UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SKANDIA AMERICA REINSURANCE CORPORATION,

Petitioner,

v. 96 Civ. 2289 SS

SEGUROS LA REPUBLICA,

Respondent.

----------x

September 20, 1996
4:26 p.m.

Before:

HON. SONIA SOTOMAYOR,

District Judge

APPEARANCES

OPPENHEIMER, WOLFF & DONNELLY
Attorneys for Petitioner
BY: EDWARD K. LENCI, Esq.
Of counsel

LORD, BISSELL & BROOK
Attorneys for Respondent
BY: MICHAEL R. HASSAN, Esq.
Of counsel

(In open court)

(Case called)

THE COURT: Please have a seat.

Who is Mr. Hassan?

MR. HASSAN: Your Honor, I am.

THE COURT: Mr. Hassan, my biggest problem with your papers is I have absolutely no idea why this contract is invalid or against Mexican public policy. You give me a Mexican complaint in a foreign language, you give me absolutely no explanation by competent authorities explaining to me what's at issue. You don't explain it even in passing. You tell me in a nice footnote, in a conclusory fashion, the reinsurance contracts are contrary to Mexican -- or are invalid in Mexican law and contrary to public policy.

You know, sir, that's a nice statement. Did you read the New York convention on arbitrable awards? It requires, quote-unquote, proof, not conclusory statements. It says that in an action to confirm or recognize an award, the court may refuse to do so only when the party opposing the action provides, quote-unquote, proof.

Where's the proof?

MR. HASSAN: Your Honor, attached to the petition to confirm the award is the complaint by Seguros La Republica, and I apologize --

THE COURT: Sir, I said to you it is in the category it is very nice it is in Spanish. In a complaint, as in complaints under America law, are likely to be not terribly informative.

MR. HASSAN: That attachment does refer to Article 28 of the general law of insurance, the Mexican general law of insurance, which requires government approval of agents, any agents that are appointed or that are acting on behalf of an insurance company in Mexico, whether those agents are located in Mexico or abroad, and that is set forth in the Mexican complaint, and I admit that that was not fully articulated and referred to in our pleadings, and I apologize.

THE COURT: Counsel, the words, "Not fully articulated" --

MR. HASSAN: It is understated.

THE COURT: Thank you, sir.

MR. HASSAN: As to the issue --

THE COURT: Would that invalidate the agreement to arbitrate? And why under Mexican law?

MR. HASSAN: Under Mexican law, my understanding of Mexican law is that any actions taken on behalf of someone who has not been an agent, duly appointed and approved by the Mexican authorities would render the contract a nullity.

THE COURT: Did you, plaintiff -- I have never quite understand these reinsurance contracts that well, but were there benefits or was there more than mere demand for payment between yourselves?

Was there a course of deals between yourselves and Republica based on this contract other than the payment?

MR. LENCI: As I understand this transaction, because of the nature of the reinsurance business, the communication wasn't direct, so it wasn't Skandia dealing with anybody directly at La Republica. This was done through any number of intermediaries and brokers. Skandia did, as far as I know, hold up its end as far as communicating with the intermediary. What happened after that we really didn't explore.

THE COURT: Okay. Mr. Hassan, let me tell you what I'm doing. I am confirming the award, and I'll tell you why. You failed miserably to provide the proof required under the convention, number one. Number two -- and I am going to read a decision into the record -- there is no reason why I needed to accede to the Mexican action under principles of comity. They don't exist here.

Having said that, you should have done, sir, what you needed to do, which was follow the convention and provide me with proof. The only thing you have done by [illegible] is [illegible]

mind, which was whether I was going to assess attorney's fees against you or not.

But, sir, the manner in which this has been handled by your client leaves a lot to be desired. Waiting 10 months and two weeks before the arbitration hearing to start the Mexican action, defaulting in its answer to the petition in this action, and waiting till an order to show cause why the default should not be entered is served upon him to respond, to thereafter respond with the quality of papers I received from you, sir, which at no point even explains to me what the legal argument is, smacks of the type of bad faith that leaves a court disquieted.

However, assuming, sir, that there was and is under that article you've just quoted to me a basis to have fought the arbitration proceeding, I would suggest, sir, that your client's choices were one of many, but not the one you elected.

The first was to move to stay the arbitration in this court based on Mexican law when the arbitration was demanded.

The second, to answer the petition and provide the proof required under the convention. It's failed to do so. It will have an award rendered here. If you have assets in the United States, presumably those will be subject to the award. Go to Mexico and let them fight in

Mexico. There is law under the convention that permits any country in which assets are located to refuse enforcement of the award on the grounds that the award is against the public policy of the state of enforcement. So if your assets are there, sir, you're safe. If they're not, then the course of action elected here is punishment enough and I don't need to assess attorney's fees for the conduct Republica has chosen.

This is my decision on this motion:

This case is a diversity action to confirm an arbitration award rendered in favor of petitioner Skandia America Reinsurance, incorporated in Delaware with its primary offices in New York, New York, and against respondents Seguros La Republica, a Mexican company known as Aseguradora Interacciones, S.A., with its principal place of business in Mexico. The arbitration at issue involved the claim by Skandia that Republican owed it payment under reinsurance retrocession agreement, SK-100, entered into in 1977, and updated in 1979.

Skandia demanded an arbitration of its dispute on December 19, 1994, under the arbitration clause of SK-100 which provides, in pertinent, part as follows:

"As a condition precedent to any right of action hereunder, any dispute arising out of SK-100 shall be submitted to a decision of a board of arbitration composed

of two arbitrators and an umpire, meeting in New York, New York, unless otherwise agreed."

The laws of the State of New York shall govern interpretation and application of -- I am skipping the rest part of that clause. The procedures for the arbitration, the appointment for the arbitrators and the manner in which the arbitrators needed to render a decision. The last part of that section requires, "That the laws of the State of New York shall govern interpretation and application of SK-100."

In SK-100, the parties also stipulated that foreign reinsurers failing to pay amounts due under the contract would submit to the jurisdiction of the U.S. courts and that the Superintendent of Insurance of the State of New York, "Would be the agent of the foreign reinsurers for the purposes of service." That's Article 14 of that agreement.

Although duly served with and informed of Skandia's arbitration demand, Republican failed to appoint an arbitrator within the time required by the arbitration agreement. Skandia extended the time for Republican to find an arbitrator. Finally, in August of 1995, Skandia finally informed Republica that it would grant no further extensions. Only then and then by fax, dated August 3, 1995, did Republica respond and state that, "This company had not copy of the purported reinsurance contract. We have analyzed all the documents which you have sent to us

subsequent to such demand for arbitration and we conclude that there is not sufficient evidence that this company entered into such transaction. Therefore, we do not feel bound to appoint an arbitrator."

In an October 16, 1995 fax, Republica repeated its contentions to the arbitrators that it had never entered into the reinsurance contract with Skandia. Skandia continued with the arbitration, appointing a second arbitrator as permitted by the arbitration agreement.

I note that both of these letters don't do what counsel has just done here and set forth the basis for the invalidity of the contract, there is just a conclusory statement that there was no reinsurance contract binding the parties.

Nevertheless, after receiving these faxes, Skandia continued with the arbitration and appointed a second arbitrator. Republica did not participate or defend itself in the proceedings. A hearing took place on October 24, 1995, and on October 25, 1995, the arbitrators awarded Skandia the sum of $190,639. The award gave Republica 30 days to make payment, which Republica has not done to date.

On October 6, 1995, just two weeks prior to the scheduled arbitration hearing, Republica filed an action in Mexico challenging the validity of the reinsurance contract under Mexican law. The Mexican action also appears to

challenge the validity of various other contracts with other insurance companies named as defendants. Skandia has answered the Mexican action, which remains pending.

On March 24, 1996, Skandia filed the instant petition seeking confirmation of the arbitral award, interests and attorneys' fees under New York Insurance Law 1213 (d).

Republica did not answer the petition, and on June 24, 1996, as required by this judge's rules of individual practice, Skandia filed an order to show cause why the court should not enter a default judgment against Republica. On or about July 19, 1996, Republica finally entered an appearance opposing the entry of the default judgment and cross-moving to dismiss the petition or stay it pending the outcome of the Mexican action. The problem is Republica never offered an explanation as to why it failed to answer or otherwise move against the petition in a timely manner. I'm still curious about that, gentlemen.

Republica contends that this court should, on the basis of international comity, stay the current petition in deference to its Mexican action because:

1. Republica filed the Mexican action six months before Skandia filed the motion to confirm the award;

2. Both this action and the Mexican proceeding involved the validity of the reinsurance contracts under

Mexican law,

3. The Mexican court is the appropriate forum to decide the validity of the contract under its laws;

4. The Mexican court provides an adequate forum for both parties, and staying the New York action promotes judicial efficiency.

Republica further maintains that Skandia should be estopped from proceeding in New York because it should have enforced the arbitration award in Mexico. That argument I simply don't understand. Republica admits that the motion to confirm under the convention and otherwise is appropriately made in the jurisdiction in which the award is rendered. It could be made in Mexico, but there is certainly no legal or equitable argument that would have compelled or should have compelled Skandia to seek a motion to confirm the award in Mexico.

Instead, gentlemen, the place to seek the confirmation actually had to be here to reduce the award to judgment. Skandia would have been the party acting in bad faith if it had tried to do that in Mexico instead.

At any rate, finally Republica maintains that the award violates the public policy of Mexico and should, therefore, not be enforced under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. Section 201 et seq..

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Skandia in turn argues this court should confirmthe award because Republica agreed to hold both the arbitration proceeding and confirmation of the award in New York. Skandia notes that it initiated the arbitration proceedings 10 months before Republica started the Mexican action and that, therefore, its action should have precedence. Skandia also points out Republica has failed to provide proof either that the agreement to arbitrate or the reinsurance contract itself was against Mexico's public policy or invalid under Mexican law.

Finally, Skandia claims it is entitled to attorneys' fees under New York State Insurance Law 1211 (d) because Republica's unexplained default in participating in arbitration and in answering the petition is, "Prima facie evidence that its failure to pay was vexatious and without reasonable cause."

International comity does not require this court to stay the petition to confirm the arbitration award. Respondent argues that because it initiated the Mexican action prior to the instant motion to confirm the award, international comity requires this court to stay or dismiss the confirmation petition pending resolution of the Mexican action. The Suprene Court has defined comity as: "The recognition which one nation allows within its territory to the legislative, executive or judicial acts of another

nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws. I am citing Hilton versus Guyot, 159 U.S. 113, 164 (1895).

The factors considered by courts in determining whether to apply the principles of comity and stay or dismiss the pending action, however, do not mitigate in favor of Republica. These factors are the similarity of parties and issues involved, promotion of judicial efficiency, adequacy of relief available in the alternative forum, consideration of fairness to all parties and possible prejudice to any of them, and the temporal sequence of filing such actions. See Caspian Investment, Inc v. Viacon Holdings, Ltd, 770 F.Supp. 880, 884 (Southern District of New York 1991.)

Here, Republica's insistence that the Mexican action should take precedence is unsupported by any compelling reason under these factors. First, Republica is wrong that the Mexican action should be considered first in time. Arbitration proceedings are adjudications on the merits of issues. See Fotochrome, Inc Copal Company, Ltd., 517 F.2d 512, 517 (Second Circuit 1975). That case holds that foreign arbitrable awards made after bankrupt proceedings were initiated in the United States are nonetheless a binding adjudication on the merits when

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arbitration proceedings were initiated before the bankruptcy actions.

The arbitration proceeding here was initiated a full 10 months before the Mexican action. Therefore, the award rendered, even though rendered after the Mexican action started, is still res judicata. It is an adjudication on the merits, gentlemen.

Now, at the time this arbitration proceeding was started, Republica was aware that both the validity of the reinsurance contract and its arbitration clause were at issue and it had forums fully available both before the arbitrators and alternatively the New York courts to challenge the arbitration proceeding and the contracts at issue. Therefore, the temporal sequence of the filing of the actions favors petitioners Skandia and not the respondent.

Further, in considering the fairness to the parties, the Second Circuit has generally refrained from surrendering jurisdiction to a court where no judgment has been reached. China trade & Development versus M.V. Choong Yong, 837 Fed 2d. 33, 36 (Second Circuit 1987) and I am quoting from that case, "Parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in which one can plead as res judicata." As expressed further

in Diego J. Herbstin versus Martin E. Greetman, 743 Fed. Supp. 184, 188 (Southern District of New York 1990), "Without a final judgment from another court, surrender of jurisdiction is justified only under exceptional circumstances."

Now, here there is no exceptional circumstance. The Mexican action seems far from completed, gentlemen. I have no indication that the Mexican action is going to do anything but drag on and on. Instead, here I am going to decide this case rather expeditiously, and there is certainly nothing that makes me incapable of interpreting Mexican law if it had been provided to me in an accurate and appropriate manner.

Therefore, neither judicial efficiency nor the similarity of parties and issues are served by abstention in this case. I repeat, the Mexican action doesn't involve just this defendant. It has multiple defendants in multiple other reinsurance contracts. Therefore, all I have is one case, one award, one set of parties.

Similarly, the issues involved in these two cases are not identical. The Mexican action centers around the validity and public policy considerations of the enforcement of reinsurance contracts. The issue before me is much narrower. Was there a valid agreement to arbitrate? If there was, and Republica failed to defend in the

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arbitration, all other issues have been resolved.

Further, only the respondent is favored in having the action in Mexico. Petitioner, an entity with its principal place of business in New York, is prejudiced by having to appear in a foreign forum, Mexico, in the same manner respondent claims prejudice up here in New York.

Respondent has less of a basis to claim prejudice because it entered into a contract consenting to jurisdiction in New York, while petitioner never even arguably consented to jurisdiction in Mexico by contract. In short, there is nothing counseling a stay of dismissal of this action because of international comity and the court rejects respondent's request that this court do so.

Now I turn to the substance of the motion. You oppose the motion to confirm the award or enter a default. I'm going to confirm the award. The New York Convention authorizes courts -- because you've provided me, frankly, sir, with no defense to the action -- the New York Convention authorizes courts of signatory countries to refuse recognition in enforcement of awards, "Only if the party against whom an award is invoked furnishes to the competent authority where the recognition and enforcement is sought, proof that -- and I underline the word, "Proof" -- that: 1. The parties to the agreement, the arbitration agreement, were under the law applicable to them under some

in capacity, or 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

2. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

B. Recognition or enforcement of the award would be contrary to the public policy of that country.

It is significant to note that respondent has proffered absolutely no proof in this case of anything. Republica filed a Mexican action with a complaint apparently claiming that the reinsurance contracts at issue were invalid and against public policy. It has not filed a translation of the complaint for the court and has failed altogether to file a memorandum of law or affidavit by an expert in Mexican law that its obligations have substance of any kind under Mexican law.

More fatal to respondent's position, however, is that the validity of the reinsurance contracts is not pertinent to the inquiries before this court under the convention. Respondent does not claim here that under New York law the reinsurance contracts are invalid or against public policy. New York is the law which the reinsurance contracts stipulated will govern the contract and the law

that governs enforcement of the arbitration award in this confirmation proceeding.

Therefore, under the sections of the convention just cited, the sole remaining issue is whether the agreement not to arbitrate, not the reinsurance agreement, was invalid under the laws applicable to the parties to the agreement. On this issue, respondent has failed to supply the, "Proof" the convention demands; and, therefore, there is no ground available for this court to refuse confirmation of the award.

As a treaty ratified and adopted by the U.S., this court is compelled to follow the dictates of the convention above all domestic principles of arbitration. This court would need dramatically more proof than that proffered by respondent or a belief by respondent's counsel of Mexican law based on no explanation as to how counsel came to that belief or he has the education, training or knowledge of Mexican law to make that belief anything more than speculative for this court to refuse confirmation of the award based on the dictates of the convention.

Even if abstention principles were available under the convention, only a truly extraordinary circumstance not present here would justify a stay of a confirmation hearing in the forum in which the award was rendered. In short, gentlemen, I am going to enter a

default on the confirmation hearing. You have not explained your delay and your failure to answer. You have not shown me in any way with proof or otherwise that you have a meritorious defense to this action, and you have been unnecessarily delaying this arbitration process and consideration in a full forum for as long as you humanly could. You waited 10 months, till the eve of the arbitration hearing, to start the Mexican action. You refused to answer this petition in a timely manner. You waited till the last moment to put in papers opposing the entry of the default.

You then oppose it with incomplete papers explaining absolutely nothing of pertinence to the court, setting forth any kind of basis for a meritorious defense, and not explaining your delay in the least. Under these circumstances, it would be an abomination for this court to refuse to enter the default confirming this award and it would be highly prejudicial and an insult to the judicial process to do so. I am granting the default. I am denying the cross-motion for a stay or dismissal pending the Mexican action.

Having used those very harsh words, however, I am now left with consideration as to whether or not I should award attorney's fees under Section 1213 (d) of the New York State Insurance Law. That law holds the following: In any

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action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this state to a resident thereof, or to a corporation authorized to do business therein, if the insurer has failed for 30 days after demand prior to the commencement of the action to make payment pursuant to the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow plaintiff reasonable attorney's fees and include such fee in any judgment rendered in such action. Such fee shall not exceed 12 and one half percent in the amount the court finds the plaintiff is entitled to recover against the insured, nor it would be less than $25.

Failure of an insured to defend any such action shall be prima facie evidence of its failure to pay was vexatious and without reasonable cost. There is a dearth of cases in New York invoking this provision. I have found only one, and that case was Oakley versus National W. Life Insurance, 294 F. Supp. 504, 511 (Southern District of New York 1968) In that case, unfortunately, the district court held that a failure to pay based on an erroneous interpretation of law was insufficient to satisfy the requirement that such failure be vexatious and without reasonable cost.

Well, here I have a company who has chosen a rather ill-advised sequence of events to proffer its defense

that under Mexican law its agent was unauthorized to bind it to the reinsurance contracts, but that stands comparable to the Oakley case to be an erroneous interpretation of law and not necessarily the type of vexatious action that the New York State Insurance Law was directed at.

I am also concerned because superimposing on the arbitrable process in a foreign arbitration award attorney fee applications of this nature could have a chilling effect on the arbitration process itself. The convention itself prohibits signatory companies from imposing costs to the arbitration process that would dissuade its use. Although this law doesn't necessarily fall within that prohibition, I think that in the exercise of discretion, that a confirming court should rule against the award of attorney's fees rather than for it except in the most extraordinary circumstance, where a party has refused to interact at all in making payment.

Where a party has come in and denied its obligation and provided a basis, albeit not in the manner of denial required by law, i.e., with the quote-unquote proof of the convention, or it has chosen to not participate as opposed to in, the arbitrable process, as opposed to following available alternatives to it, that does not constitute the vexatiousness that I think should be applied under the New York State Insurance Law.

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Hence, it is for this reason and these reasons alone that I am denying the application for the attorney's fees. I do, however, grant the motion to confirm the award and will enter judgment accordingly.

Petitioner, do you want to make up an order to this effect, and I will have the Clerk of the Court enter it with interest?

MR. LENCI: Yes.

THE COURT: You are entitled to interest under New York State Law. I believe the interest runs from the date payment was due, correct?

MR. LENCI: I believe so.

THE COURT: Run out the calculations.

MR. LENCI: I will.

THE COURT: When can you do this by, counsel?

MR. LENCI: Early next week.

THE COURT: Give me a date.

MR. LENCI: Wednesday.

THE COURT: You have till Thursday -- can you do it by Wednesday?

MR. LENCI: I will get it to the court by Wednesday.

THE COURT: Not to the court; your adversary.

MR. LENCI: I will mail it out Wednesday.

THE COURT: You will hand deliver it to them.

MR. LENCI: They're in Chicago.

THE COURT: Fax it to them. You have till 5:00 o'clock on Thursday afternoon to fax back to him your objections to that proposed judgment, okay?

MR. HASSAN: Yes, your Honor.

THE COURT: You can get to me the proposed judgment on a Word Perfect disk, 5.1 or 6.1 is fine, either one, I have both, Dos or Windows. I guess 5.1 is Dos and 6.1 is our Windows. They're shaking their head at me. Just get it to me on a disk with the proposed judgment and any objections that they submitted, and I will then consider it and sign the judgment on Friday, okay? Not yours necessarily, but however I decide based on the objections. You can submit whatever responsive letter you want by Friday, too.

MR. HASSAN: Your Honor, my objections I address to Mr. Lenci or to your Honor that he submits to you?

THE COURT: Yes, he will take the telefax from you and give it to me. He has to reply to it first. You have till the end of Friday to give to me, by 4:00 or 5:00 o'clock. I'll enter it on Monday.

MR. LENCI: Yes, your Honor.

THE COURT: What is next Wednesday's date?

THE CLERK: The 25th.

THE COURT: Mr. Hassan, I don't know what is

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going on in this case. I told you when I started that I don't like the smell of it. I don't like the delays. I don't like the quality of papers that came into me. I am unhappy generally with the manner in which this arbitration, the proceedings have gone on.

You can convey to your client that if there are resources here, more the better the petitioner can get them. If not, I am very sorry for the petitioner, but it is relegated to the delays in Mexico. If there are procedures in Mexico in which your client can be held to the bar for what it has done in delaying this action, I hope they are fully held to it. If it has a meritorious defense, I simply don't understand the delays in interposing that defense.

Thank you, gentlemen.

MR. LENCI: Excuse me, your Honor. There was also additional issue of the costs of the arbitration. Under the contract, we're entitled to half the fees for the --

THE COURT: Yes, that I will grant as part of the judgment, yes, because that is part of the award as well.

MR. LENCI: It was --

THE COURT: It was part of the contract?

MR. LENCI: -- part of the contract. We appointed their arbitrator and paid the arbitrator.

THE COURT: Yes, I will give you those amounts as

well. You'll have interest from the date the payment was made.

MR. LENCI: Thank you, your Honor.

(Court adjourned)

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