

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x
UKRVNESHROM STATE FOREIGN
ECONOMIC ENTERPRISE, a Ukrainian
Corporation,

Plaintiff,

-v-

TRADEWAY, INC.,

Defendant.
-----x

95 Civ. 10278 (RPP)

OPINION AND ORDER

A P P E A R A N C E S

Counsel for Plaintiff:

Graham & James, New York, NY
By: Elliot J. Stein, Paul Summit.

Counsel for Defendant:

Healy & Ballie, New York, NY
By: Andrew M. Krinsky, LeRoy Lambert.
Alan Brutton, Brooklyn, NY
By: Alan Brutton.

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiff Ukrvneshprom State Foreign Economic Enterprise ("USFEE") petitions for enforcement of an arbitral award ("the Award") rendered by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in the Republic of the Ukraine under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). 9 U.S.C. §§ 201 et seq. Defendant Tradeway, Inc. ("Tradeway") requests that confirmation of the Award be deferred pending: (a) the disposition of Tradeway's petition to the Supreme Court of Ukraine to review and set aside the Award; and (b) the resolution

USFEE

of an arbitration claim, in more than twice the amount of the award in Plaintiff's favor, now subject to arbitration before the International Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry (the "Counterclaim Arbitration"). USFEE requests that judgment be entered upon the Award in the amount of \$6,125,184 plus interest and costs. For the reasons stated below, Plaintiff's petition is granted, and defendant's motion is denied.

Background

USFEE is a Ukrainian corporation with principal offices in Kiev, Ukraine. It was established by the Ukrainian government in 1993 as a trading company to sell Ukrainian goods in other countries. Tradeway is a New York corporation with offices at One World Trade Center, Suite 4653, New York, New York. At the time of the events giving rise to this action, Tradeway was involved in the purchase of steel and iron products from various mills in the Ukraine for resale abroad. On or about June 22, 1993, USFEE and Tradeway entered into a written contract, No. 01/U-011X (the "1993 Contract"). Ex. 1, Appendix to Memorandum of Law of Tradeway, Inc. in Opposition to Petition to Confirm Foreign Arbitral Award.¹ Article 10 of the 1993 Contract provides for the arbitration of disputes by the Court of Arbitration at the Chamber of Commerce and Industry of Ukraine,

¹ References to numbered exhibits ("Ex.") will be to those exhibits included in the Appendix to Memorandum of Law of Tradeway, Inc. in Opposition to Petition to Confirm Arbitral Award.

Kiev (the "Arbitral Authority"). Ex. 1 at 5. On or about February 3, 1994, USFEE and Tradeway executed a successor contract, No. 02/U-002K (the "1994 Contract"). Ex. 2. Article 9 of the 1994 Contract similarly provides for the arbitration of disputes by the Arbitral Authority. Ex. 2 at 10.

In the fall of 1994, a dispute arose between USFEE and Tradeway with respect to the deliveries made under the 1993 and 1994 Contracts. On September 29, 1994, Tradeway commenced an action in the Supreme Court of New York, seeking damages from USFEE for breach of contract. In response, USFEE invoked the contractual arbitration clause and Tradeway discontinued the suit. After meeting and coming to an understanding on January 25, 1995, Ex. 4, the Cabinet of Ministers of the Ukraine failed to determine export quotas, and USFEE repudiated the January 25 agreement by letter on February 1, 1995. Ex. 5.

On March 31, 1995, USFEE initiated proceedings before the Arbitral Authority against Tradeway, for damages it claimed it sustained as a result of Tradeway's breach of the 1993 and 1994 Contracts. USFEE served Tradeway with notice of the proceedings. Petition to Confirm Foreign Arbitral Award Pursuant to 9 U.S.C. § 201 et seq. ("Petition to Confirm") at P 13. Both parties agreed on the arbitrator. Ex. 6 at 2. The arbitrator held hearings on the matter and heard evidence from USFEE and Tradeway. Id. at P 14. On August 9, and as amended on August 31, 1995, the arbitrator awarded USFEE \$ 6,125,104.55 plus interest and costs for breach of the 1993 and 1994 Contracts. Exs. 6, 7.

On or about October 5, 1995, Tradeway petitioned the Kiev City Court to set aside the Award. Petition of Tradeway to Kiev Municipal Court "Kiev Petition" at P 1. On October 31, 1995, Tradeway commenced an arbitration, which it calls a counterclaim arbitration, against USFEE with the Arbitral Authority, claiming \$14,043,150.58. November 12, 1995 Letter of the Arbitral Authority. Tradeway asserts that the Counterclaim Arbitration is currently underway. Statement of Serge Ostrovich ("Ostrovich Statement") at P 1. On December 1, 1995, USFEE petitioned this Court to confirm the Award. On December 6, 1995, by Order to Show Cause, USFEE further requested that this Court confirm the Award, enjoin Tradeway from concealing, destroying, transferring or disposing of any property in which it claims an interest, and order expedited discovery. Both Tradeway and USFEE appeared before this Court on December 12, 1995, at which time Plaintiff made an additional alternative request for an order directing Tradeway to provide security under Article VI of the Convention. At the hearing on December 12, 1995, Tradeway acknowledged that it had sold its assets to Tradeway West, Inc. ("Tradeway West"), a corporation owned by one of its employees. Tradeway agreed not to make any extraordinary payments and this Court granted Plaintiff discovery of any transfer of assets by Tradeway.

On December 11, 1995, the Kiev City Court declined to set aside the Award. Ex. 13. On December 22, Tradeway petitioned the Supreme Court of the Ukraine for review of the Kiev City Court decision. Ex. 17. The petition is currently under consideration

by that court.

On December 28, 1995, the parties again appeared before this Court. At that time, the Court requested the parties to submit additional briefs upon the issue of whether and to what extent the enforcement of the Award is barred by Convention, Art. V(1)(e), 9 U.S.C. § 201.

Discussion

1. Arbitral Awards

The Convention is a United Nations treaty to which both the United States and Ukraine are signatories. The Convention was implemented in the United States by 9 U.S.C. § 201 et seq., and in the Ukraine by the Law of the Ukraine on International Commercial Arbitration. Under 9 U.S.C. § 203, district courts of the United States are given original jurisdiction over actions or proceedings arising under the Convention. Any party to an arbitration may apply to a district court for an order confirming an arbitral award within three years of the arbitral decision. Upon such application, a party seeking confirmation of an award must submit to the court the original award and the original agreement between the parties, or certified copies of each. Convention, Art. IV, 9 U.S.C. § 201. Pursuant to 9 U.S.C. § 207, "the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

Article V of the Convention delineates five factors which may justify a court's refusal to recognize and enforce an award.

(Footnote omitted)

9 U.S.C. § 201. Article V also provides two additional bases for refusing to recognize and enforce an award in the event that " (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country." Id.

Tradeway asserts three defenses in opposition to USPEE's Petition to Confirm Award: (1) the Award is not yet binding and

The five factors under Article V are:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority of the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention, Art. V, 9 U.S.C. § 201.

final under Ukrainian law (Convention, Art. V(1) (e); (2) the Award should not be recognized and enforced by this Court even if a Ukrainian Court refuses to set it aside because the arbitrator refused to hear and consider relevant and material evidence presented by Tradeway (Convention, Art. V(1) (b); and (3) recognition and enforcement of the award would violate the public policy of this country (Convention, Art. V(2)(b)). Answer to Petition to Confirm Arbitral Award Pursuant to 9 U.S.C. §§ 201 et. seq. ("Answer to Petition") at PP 19-21.

Article VI of the Convention, although not raised in Tradeway's Answer to Petition to Confirm Award, provides a final basis for declining to recognize or enforce an arbitral award. Article VI states that "if an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security." 9 U.S.C. § 201.

USFEE has submitted to the Court certified copies of both the Award and the 1993 and 1994 Contracts. Pursuant to 9 U.S.C. § 207, this Court must, therefore, confirm the award unless it concludes that one of the asserted defenses is valid, or chooses to adjourn its decision under Article VI. Before addressing the Court's discretionary powers under Article VI, it is necessary to

analyze each of the Article V defenses in turn.

2. Binding Effect of the Award

Tradeway asserts that the Award is not binding on the parties under Ukrainian law. As of the date of Tradeway's Answer to Petition to Confirm Award, its appeal of the Award was still pending in the Kiev City Court. Answer to Petition-PP 18, 19. Tradeway claims that the effect of the Award was suspended by the Kiev City Court pending its decision on Tradeway's Petition to set aside the Award. Following the Kiev City Court's rejection of Tradeway's petition, Tradeway filed another petition with the Supreme Court of the Ukraine. Ex-17. Tradeway's present assertion that the Award is not binding rests upon this appeal.

Article V(1) (e) addresses the binding effect of arbitral awards under the Convention. A court may decline to enforce an award if:

- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

9 U.S.C. § 201. Tradeway argues that the Award is not binding within the meaning of the Convention because it may be set aside by the Ukrainian Supreme Court. While conceding that there is not an "automatic" stay of enforcement pending such review under Ukrainian law, Tradeway points out that the Ukrainian Supreme Court has discretion to grant such a stay, and that Tradeway has requested that it do so. Affidavit of Andrew N. Krinsky in Opposition to Petition to Confirm Foreign Arbitral Award ("Krinsky Aff.") P 4(b). The only support Tradeway provides for

this claim is the testimony of its lawyer, Mr. Serge Ostrovich. Answer to Petition to Confirm at P-19.

USFEE maintains that under Ukrainian law and the contracts between the parties, an arbitral award is final and binding. USFEE refers to the Law of Ukraine on International Commercial Arbitration, Article 35(1) of which states that "An arbitration judgment, irrespective of the country where it has been awarded, shall be recognized as binding." Plaintiff's Supplemental Statement at 17. Similarly, Sections 10.1 and 10.2 of Article VI, Recognition and Enforcement of an Arbitral Award, of the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine, also supplied by Plaintiff, provides, in pertinent part, that "an award of the Arbitration Court shall be final,"¹ and "an arbitral award shall be recognized as binding." Plaintiff's Supplemental Statement at 14. Additionally, the 1993 and 1994 Contracts both contained clauses regarding the finality of arbitral awards.²

The binding effect of an arbitral award is well established in the American courts. See, e.g., James Richardson & Sons v. M.E. Hedger Transportation Corp., 98 F.2d 55 (2d Cir. 1938), cert. denied, 305 U.S. 657, 83 L. Ed. 426, 59 S. Ct. 357 (1938) (acknowledging that the awards of arbitrators are final and

¹ Article 10 of the 1993 Contract states that "the award of the Court of Arbitration shall be final for both parties." Ex. 1 at 5. Similarly, Article 9.2 of the 1994 Contract provides, in pertinent part, that "the award of ARBITRATION shall be final and binding on either PARTY." Ex. 2 at 10.

binding); Blue Tee Corp. v. Koshring Co., 808 F. Supp. 343, 346 (S.D. N.Y. 1992) (recognizing the authority of arbitrators of the American Arbitration Association to render final and binding awards that are enforceable in a court of competent jurisdiction); Fertilizer Corp. of India v. ICI Management, Inc., 517 F. Supp. 948, 957 (S.D. Ohio 1981) (concluding that an arbitral award that was before the Indian courts for review was nonetheless binding and enforceable). As the court in Fertilizer Corp. of India recognized:

The award will be considered "binding" for the purpose of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being "binding." This provision should make it more difficult for an obstructive loser to postpone or prevent enforcement by bringing, or threatening to bring, proceedings to have an award set aside or suspended.

517 F. Supp. at 957-958 (quoting Gerald Aksen, American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 Sw. U. L. Rev. 1, 11 (1971)).

Tradeway's most recent submission to this Court concedes that there is no "automatic" stay of enforcement pending Supreme Court review under Ukrainian law. Krinsky Aff. at P 4(a). Tradeway argues, nonetheless, that the Ukrainian Supreme Court has discretion to grant such a stay, and that the effect of this power is to undermine the finality of the award. Id.

In response to Tradeway's assertion that the Ukraine Supreme

Court's discretion to grant a stay undermines the finality of the Award USFEE offers a letter from the Deputy of the Chairman of the Supreme Court of Ukraine which states that "in accordance with the existing civil-procedural legislation of Ukraine the applying of such kind of Petition does not suspend the executing of the Award." Plaintiff's Supplemental Statement. This statement, in conjunction with USFEE's numerous references to Ukrainian and United States law supports the conclusion that the Award is binding and final under the Convention.

3. Inadequate Opportunity to Present Defense

Article V(1) (b) of the Convention empowers a court to refuse to recognize and enforce an award if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." 9 U.S.C. § 201. Tradeway claims that denial of confirmation of the award would be appropriate because the arbitrator refused to hear and consider relevant and material evidence presented by Tradeway. Answer to Petition at P-20.

The Second Circuit has concluded that Article V(1) (b) "essentially sanctions the application of the forum state's standards of due process." Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA) 508 F.2d 969, 975 (2d Cir. 1974); see also, Iran Aircraft Industries v. AVCO Corp., 980 F.2d 141 (2d Cir. 1992) ["the fundamental requirement of due process is the opportunity to be heard 'at a

meaningful time and a meaningful manner.'"] *Id.* at 146 (quoting Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 10, 96 S. Ct. 893, (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187)). Accordingly, in order to invoke the Article V(1)(b) defense, Tradeway must establish that it was denied the opportunity to be heard at a meaningful time or in a meaningful manner.

USFEE asserts that it duly served Tradeway with notice of the proceedings. Petition to Confirm at P-13; Tradeway does not contest this claim, nor does it deny that it appeared before the arbitrator "and attempted to defend itself against the Claims on their merits." Answer to Petition at P-13. Instead, Tradeway asserts that the arbitrator refused to hear and consider relevant and material evidence it presented. *Id.* at P-20. Specifically, Tradeway contends that the arbitrator incorrectly considered USFEE claims under the 1993 Contract, because those claims were timebarred. Ostrovich Statement at P 8. Tradeway admits, however, that its representatives objected to USFEE's submission of claims under the 1993 Contract and that the arbitrator rejected its objection and allowed USFEE's claim. Kiev Petition at P 5.

Tradeway also objects to the arbitrator's decision to reject claims alleging breach of contract by USFEE. Tradeway admits that it asserted and presented evidence concerning claims for \$14,000,000 against USFEE, but contends that the arbitrator "failed to take them into consideration." Ostrovich Statement at

P 6. The award has been carefully reviewed and no such determination is reflected in it. Furthermore, paragraph 5.11 of the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine provides for a special procedure for the filing of a counterclaim. Sworn Statement of Valery Klochek Pursuant to 28 U.S.C. 1746 in Support of Petition to Confirm Award ("Klochek Statement") at P 4. The Defendant chose not to follow these procedures, and thus has no claim of being denied an opportunity to present its claim in a meaningful manner. See Iran Aircraft Industries v. AVCO Corp., 980 F.2d 141 (2d Cir. 1992).

4. Public Policy

Article V(2) (b) of the Convention allows a court to refuse to enforce an award if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C. § 201. The court in Parsons & Whittemore concluded that the history of the Convention indicated that the intention of the Convention was to construe the public policy defense narrowly: "enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice." Parsons & Whittemore, 508 F.2d at 974.

Tradeway asserts that the Award should not be enforced because it "is contrary to the public policy and law of the Ukraine . . . as well as of this country." Answer to Petition at P 21. Tradeway concedes that it has not provided substantial

elaboration on this point, claiming that it has not had time to investigate and review the documentary record of the arbitral proceedings. Krinsky Aff. at P 5. Tradeway suggests that the following circumstantial evidence provides a basis for its claim: (a) recent political changes and turmoil in the Ukraine; (b) the arbitrator's alleged misapplication of Ukrainian law regarding the statute of limitations on arbitral claims; and (c) the arbitrator's failure to mention the settlement agreement of January 25, 1995 and his refusal to consider evidence of Tradeway's counterclaims. *Id.*

Insofar as Tradeway seeks to invoke an Article V(2) (b) defense on the basis of the public policy of the Ukraine, its claim fails. Article V(2) (b) refers to the public policy of the forum state, the state in which recognition and enforcement is sought, rather than to the state in which the award was originally rendered. Parsons & Whittemore, 508 F.2d at 974. Nor do any of the factors asserted satisfy the narrow scope of the Article V(2) (b) defense under United States public policy. The factors set forth, while claiming a misapplication of Ukrainian law, do not amount to a violation of the "most basic notions of morality and justice." *Id.*

5. Article VI of the Convention

Article VI of the Convention provides:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of

the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

9 U.S.C. § 201. Article VI has been construed to grant courts "unfettered discretion" to adjourn pending the outcome of an application to set aside an award in the country in which it was issued. Fertilizer Corporation of India, 517 F. Supp. at 961.

Tradeway contends that, pursuant to Article VI, the Court should adjourn decision on confirmation of the award pending review by the Ukraine Supreme Court. In applying Article VI of the Convention, it is important to consider the purpose and intentions of the Convention. The Supreme Court explained in Scherk v. Alberto-Culver Co., 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974):

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Id. at 520. The Scherk Court also noted that:

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

Id. at 516-517. These goals are not served by allowing defendants to avoid a judgment through obstructive litigation.

As the court noted in Hewlett-Packard Co., Inc. v. Berg, 61 F.3d 101 (1st Cir. 1995), "the risk that the power to stay could be

abused by disgruntled litigants . . . argues more for a cautious and prudent exercise of the power than for its elimination." Id. at 106.

Throughout these proceedings, Tradeway has been unwilling or unable to substantiate the claims on which it bases its appeal. Many of Tradeway's claims are substantiated only by the representations of its lawyers. In one instance in which Tradeway does refer specifically to Ukrainian law, it has provided a translation that excludes a phrase critical to the construction of the provision.⁴ Coincidentally, the allegedly inadvertent exclusion removed language that appears to be harmful to Tradeway's claim. Klochek Statement at P 5. Furthermore, Tradeway's claims have changed over the course of this action, to the extent that it is often difficult to ascertain precisely which defenses Tradeway is setting forth. These factors undermine the legitimacy of Tradeway's claims. Rather than contesting actual harm, Tradeway appears to be seeking a legal basis for avoiding the effect of the Award.

Following the commencement of this action, it was revealed that Tradeway has ceased doing business, and that by agreement dated August 7, 1995 (the "Asset Purchase Agreement"), a newly formed corporation, Tradeway West, Inc. ("Tradeway West")

⁴ Article 71 of the Civil Code of Ukraine sets the statute of limitations at one year for bringing causes of action of state organizations, collective farms cooperatives and other public organizations to each other. Klochek Statement at P 5. Tradeway submitted a translation of this provision that excluded the phrase "to each other". Id.

purchased Tradeway's assets and liabilities. Ex. 9. Although dated two days before the Award was rendered, the Asset Purchase Agreement was in fact executed in mid-September of 1995. Tradeway West was not incorporated until August 24, 1995. Supplemental Affidavit of Vladimir Syelski in Opposition to Petition to Confirm Arbitral Award ("Syelski Aff.") P 3. Tradeway provides affidavits of the parties involved in negotiating the Agreement to substantiate their claim that such negotiations commenced well before the award was granted, but that the absence of certain parties during negotiations delayed final execution of the transaction. Statement of Robert G. Shaw in Opposition to Petition to Confirm Arbitral Award ("Shaw Aff.") PP 2-5, 7. Such statements are not convincing, since the Award indicates that the arbitrator was making progressive decisions on the issues raised during the course of the arbitration. Tradeway was thus aware of the probable outcome of the arbitration before the Award was rendered.

The purchaser of Tradeway's assets and liabilities, and the President and sole shareholder of Tradeway West, is Mr. Vladimir Syelski. Mr. Syelski was employed by Tradeway since 1992 as the corporation's contact person in Ukraine and Kazakhstan. Syelski Aff. P 1. Mr. Syelski claims that he began negotiating with the President of Tradeway, Mr. Yuri Orlikov, to purchase Tradeway's shares in early spring of 1995, prior to receiving notice of the commencement of arbitration. *Id.* P 3. He further claims that his attorney suggested that rather than purchasing Tradeway, he form

a separate company and purchase Tradeway's assets and liabilities. *Id.* The two parties allegedly reached an agreement to this effect on August 7, 1995. The Asset Purchase Agreement was executed in mid-September. *Id.* In October, Mr. Syelski filed the so-called counterclaim arbitration in Tradeway's name.

Despite assertions that negotiations of the sale began before they received official notice of the commencement of arbitration, Mr. Orlikov has admitted that USFEE had expressed its intention to go to arbitration as early as 1994. Orlikov Deposition of December 19, 1995 ("Orlikov Dep.") at 107-115. Mr. Orlikov further admits in his affidavit that he was willing to concede to the sale to Mr. Syelski because he "was happy to have the opportunity to gracefully withdraw and turn my attention to other projects." Supplemental Affidavit of Yuri Orlikov in Opposition to Petition to Confirm Arbitral Award ("Supp. Orlikov Aff.") P 5.

Mr. Orlikov acknowledges that Tradeway has no assets to pay the award or to provide security in such amount. Orlikov Aff. P 8. Similarly, Mr. Syelski declares that Tradeway West has no assets to pay the amount of the award. Syelski Aff., P 6. Plaintiff's attempts to ascertain the whereabouts of Tradeway's assets have been unsuccessful. In particular, USFEE challenges a transfer of one million dollars to Consolidated Steelex, a New York corporation also owned by Mr. Orlikov, and operated out of the Tradeway office in One World Trade Center. While Mr. Orlikov claims that the loan has been repaid, he refuses to provide any

detail or substantiation of the means of repayment or the whereabouts of the funds. Orlikov Aff. at 31-37.

On December 28, 1995, attorneys for USFEE asserted that Tradeway West has declined to submit to the jurisdiction of this Court. Transcript of December 28, 1995 at 8. This refusal undermines the effectiveness of Tradeway West's assurance that it will maintain the status quo, so as to not be required to pay security. The dynamics of the transfer between Tradeway and Tradeway West, the misleading effect of the incorrect date on the Asset Purchase Agreement, and Tradeway's persistent refusal to reveal the status of its current assets undermine the credibility of Tradeway's claims, and further suggest that Tradeway is engaged in obstructive litigation while it conducts transactions intended to avoid the effect of the Award.

Conclusion

For the reasons stated above, USFEE's petition to confirm the Award is granted. Tradeway is instructed to pay the full amount of the award plus interest and costs.

IT IS SO ORDERED.

Dated: New York, New York
March 11, 1996

Robert P. Patterson, Jr.
U.S.D.J.

Enforcement: grounds for stay: ARTICLE VI:
will not grant a stay: on the basis of foreign appellate proceedings Page 23
if those proceedings simply constitute obstructive litigation without merit 3

19TH CASE of Focus printed in FULL format.

UKRVNESH PROM STATE FOREIGN ECONOMIC ENTERPRISE, a Ukrainian Corporation, Plaintiff,
-v- TRADEWAY, INC., Defendant.

95 Civ. 10278 (RPP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 2827

March 11, 1996, Dated

March 12, 1996, FILED

COUNSEL: [*1] APPEARANCES

Counsel for Plaintiff: Graham & James, New York, NY,
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Counsel for Defendant: Healy & Baillie, New York,
NY, By: Andrew N. Krinsky, LeRoy Lambert. Alan
Brutten, Brooklyn, NY, By: Alan Brutten.

JUDGES: Robert P. Patterson, Jr., U.S.D.J.

OPINION BY: Robert P. Patterson, Jr.

OPINION: OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

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below, Plaintiff's petition is granted, and Defendant's motion is denied.

Background

USFEE is a Ukrainian corporation with principal offices in Kiev, Ukraine. It was established by the Ukrainian government in 1993 as a trading company to sell Ukrainian goods in other countries. Tradeway is a New York corporation with offices at One World Trade Center, Suite 4653, New York, New York. At the time of the events giving rise to this action, Tradeway was involved in the purchase of steel and iron products from various mills in the Ukraine for resale abroad. On or about June 22, 1993, USFEE and Tradeway entered into a written contract, No. 01/U-011K (the "1993 Contract"). Ex. 1, Appendix to Memorandum of Law of Tradeway, Inc. in Opposition to Petition to Confirm Foreign Arbitral Award. n1 Article 10 of the 1993 Contract provides for the arbitration of disputes by the Court of Arbitration at the Chamber of Commerce and Industry of Ukraine, Kiev (the "Arbitral Authority"). Ex. 1 at 5. On or about [*3] February 3, 1994, USFEE and Tradeway executed a successor contract, No. 02/U-002K (the "1994 Contract"). Ex. 2. Article 9 of the 1994 Contract similarly provides for the arbitration of disputes by the Arbitral Authority. Ex. 2 at 10.

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In the fall of 1994, a dispute arose between USFEE and Tradeway with respect to the deliveries made under



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the 1993 and 1994 Contracts. On September 29, 1994, Tradeway commenced an action in the Supreme Court of New York, seeking damages from USFEE for breach of contract. In response, USFEE invoked the contractual arbitration clause and Tradeway discontinued the suit. After meeting and coming to an understanding on January 25, 1995, Ex. 4, the Cabinet of Ministers of the Ukraine failed to determine export quotas, and USFEE repudiated the January 25 agreement by letter on February 1, 1995. Ex. [*4] 5.

On March 31, 1995, USFEE initiated proceedings before the Arbitral Authority against Tradeway, for damages it claimed it sustained as a result of Tradeway's breach of the 1993 and 1994 Contracts. USFEE served Tradeway with notice of the proceedings. Petition to Confirm Foreign Arbitral Award Pursuant to 9 U.S.C. § 201 et seq. ("Petition to Confirm") at P 13. Both parties agreed on the arbitrator. Ex. 6 at 2. The arbitrator held hearings on the matter and heard evidence from USFEE and Tradeway. Id. at P 14. On August 9, and as amended on August 31, 1995, the arbitrator awarded USFEE \$ 6,125,104.55 plus interest and costs for breach of the 1993 and 1994 Contracts. Exs. 6, 7.

On or about October 5, 1995, Tradeway petitioned the Kiev City Court to set aside the Award. Petition of Tradeway to Kiev Municipal Court "Kiev Petition" at P 7. On October 31, 1995, Tradeway commenced an arbitration, which it calls a counterclaim arbitration, against USFEE with the Arbitral Authority, claiming \$ 14,043,150.58. November 12, 1995 Letter of the Arbitral Authority. Tradeway asserts that the Counterclaim Arbitration is currently underway. Statement of Serge Ostrovich ("Ostrovich Statement") [*5] at P 7. On December 1, 1995, USFEE petitioned this Court to confirm the Award. On December 6, 1995, by Order to Show Cause, USFEE further requested that this Court confirm the Award, enjoin Tradeway from concealing, destroying, transferring or disposing of any property in which it claims an interest, and order expedited discovery. Both Tradeway and USFEE appeared before this Court on December 12, 1995, at which time Plaintiff made an additional alternative request for an order directing Tradeway to provide security under Article VI of the Convention. At the hearing on December 12, 1995, Tradeway acknowledged that it had sold its assets to Tradeway West, Inc. ("Tradeway West"), a corporation owned by one of its employees. Tradeway agreed not to make any extraordinary payments and this Court granted Plaintiff discovery of any transfer of assets by Tradeway.

On December 11, 1995, the Kiev City Court declined to set aside the Award. Ex. 13. On December 22,

Tradeway petitioned the Supreme Court of the Ukraine for review of the Kiev City Court decision. Ex. 17. The petition is currently under consideration by that court.

On December 28, 1995, the parties again appeared before this Court. [*6] At that time, the Court requested the parties to submit additional briefs upon the issue of whether and to what extent the enforcement of the Award is barred by Convention, Art. V(1)(e), 9 U.S.C. § 201.

Discussion

1. Arbitral Awards

The Convention is a United Nations treaty to which both the United States and Ukraine are signatories. The Convention was implemented in the United States by 9 U.S.C. § 201 et seq., and in the Ukraine by the Law of the Ukraine on International Commercial Arbitration. Under 9 U.S.C. § 203, district courts of the United States are given original jurisdiction over actions or proceedings arising under the Convention. Any party to an arbitration may apply to a district court for an order confirming an arbitral award within three years of the arbitral decision. Upon such application, a party seeking confirmation of an award must submit to the court the original award and the original agreement between the parties, or certified copies of each. Convention, Art. IV, 9 U.S.C. § 201. Pursuant to 9 U.S.C. § 207, "the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the [*7] award specified in the said Convention."

Article V of the Convention delineates five factors which may justify a court's refusal to recognize and enforce an award. n2 9 U.S.C. § 201. Article V also provides two additional bases for refusing to recognize and enforce an award in the event that "(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country." Id.

n2 The five factors under Article V are:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or



(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;

or

(d) The composition of the arbitral authority of the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention, Art. V, 9 U.S.C. § 201.

[*8]

Tradeway asserts three defenses in opposition to USFEE's Petition to Confirm Award: (1) the Award is not yet binding and final under Ukrainian law (Convention, Art. V(1) (e)); (2) the Award should not be recognized and enforced by this Court even if a Ukrainian Court refuses to set it aside because the arbitrator refused to hear and consider relevant and material evidence presented by Tradeway (Convention, Art. V(1)(b)); and (3) recognition and enforcement of the award would violate the public policy of this country (Convention, Art. V(2)(b)). Answer to Petition to Confirm Arbitral Award Pursuant to 9 U.S.C. §§ 201 et. seq. ("Answer to Petition") at PP 19-21.

Article VI of the Convention, although not raised in Tradeway's Answer to Petition to Confirm Award, provides a final basis for declining to recognize or enforce an arbitral award. Article VI states that "if an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application [*9] of the party claiming enforcement of the award, order the other party to give suitable security." 9 U.S.C. § 201.

USFEE has submitted to the Court certified copies of both the Award and the 1993 and 1994 Contracts. Pursuant to 9 U.S.C. § 207, this Court must, therefore,

confirm the award unless it concludes that one of the asserted defenses is valid, or chooses to adjourn its decision under Article VI. Before addressing the Court's discretionary powers under Article VI, it is necessary to analyze each of the Article V defenses in turn.

2. Binding Effect of the Award

Tradeway asserts that the Award is not binding on the parties under Ukrainian law. As of the date of Tradeway's Answer to Petition to Confirm Award, it's appeal of the Award was still pending in the Kiev City Court. Answer to Petition PP 18, 19. Tradeway claims that the effect of the Award was suspended by the Kiev City Court pending its decision on Tradeway's Petition to set aside the Award. Following the Kiev City Court's rejection of Tradeway's petition, Tradeway filed another petition with the Supreme Court of the Ukraine. Ex. 17. Tradeway's present assertion that the Award is not binding rests upon this [*10] appeal.

Article V(1) (e) addresses the binding effect of arbitral awards under the Convention. A court may decline to enforce an award if:

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

9 U.S.C. § 201. Tradeway argues that the Award is not binding within the meaning of the Convention because it may be set aside by the Ukrainian Supreme Court. While conceding that there is not an "automatic" stay of enforcement pending such review under Ukrainian law, Tradeway points out that the Ukrainian Supreme Court has discretion to grant such a stay, and that Tradeway has requested that it do so. Affidavit of Andrew N. Krinsky in Opposition to Petition to Confirm Foreign Arbitral Award ("Krinsky Aff.") P 4(b). The only support Tradeway provides for this claim is the testimony of its lawyer, Mr. Serge Ostrovich. Answer to Petition to Confirm at P 19.

USFEE maintains that under Ukrainian law and the contracts between the parties, an arbitral award is final and binding. USFEE refers to the Law of Ukraine on International Commercial Arbitration, [*11] Article 35(1) of which states that "An arbitration judgment, irrespective of the country where it has been awarded, shall be recognized as binding." Plaintiff's Supplemental Statement at 17. Similarly, Sections 10.1 and 10.2 of Article VI, Recognition and Enforcement of an Arbitral Award, of the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine, also supplied by Plaintiff, pro-



vides, in pertinent part, that "an award of the Arbitration Court shall be final," and "an arbitral award shall be recognized as binding." Plaintiff's Supplemental Statement at 14. Additionally, the 1993 and 1994 Contracts both contained clauses regarding the finality of arbitral awards. n3

The binding effect of an arbitral award is well established in the American courts. See, e.g., *James Richardson & Sons v. W.E. Hedger Transportation Corp.*, 98 F.2d 55 (2d Cir. 1938), cert. denied, 305 U.S. 657, 83 L. Ed. 426, 59 S. Ct. 357 (1938) (acknowledging that the awards of arbitrators are final and binding); *Blue Tee Corp. v. Koehring Co.*, 808 F. Supp. 343, 346 (S.D.N.Y. 1992) (recognizing the authority of arbitrators of the American Arbitration Association [*12] to render final and binding awards that are enforceable in a court of competent jurisdiction); *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 957 (S.D. Ohio 1981) (concluding that an arbitral award that was before the Indian courts for review was nonetheless binding and enforceable). As the court in *Fertilizer Corp. of India* recognized:

The award will be considered "binding" for the purpose of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being "binding." This provision should make it more difficult for an obstructive loser to postpone or prevent enforcement by bringing, or threatening to bring, proceedings to have an award set aside or suspended.

517 F. Supp. at 957-958 (quoting Gerald Aksen, American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 Sw. U. L. Rev. 1, 11 (1971)).

n3 Article 10 of the 1993 Contract states that the award of the Court of Arbitration shall be final for both parties." Ex. 1 at 5. Similarly, Article 9.2 of the 1994 Contract provides, in pertinent part, that "the award of ARBITRATION shall be final and binding on either PARTY." Ex. 2 at 10.

[*13]

Tradeway's most recent submission to this Court concedes that there is no "automatic" stay of enforcement pending Supreme Court review under Ukrainian law. *Krinsky Aff.* at P 4(a). Tradeway argues, nonetheless,

that the Ukrainian Supreme Court has discretion to grant such a stay, and that the effect of this power is to undermine the finality of the award. *Id.*

In response to Tradeway's assertion that the Ukraine Supreme Court's discretion to grant a stay undermines the finality of the Award USFEE offers a letter from the Deputy of the Chairman of the Supreme Court of Ukraine which states that "in accordance with the existing civil-procedural legislation of Ukraine the applying of such kind of Petition does not suspend the executing of the Award." Plaintiff's Supplemental Statement. This statement, in conjunction with USFEE's numerous references to Ukrainian and United States law supports the conclusion that the Award is binding and final under the Convention.

3. Inadequate Opportunity to Present Defense

Article V(1) (b) of the Convention empowers a court to refuse to recognize and enforce an award if "the party against whom the award is invoked was not given proper notice [*14] of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." 9 U.S.C. § 201. Tradeway claims that denial of confirmation of the award would be appropriate because the arbitrator refused to hear and consider relevant and material evidence presented by Tradeway. Answer to Petition at P 20.

The Second Circuit has concluded that Article V(1) (b) "essentially sanctions the application of the forum state's standards of due process." *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)* 508 F.2d 969, 975 (2d Cir. 1974); see also, *Iran Aircraft Industries v. AVCO Corp.*, 980 F.2d 141 (2d Cir. 1992) ("the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and a meaningful manner.'") *Id.* at 146 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893, (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187)). Accordingly, in order to invoke the Article V(1)(b) defense, Tradeway must establish that it was denied the opportunity to be heard at a meaningful time or in a meaningful manner.

USFEE [*15] asserts that it duly served Tradeway with notice of the proceedings. Petition to Confirm at P 13. Tradeway does not contest this claim, nor does it deny that it appeared before the arbitrator "and attempted to defend itself against the Claims on their merits." Answer to Petition at P 13. Instead, Tradeway asserts that the arbitrator refused to hear and consider relevant and material evidence it presented. *Id.* at P 20. Specifically, Tradeway contends that the arbitrator incorrectly con-



sidered USFEE claims under the 1993 Contract, because those claims were timebarred. Ostrovich Statement at P 8. Tradeway admits, however, that its representatives objected to USFEE's submission of claims under the 1993 Contract and that the arbitrator rejected its objection and allowed USFEE's claim. Kiev Petition at P 5.

Tradeway also objects to the arbitrator's decision to reject claims alleging breach of contract by USFEE. Tradeway admits that it asserted and presented evidence concerning claims for \$ 14,000,000 against USFEE, but contends that the arbitrator "failed to take them into consideration." Ostrovich Statement at P 6. The award has been carefully reviewed and no such determination is [*16] reflected in it. Furthermore, paragraph 5.11 of the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine provides for a special procedure for the filing of a counterclaim. Sworn Statement of Valery Klochek Pursuant to 28 U.S.C. 1746 in Support of Petition to Confirm Award ("Klochek Statement") at P 4. The Defendant chose not to follow these procedures, and thus has no claim of being denied an opportunity to present its claim in a meaningful manner. See *Iran Aircraft Industries v. AVCO Corp.*, 980 F.2d 141 (2d Cir. 1992).

4. Public Policy

Article V(2) (b) of the Convention allows a court to refuse to enforce an award if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C. § 201. The court in *Parsons & Whittemore* concluded that the history of the Convention indicated that the intention of the Convention was to construe the public policy defense narrowly: "enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice." *Parsons & Whittemore*, 508 F.2d at [*17] 974.

Tradeway asserts that the Award should not be enforced because it "is contrary to the public policy and law of the Ukraine...as well as of this country." Answer to Petition at P 21. Tradeway concedes that it has not provided substantial elaboration on this point, claiming that it has not had time to investigate and review the documentary record of the arbitral proceedings. Krinsky Aff. at P 5. Tradeway suggests that the following circumstantial evidence provides a basis for its claim: (a) recent political changes and turmoil in the Ukraine; (b) the arbitrator's alleged misapplication of Ukrainian law regarding the statute of limitations on arbitral claims; and (c) the arbitrator's failure to mention the settlement agreement of January 25, 1995 and his refusal to con-

sider evidence of Tradeway's counterclaims. *Id.*

Insofar as Tradeway seeks to invoke an Article V(2) (b) defense on the basis of the public policy of the Ukraine, its claim fails. Article V(2) (b) refers to the public policy of the forum state, the state in which recognition and enforcement is sought, rather than to the state in which the award was originally rendered. *Parsons & Whittemore*, 508 F.2d at 974. [*18] Nor do any of the factors asserted satisfy the narrow scope of the Article V(2) (b) defense under United States public policy. The factors set forth, while claiming a misapplication of Ukrainian law, do not amount to a violation of the "most basic notions of morality and justice." *Id.*

5. Article VI of the Convention

Article VI of the Convention provides:

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

9 U.S.C. § 201. Article VI has been construed to grant courts "unfettered discretion" to adjourn pending the outcome of an application to set aside an award in the country in which it was issued. *Fertilizer Corporation of India*, 517 F. Supp. at 961.

Tradeway contends that, pursuant to Article VI, the Court should adjourn decision on confirmation of the award pending review by the Ukraine [*19] Supreme Court. In applying Article VI of the Convention, it is important to consider the purpose and intentions of the Convention. The Supreme Court explained in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974):

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Id. at 520. The Scherk Court also noted that:

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not



only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

Id. at 516-517. These goals are not served by allowing defendants to avoid a judgment through obstructive litigation. As the court noted in *Hewlett-Packard Co., Inc. v. Berg*, 61 F.3d 101 (1st Cir. 1995), "the risk that the power to stay could [*20] be abused by disgruntled litigants...argues more for a cautious and prudent exercise of the power than for its elimination." *Id.* at 106.

Throughout these proceedings, Tradeway has been unwilling or unable to substantiate the claims on which it bases its appeal. Many of Tradeway's claims are substantiated only by the representations of its lawyers. In one instance in which Tradeway does refer specifically to Ukrainian law, it has provided a translation that excludes a phrase critical to the construction of the provision. n4 Coincidentally, the allegedly inadvertent exclusion removed language that appears to be harmful to Tradeway's claim. Klochek Statement at P 5. Furthermore, Tradeway's claims have changed over the course of this action, to the extent that it is often difficult to ascertain precisely which defenses Tradeway is setting forth. These factors undermine the legitimacy of Tradeway's claims. Rather than contesting actual harms, Tradeway appears to be seeking a legal basis for avoiding the effect of the Award.

Following the commencement of this action, it was revealed that Tradeway has ceased doing business, and that by agreement dated August 7, 1995 (the "Asset Purchase [*21] Agreement"), a newly formed corporation, Tradeway West, Inc. ("Tradeway West") purchased Tradeway's assets and liabilities. Ex. 9. Although dated two days before the Award was rendered, the Asset Purchase Agreement was in fact executed in mid-September of 1995. Tradeway West was not incorporated until August 24, 1995. Supplemental Affidavit of Vladimir Syelski in Opposition to Petition to Confirm Arbitral Award ("Syelski Aff.") P 3. Tradeway provides affidavits of the parties involved in negotiating the Agreement to substantiate their claim that such negotiations commenced well before the award was granted, but that the absence of certain parties during negotiations delayed final execution of the transaction. Statement of Robert G. Shaw in Opposition to Petition to Confirm Arbitral Award ("Shaw Aff.") PP 2-5, 7. Such statements are not convincing, since the Award indicates that the arbitrator was making progressive decisions on the issues raised during the course of the arbitration. Tradeway was thus aware of the probable outcome of the arbitration before the Award was rendered.

n4 Article 71 of the Civil Code of Ukraine sets the statute of limitations at one year for bringing causes of action of state organizations, collective farms co-operatives and other public organizations to each other. Klochek Statement at P 5. Tradeway submitted a translation of this provision that excluded the phrase "to each other". *Id.*

[*22]

The purchaser of Tradeway's assets and liabilities, and the President and sole shareholder of Tradeway West, is Mr. Vladimir Syelski. Mr. Syelski was employed by Tradeway since 1992 as the corporation's contact person in Ukraine and Kazakhstan. Syelski Aff. P 1. Mr. Syelski claims that he began negotiating with the President of Tradeway, Mr. Yuri Orlikov, to purchase Tradeway's shares in early spring of 1995, prior to receiving notice of the commencement of arbitration. *Id.* P 3. He further claims that his attorney suggested that rather than purchasing Tradeway, he form a separate company and purchase Tradeway's assets and liabilities. *Id.* The two parties allegedly reached an agreement to this effect on August 7, 1995. The Asset Purchase Agreement was executed in mid-September. *Id.* In October, Mr. Syelski filed the so-called counterclaim arbitration in Tradeway's name.

Despite assertions that negotiations of the sale began before they received official notice of the commencement of arbitration, Mr. Orlikov has admitted that USFEE had expressed its intention to go to arbitration as early as 1994. Orlikov Deposition of December 19, 1995 ("Orlikov Dep.") at 107-115. Mr. [*23] Orlikov further admits in his affidavit that he was willing to concede to the sale to Mr. Syelski because he "was happy to have the opportunity to gracefully withdraw and turn my attention to other projects." Supplemental Affidavit of Yuri Orlikov in Opposition to Petition to Confirm Arbitral Award ("Supp. Orlikov Aff.") P 5.

Mr. Orlikov acknowledges that Tradeway has no assets to pay the award or to provide security in such amount. Orlikov Aff. P 8. Similarly, Mr. Syelski declares that Tradeway West has no assets to pay the amount of the award. Syelski Aff. P 6. Plaintiff's attempts to ascertain the whereabouts of Tradeway's assets have been unsuccessful. In particular, USFEE challenges a transfer of one million dollars to Consolidated Stelex, a New York corporation also owned by Mr. Orlikov, and operated out of the Tradeway office in One World Trade Center. While Mr. Orlikov claims that the loan has been repaid, he refuses to provide any detail or substantiation of the means of repayment or the whereabouts of the funds. Orlikov Aff. at 31-37.



On December 28, 1995, attorneys for USFEE asserted that Tradeway West has declined to submit to the jurisdiction of this Court. Transcript [*24] of December 28, 1995 at 8. This refusal undermines the effectiveness of Tradeway West's assurance that it will maintain the status quo, so as to not be required to pay security. The dynamics of the transfer between Tradeway and Tradeway West, the misleading effect of the incorrect date on the Asset Purchase Agreement, and Tradeway's persistent refusal to reveal the status of its current assets undermine the credibility of Tradeway's claims, and further suggest that Tradeway is engaged in obstructive litigation while it conducts transactions intended to avoid the effect of the Award.

Conclusion

For the reasons stated above, USFEE's petition to confirm the Award is granted. Tradeway is instructed to pay the full amount of the award plus interest and costs.

IT IS SO ORDERED.

Dated: New York, New York

March 11, 1996

Robert P. Patterson, Jr.

U.S.D.J.

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