimants were entitled to assume that Mr. Eric Ko signing on behalf of TRC was entitled to bind the Respondent by signing the Service Contract and arranging for special freight rates for the Respondent under its terms.

The Claimants also argued that, in the circumstances, the Respondent must be taken to have ratified TRC's authority. In the absence of evidence as to the circumstances in which the Service Contract was identified on the Bills of Lading produced to me and evidence that the

Respondent positively know the Service Contract gave it preferential freight rates, I am unable to find an unequivocal ratification of the Service Contract by the Respondent.

Pursuant to Article 5 in Appendix A of the Service Contract, the Respondent agreed to ship on the Claimants' vessels a minimum of 130 Forty Foot Equivalent Units (FEUs) of garments from Far East ports to specified US destination ports at the rates specified in Appendix A.

In consideration of this Minimum Quantity Commitment ("MQC"), the Claimants agreed to provide vessel capacity adequate to carry the MQC and, at the Claimants' option, any additional cargo tendered by the Respondent during the term of the Service Contract.

Under Article 9(i) of the Service Contract, the Claimants and the Respondent agreed, inter alia, that in the event of the Respondent failing to tender the contractual MQC, liquidated damages in the form of deadfreight would be assessed as follows:-

> "9. DEADFREIGHT
>
> The Agreement (i.e. the Claimants) and the Shipper (i.e. the Respondent) recognise that breaches of this Contract cause not only loss of freight but also instability and, accordingly, agree that in lieu of all damages, which are difficult to calculate, deadfreight shall be assessed as follows:-
>
> (i) If the Shipper fails to tender the Minimum Quantity Commitment specified in Appendix A to this Contract, the Agreement shall invoice the Shipper and the Shipper agrees to pay deficit charges on the difference between the quantity of cargo actually shipped and the Minimum Quantity Commitment at the lowest 40' rate, specified in Appendix A. The total of any amounts due hereunder shall be paid directly to the Agreement within thirty (30) days following written notification by the Agreement. Deadfreight shall be distributed among the Agreement Members in proportion to the revenue earned by each Member under the Contract."

The rate specified in Clause 7 of Appendix A of the Service Contract in respect of deadfreight is US$2,450 per FEU and this is the applicable deadfreight rate.

The Claimants have produced to me the Affidavit of Alfredo Garcia dela Pena, the Service Contract Manager of the 1st Claimant. This Affidavit was sworn on 7th January 1994. This Affidavit has exhibited to it a copy of the Service Contract which contains the above provisions and, as explained above, is validly signed on behalf of the Respondent. This Affidavit also verifies that according to the records of the Claimants, the Respondent tendered 127.605 FEUs of cargo under the Service Contract and Mr. dela Pena has verified that this is a shortfall of 22.395 FEU in accordance with the provisions of Article 8 of the Service Contract and its other provisions. Using the rate of US$2,450 per FEU, this means that the deadfreight payable by the Respondent to the Claimants totals US$54,867.75 (22.395 multiplied by US$2,450). Accordingly I find that the Respondent is liable to the Claimants for this amount.

In regard to interest, the Claimants also produced to me a letter sent by registered post by the 1st Claimant to the Respondent on 17th October 1989 whereby the Claimants demanded US$54,867.75 as deadfreight from the Respondent. Mr. dela Pena has further verified in his Affidavit that the amount of US$54,867.75 has not been paid by the Respondent. I

therefore find that the Claimants are entitled to US$23,405.31 being interest on US$54,867.75 at the rate of 10% per annum from 24th November 1989 (10 days after the 1st Claimant's letter dated 17th October 1989 was likely to have been received by the Respondent) to the date hereof.

In regard to the Claimants' claim for their costs, I have examined their Costs Submissions and the further clarification provided by the Claimants' lawyers. After disallowing some of the items claimed (including the account of Chen Chang & Associates), I am satisfied that the Claimants were entitled to their costs and out-of-pocket expenses of this arbitration which I assess at the sum of HK$116,480.07. I am also satisfied that they are entitled to recover from the Respondent my fees and expenses for this arbitration and Award if they have to pay those fees and expenses to me.

Dated this 28th day of February 1994.

R. S. Peard

Arbitrator

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