Sent by Ck. 1635
Norbig
See fn. 4 for
Panama Conv.

SKANDIA AMERICA REINSURANCE CORPORATION, Petitioner,
-against- CAJA NACIONAL DE AHORRO Y SEGORO, Respondent.

96 Civ. 2301 (KMW)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1997 U.S. Dist. LEXIS 7221

May 21, 1997, Decided
May 23, 1997, FILED

COUNSEL: [*1] For SKANDIA AMERICA REINSURANCE CORP., petitioner: Edward Kevin Lenci, Oppenheimer Wolff et ano., New York, NY.

JUDGES: Kimba M. Wood, United States District Judge

OPINIONBY: Kimba M. Wood

OPINION: OPINION AND ORDER

WOOD, D.J.

Petitioner has moved to confirm an arbitration award of $ 394,462.19 entered against respondent on August 11, 1995. Petitioner has also petitioned for pre-judgment interest and attorney's fees. Respondent objected to the petition insofar as it requests damages beyond the award. In its reply, petitioner has asked that I order respondent to post security pursuant to NY. Ins. Law @ 1213(c) or risk having the petition together with prejudgment interest and attorney's fees granted by default. For the reasons set forth below, I hereby order respondent to post security in an amount to be agreed on by the parties, but in any event not less than $ 394,462.19.

I. Background

Unless otherwise stated, the facts of this case are not in dispute. Petitioner Skandia America Reinsurance Corporation is a United States corporation involved in the reinsurance business. n1 Respondent Caja Nacional de Ahorro y Seguro is an Argentinean company n2 that was also involved in the insurance [*2] and reinsurance business. Petitioner and respondent were party to three retrocession agreements, n3 each of which requires arbitration of any dispute thereunder in New York, New York. In December 1994, petitioner made an arbitration demand of respondent in order to recover amounts allegedly due to petitioner under the agreements. Respondent failed to respond to the arbitration demand. Pursuant to the arbitration provisions in the contracts, petitioner appointed its arbitrator; when respondent failed to appoint its arbitrator, petitioner appointed one for respondent as well. These two arbitrators appointed an umpire of the panel pursuant to the arbitration provisions in the contracts. Respondent failed to appear at the arbitration hearing. Petitioner put on its case and was awarded a total of $ 394,462.19 under the three contracts after a hearing and deliberations. The

award ordered respondent to pay petitioner within thirty days of the award. Respondent never satisfied the award.

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

n1 "A reinsurer is in the business of indemnifying a primary insurer for losses paid to the primary insurer's policyholders." Curiale v. Ardra Insurance Co., 88 N.Y.2d 268, 271, n. 1, 644 N.Y.S.2d 663, 665, n.1, 667 N.E.2d 313 (N.Y. 1996). [*3]

n2 Respondent claims that it is wholly owned by the government of Argentina, and as such is an instrumentality of a foreign state. (Mem. of Law in Opp. to Pet. to Confirm. Arb. at 5, n.3.) Petitioner disputes this claim. (Pet.'s Reply Mem. at 2 & 4, n. 2.)

n3 A retrocession agreement is an agreement whereby a reinsurer agrees to indemnify a reinsurer (called a "retrocedent"), in exchange for a share of the premium, against all or part of the loss which the retrocedent may sustain under a reinsurance policy or policies. See generally, Kramer, The Nature of Reinsurance, in REINSURANCE 4-6, 20 (R. Strain ed. 1980); see also, Stephens v. National Distillers & Chem. Co., 69 F.3d 1226, 1228 (2d Cir. 1996).

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

II. Discussion

Petitioner originally brought this action under Chapter One of the Federal Arbitration Act ("FAA"), 9 U.S.C. @@ 9-10 (1996). However, after respondent argued that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, (the "New York Convention") applies to this case due to the fact that [*4] respondent is "domiciled or ha[s its] principal place of business outside the enforcing jurisdiction," Bergesen v. Joseph Muller Corp. 710 F.2d 928, 932 (2d Cir. 1983), petitioner agreed that the New York Convention applies. (Reply. Mem of Law at 2, 3, etc.) Therefore, I will apply the New York Convention to this petition. n4 I note that Congress has implemented the New York Convention as Chapter Two of the FAA, 9 U.S.C. @@ 201-08 (1988), and the New York Convention applies the provisions of Chapter One of the FAA in proceedings under the New York Convention to the extent that the Chapter One provisions are not in conflict with the provisions of the New York Convention. 9 U.S.C. @ 208.

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

n4 I note that it is possible that this award would also be enforceable under the Inter-American Convention on International Commercial Arbitration, adopted and incorporated as Chapter Three of the FAA, 9 U.S.C. @@ 301-307, to which both Argentina and the United States are signatories. However, because neither party has raised the applicability of this Inter-American Convention, I will analyze this petition under the New York Convention.

----------End Footnotes---------- [*5]

C. Respondent's Failure to Post Pre-Judgment Security n5

----------Footnotes---------- n5 Despite the fact that both parties have submitted a plethora of letters on this issue, respondent has requested the opportunity to rebrief the issue further, because, it argues, petitioner did not raise the issue until its reply. In addition to the fact that respondent submitted a number of substantive letters which are treated by the Court as sur-replies, I note that it is not petitioner's responsibility to inform respondent of its obligations under the law; "the language of @ 1213(c)(1) does not require a timely demand of pre-answer security; the language only sets a trigger for security (that being before a defendant undertakes to defend the action)." Moore v. Nat'l Distillers and Chemical Corp., 143 F.R.D. 526, 531-32 (S.D.N.Y. 1992), aff'd sub nom Stephens v. National Distillers & Chem. Co., 69 F.3d 1226 (2d Cir. 1996). Furthermore, respondent admits that petitioner gave respondent notice of its duty to post security under New York Insurance Law before respondent answered the petition. (Mem. of Law in Opp. to Pet. to Confirm. Arb. at 5, n.3.)

----------End Footnotes---------- [*6]

In its reply memorandum, petitioner argues that respondent should immediately be required to post pre-judgment security pursuant to New York Insurance Law @ 1213(c), and that if respondent refuses to post pre-judgment security, I should strike respondent's answer and grant the petition by default. Respondent argues that as an instrumentality of the Argentinean government, it is immune from posting security under the Foreign Sovereign Immunities Act (the "FSIA"). n6 Petitioner counters that respondent is not immune from the posting requirement because Argentina has signed the New York Convention, which allows for pre-judgment attachments, and because when it invoked the New York Convention, respondent explicitly waived any immunity for which it might have been eligible.

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

n6 The FSIA is codified at 28 U.S.C. @@ 1330(a), 1441(d), 1602-1611 (1988).

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

1. A Foreign Insurer's Duty to Post Security

Under New York insurance law, a foreign insurer is required to post security before filing pleadings or an answer to [*7] a suit. Section 1213(c) of the New York Insurance Law states:

Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
(A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or (B) procure a license to do an insurance business in this state.

Pursuant to this provision, if a foreign insurer fails to post security as required, a court can grant the movant party's motion by default. Curiale v.

Ardra Insurance Co., 88 N.Y.2d 268, 644 N.Y.S.2d 663, 667 N.E.2d 313 (N.Y. 1996) (upholding constitutionality of this provision and of court's granting of judgment [*8] by default based on the opposing party's failure to post security). The purpose of this law is ensure that foreign insurers can meet their insurance obligations. Id. at 274 ("Since insurers, licensed and unlicensed alike, capitalize on the legitimate expectations of the public that funds to satisfy judgments on insurance policies are readily available within the State, the Legislature enacted section 1213(c) to ensure that those expectations would be met."). See also, Moore v. National Distillers & Chem. Corp., 143 F.R.D. 526, 531 (S.D.N.Y. 1992) (purpose of law is "to protect New York residents who contract for insurance with unauthorized foreign or alien insurers from having to pursue such insurers in distant forums") aff'd sub nom Stephens v. National Distillers & Chem. Co., 69 F.3d 1226 (2d Cir. 1996).

The regulation of the insurance industry has been found to be "closely related to the public interest and a legitimate exercise of a State's police powers." Curiale, 88 N.Y.2d at 276, citing Health Ins. Assn. v. Harnett, 44 N.Y.2d 302, 308-09, 405 N.Y.S.2d 634, 376 N.E.2d 1280 (1978). Additionally, under the McCarran-Ferguson Act of 1946, 15 U.S.C. @@ 1011-1012, [*9] the power to regulate insurance is specifically granted to the states whose laws are not preempted by any act of Congress unless such act specifically relates to the business of insurance. 15 U.S.C. @ 1012(b). n7

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

n7 The McCarran-Ferguson Act provides that,
no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. @ 1012(b).

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

Accordingly, under this law, before answering the petition to confirm arbitration, Caja, as a foreign or alien insurer, is required to post security sufficient to secure payment of any final judgment, or request that I dispense with this requirement because it maintains sufficient funds within New York State to meet any final judgment, or procure a license to do insurance business in this state. Respondent has failed to meet any of these options.

2. The Foreign Sovereign Immunity Act

Respondent [*10] claims that it is immune from the posting requirement of New York Insurance Law because it is an instrumentality of the Argentinean government, and thus a foreign state under the FSIA. Initially, I note that I decline to decide whether respondent has adequately presented a prima facie case that it is an instrumentality of a foreign state. n8 Drexel Burnham Lambert Group, Inc. v. Comm. of Receivers for A.W. Galadari, 12 F.3d 317, 325 (2d Cir. 1993) (burden is on defendant to present prima facie case that it is a foreign sovereign), cert. denied, 511 U.S. 1069, 128 L. Ed. 2d 365, 114 S. Ct. 1644, 114 S. Ct. 1645 (1994); but see Moore, 143 F.R.D. at 532, n.6 (burden is on party claiming sovereign immunity sufficiently to demonstrate that it is an instrumentality of a foreign state within the meaning of @ 1603 of FSIA). As a matter of judicial economy, I will assume arguendo that respondent has demonstrated that it is the instrumentality of a foreign state, and I will consider whether the FSIA provides the respondent with immunity from its obligation to post security pursuant to NY Ins. Law @ 1213(c).

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

n8 Although the burden for meeting a prima facie case is extremely low, the only evidence respondent submitted of its sovereign status is a Spanish-language document that respondent claims is the charter of Caja.

----------End Footnotes---------- [*11]

I note that the burden to prove sovereign immunity is a shifting burden. Initially, the party claiming immunity must present a prima facie case that it is a foreign sovereign within the meaning of the act. Then, the burden switches to the party opposing immunity to come forward with a showing that under the exceptions to the FSIA, immunity should not be granted. However, the ultimate burden of persuasion remains with the alleged foreign sovereign claiming immunity. Drexel Burnham Labert Group, 12 F.3d at 325, citing Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993).

Under the FSIA, foreign states are not immune from the jurisdiction of foreign courts with respect to their commercial activities, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. 28 U.S.C. @ 1602. However, @ 1609 of the FSIA provides that,

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property of the United States or a foreign state shall be immune from attachment arrest and execution except [*12] as provided in sections 1610 and 1611 of this chapter.

Respondent, relying on Stephens v. National Distillers & Chem. Co., 69 F.3d 1226 (2d Cir. 1996), argues that as a foreign state, respondent can not be required to post security under the Insurance Law, because the posting of such security is effectively a pre-judgment attachment.

In Stephens, the Second Circuit Court of Appeals held that the posting of security, required under NY Ins. Law @ 1213(c), constituted a pre-judgment attachment for FSIA purposes, Stephens, 69 F.3d at 1229, citing S&S Machinery Co. v. Masinexportimport, 706 F.2d 411, 418 (2d Cir. 1983). The court then found that as such, foreign sovereigns were immune from posting security under NY Ins. Law @ 1213(c). The court found immunity despite the McCarran-Ferguson Act of 1946, 15 U.S.C. @@ 1011-1012, which granted states widespread authority to regulate insurance law without federal law preemption.

However, Stephens did not involve an arbitration action, and the court in Stephens specifically stated that there was no relevant treaty that predated the FSIA or that would preempt the provisions of the FSIA. 69 F.3d at 1229. Section [*13] 1609 of the FSIA explicitly states that the FSIA is "subject to existing international agreements to which the United States is a party at the time of enactment of this Act." This clause was discussed in Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp 383 (D.N.J. 1979) in which the court stated,

the [FSIA] does not abrogate any existing international agreement to which the United States was a party prior to the Act's enactment. Congress was obviously careful not to abrogate the existing agreements by the passage of the [FSIA]. To the extent such international agreements set forth a waiver of immunity, those agreements are to be given effect.

Id. at 393. Therefore, the question is whether the New York Convention, to which both Argentina and the United states are signatories, was an "existing" international agreement, and, if so, whether it allows this Court to order the posting of pre-judgment attachments.

3. The New York Convention

The United States acceded to the New York Convention on September 30, 1970, and enacted the FSIA on October 21, 1976. Therefore, the New York Convention was an "existing international agreement" that was enacted [*14] before the adoption of the FSIA, and was, therefore, incorporated by the FSIA. 28 U.S.C. @ 1609.

The purpose of the New York Convention was to effectuate arbitration proceedings and their enforcement between companies of different nationalities. This purpose was articulated by the Supreme Court in Scherk v. Alberto-Culver Co., 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974). The Court stated,

the goal of the [New York] Convention, and the principal purpose underlying the American adoption and implementation of it, was to encourage 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 n. 15. In light of this purpose, in a decision discussing United States jurisdiction over arbitration agreements, n9 the Second Circuit Court of Appeals has stated that,

the [New York] Convention should be broadly interpreted to effectuate the goals of the legislation. Moreover, when the [New York] Convention is read together with the FSIA's arbitration exception, which gives jurisdiction [*15] if an arbitration agreement "is or may be governed" by a treaty, 28 U.S.C. @ 1605(a)(6)(B), [sic] it evinces a strong legislative intent to provide enforcement for such agreements.

Cargill, 991 F.2d at 1018.

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n9 The FSIA provides an exception to sovereign immunity from United States jurisdiction where a foreign state has agreed to arbitrate. @ 1605(a)(6)(B). See, e.g., Cargill Inter. S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1017 (2d Cir. 1993).

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Because part of the purpose of the New York Convention was to encourage the enforcement of arbitral awards, the New York Convention allows for the posting of prejudgment security. Specifically, Article VI of the New York Convention provides 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, [*16] on the application of the party claiming enforcement of the award, order the other party to give suitable security.

9 U.S.C. @ 201. I note that under Article V(1)(e), a competent authority is "a competent authority of the country in which, or under the law of which, the award was made." 9 U.S.C. @ 201, Art. V(1)(e). Therefore, this Court would constitute a competent authority and could, on application of petitioner, order the respondent to post adequate security.

In light of the purpose of the New York Convention and the Second Circuit's instruction to interpret the New York Convention broadly, I find that Article VI of the New York Convention allows me to require sovereigns to post pre-judgment security if they move to set aside or suspend an arbitration award, which would allow me to order the posting of pre-judgment security pursuant to N.Y. Ins. Law @ 1213(c). n10

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

n10 Petitioner also claims that respondent is not immune from posting security under @ 1610(d) of the FSIA. Because I find that the New York Convention was an existing international agreement that was not abrogated by the FSIA, I need not decide this issue. I note that under @ 1610, which establishes an exception to a sovereign's immunity to post pre-judgment security, the sovereign must explicitly waive its immunity. 28 U.S.C. @ 1610(d)(1). It is unlikely that I would find that respondent's invocation of the New York Convention constitutes such an explicit waiver as required by @ 1610. See e.g., S&S Machinery, 706 F.2d at 416 (language of waiver of immunity in United States-Romanian trade agreement did not constitute explicit waiver of immunity from pre-judgment attachment as required by @ 1610), Reading & Bates Corp. v. Nat'l Iranian Oil Co., 478 F. Supp. 724, 728-29 (S.D.N.Y. 1979)(provision of Treaty of Amity does not constitute explicit waiver required under 28 U.S.C. @ 1610(d)).

----------End Footnotes---------- [*17]

Article VI of the New York Convention, however, allows a competent authority to order the respondent to post suitable security only if the respondent makes an "application for the setting aside or suspension of the award. . . ." In one of respondent's later letters, respondent argues that it is not moving for the "setting aside or the suspension of the award" as required by Article VI of the New York Convention. (Sheppard letter, June 6, 1996 at 2.) On this point, respondent's papers are internally inconsistent. In one part of respondent's objection to the petition respondent appears to challenge only the prejudgment interest and attorney's fees. However, elsewhere, respondent argues that petitioner's petition is per se deficient because petitioner failed to submit the original award or a duly certified copy thereof as required under Article IV(1) of the New York Convention. n11 Finally, in another section of its opposition, respondent argues that "judgment on the petition must be denied because Skandia seeks relief that may not be granted in this proceeding." (Mem. in Opp. to Pet. to Confirm Arb. at 7.) Therefore, in light of these contradictory statements, the fact that respondent [*18] has failed to pay the award as ordered, and the Second Circuit Court of Appeals' direction to interpret the New York Convention broadly, I find that respondent has in effect moved to suspend the award.

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

n11 Although petitioner did file the original award with the Court, it did fail to submit the original or a duly certified copy of the parties' arbitration agreement as also required by Article IV(1). Petitioner explains this failure as a result of its original belief that it could petition to confirm the

award under the FAA instead of the New York Convention. Because Respondent has submitted duly certified copies of the arbitration agreement to the Court, this second requirement has now been met.

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

Accordingly, pursuant to the New York Convention, respondent is not immune from the posting requirement of New York Insurance Law. I therefore order respondent to post adequate security in an amount to be determined by the parties, but in any event not less than $ 394,462.19, within thirty days from the date of this order. [*19] If respondent fails to post security within that time I will consider granting the petition by default.

III. Conclusion

For the foregoing reasons, I hereby order respondent to post security in an amount to be agreed on by the parties, but in any event not less than $ 394,462.19, within thirty days of the date of this order. If respondent refuses to post security within thirty days of the date of this order, it risks having the petition confirmed by default.

SO ORDERED.

DATED: New York, New York

May 21, 1997

Kimba M. Wood

United States District Judge

Freedberg

SKANDIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SKANDIA AMERICA REINSURANCE CORPORATION,

Petitioner,

-against-

96 Civ. 2301 (KMW)
OPINION AND ORDER

CAJA NACIONAL DE AHORRO Y SEGURO,

Respondent.

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WOOD, U.S.D.J.

Petitioner has moved to confirm an arbitration award of $394,462.19 entered against respondent on August 11, 1995. Petitioner has also petitioned for pre-judgment interest and attorney's fees. Respondent objected to the petition insofar as it requests damages beyond the award. In its reply, petitioner has asked that I order respondent to post security pursuant to NY. Ins. Law § 1213(c) or risk having the petition together with prejudgment interest and attorney's fees granted by default. For the reasons set forth below, I hereby order respondent to post security in an amount to be agreed on by the parties, but in any event not less than $394,462.19.

I. Background

Unless otherwise stated, the facts of this case are not in dispute. Petitioner Skandia America Reinsurance Corporation is a United States corporation involved in the reinsurance business.[1] Respondent Caja Nacional de Ahorro y Seguro is an Argentinean company[2] that was also involved in the insurance and reinsurance business. Petitioner and respondent were party to three retrocession agreements,[3] each of which requires arbitration of any dispute thereunder in New York, New York. In December 1994, petitioner made an arbitration demand of respondent in order to recover amounts allegedly due to petitioner under the agreements. Respondent failed to respond to the arbitration demand. Pursuant to the arbitration provisions in the contracts, petitioner appointed its arbitrator; when respondent failed to appoint its arbitrator, petitioner appointed one for respondent as well. These two arbitrators appointed an umpire of the panel pursuant to the arbitration provisions in the contracts. Respondent failed to appear at the arbitration hearing. Petitioner put on its case and was awarded a total of $394,462.19 under the three contracts after a hearing and deliberations. The award ordered respondent to pay petitioner within thirty days of the award. Respondent never satisfied the award.

II. Discussion

Petitioner originally brought this action under Chapter One of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9-10 (1996). However, after respondent argued that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, (the "New York Convention") applies to this case due to the fact that respondent is "domiciled or ha[s its] principal place of business outside the enforcing jurisdiction," Bergesen v. Joseph Muller Corp. 710 F.2d 928, 932 (2d Cir. 1983), petitioner agreed that the New York Convention applies. (Reply. Mem of Law at 2, 3, etc.) Therefore, I will apply the New York Convention to this petition.[4] I note that Congress has implemented the New York Convention as Chapter Two of the FAA, 9 U.S.C. §§ 201-08 (1988), and the New York Convention applies the provisions of Chapter One of the FAA in proceedings under the New York Convention to the extent that the Chapter One provisions are not in conflict with the provisions of the New York Convention. 9 U.S.C. § 208.

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[2] Respondent claims that it is wholly owned by the government of Argentina, and as such is an instrumentality of a foreign state. (Mem. of Law in Opp. to Pet. to Confirm. Arb. at 9, n.3.) Petitioner disputes this claim. (Pet.'s Reply Mem. at 2 & 4, n. 2.)

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[4] I note that it is possible that this award would also be enforceable under the Inter-American Convention on International Commercial Arbitration, adopted and incorporated as Chapter Three of the FAA, 9 U.S.C. §§ 301-307, to which both Argentina and the United States are signatories. However, because neither party has raised the applicability of this Inter-American Convention, I will analyze this petition under the New York Convention.

c. Respondent's Failure to Post Pre-Judgment Security[4]

In its reply memorandum, petitioner argues that respondent should immediately be required to post pre-judgment security pursuant to New York Insurance Law § 1213(c), and that if respondent refuses to post pre-judgment security, I should strike respondent's answer and grant the petition by default. Respondent argues that as an instrumentality of the Argentinean government, it is immune from posting security under the Foreign Sovereign Immunities Act (the 'FSIA').[5] Petitioner counters that respondent is not immune from the posting requirement because Argentina has signed the New York Convention, which allows for pre-judgment attachments, and because when it invoked the New York Convention, respondent explicitly waived any immunity for which it might have been eligible.

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[4]Despite the fact that both parties have submitted a plethora of letters on this issue, respondent has requested the opportunity to rebrief the issue further, because, it argues, petitioner did not raise the issue until its reply. In addition to the fact that respondent submitted a number of substantive letters which are treated by the Court as sur-replies, I note that it is not petitioner's responsibility to inform respondent of its obligations under the law; '[t]he language of § 1213(c)(1) does not require a timely demand of pre-answer security; the language only sets a trigger for security (that being before a defendant undertakes to defend the action).' Moore v. Nat'l Distillers and Chemical Corp., 143 F.R.D. 526, 531-32 (S.D.N.Y. 1992), aff'd sub nom Stephens v. National Distillers & Chem. Co., 69 F.3d 1226 (2d Cir. 1996). Furthermore, respondent admits that petitioner gave respondent notice of its duty to post security under New York Insurance Law before respondent answered the petition. (Resp. of Law in Opp. to Pet. to Confirm. Arb. at 5, n.3.)

[5]The FSIA is codified at 28 U.S.C. §§ 1330(a), 1441(d), 1602-1611 (1988).

1. A Foreign Insurer's Duty to Post Security

Under New York insurance law, a foreign insurer is required to post security before filing pleadings or an answer to a suit. Section 1213(c) of the New York Insurance Law states:

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Pursuant to this provision, if a foreign insurer fails to post security as required, a court can grant the movant party's motion by default. Curiale v. Ardra Insurance Co., 88 N.Y.2d 268, 644 N.Y.S.2d 663 (N.Y. 1996) (upholding constitutionality of this provision and of court's granting of judgment by default based on the opposing party's failure to post security). The purpose of this law is ensure that foreign insurers can meet their insurance obligations. Id. at 274 ('Since insurers, licensed and unlicensed alike, capitalize on the legitimate expectations of the public that funds to satisfy judgments on insurance policies are readily available within the State, the Legislature enacted section 1213(c) to ensure that those expectations would be met.'). See also, Moore v. National Distillers & Chem. Corp., 143 F.R.D. 526, 531 (S.D.N.Y. 1992) (purpose of law is 'to protect New York residents who contract for insurance with unauthorized foreign or alien insurers from having to pursue such insurers in distant forums') aff'd sub nom Stephens v. National Distillers & Chem. Co., 69 F.3d 1226 (2d Cir. 1996).

The regulation of the insurance industry has been found to be 'closely related to the public interest and a legitimate exercise of a State's police powers.' Curiale, 88 N.Y.2d at 274, citing Health Ins. Assn. v. Harnett, 44 N.Y.2d 302, 308-09 (1978). Additionally, under the McCarran-Ferguson Act of 1946, 15 U.S.C. §§ 1011-1012, the power to regulate insurance is specifically granted to the states whose laws are not preempted by any act of Congress unless such act specifically relates to the business of insurance. 15 U.S.C. § 1012(b).[7]

Accordingly, under this law, before answering the petition to confirm arbitration, Caja, as a foreign or alien insurer, is required to post security sufficient to secure payment of any final judgment, or request that I dispense with this requirement because it maintains sufficient funds within New York State to meet any final judgment, or procure a license to do insurance business in this state. Respondent has failed to meet any of these options.

2. The Foreign Sovereign Immunity Act

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[7]The McCarran-Ferguson Act provides that,

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.'

15 U.S.C. § 1012(b).

Respondent claims that it is immune from the posting requirement of New York Insurance Law because it is an instrumentality of the Argentinean government, and thus a foreign state under the FSIA. Initially, I note that I decline to decide whether respondent has adequately presented a prima facie case that it is an instrumentality of a foreign state.[1] Drexel Burnham Lambert Group, Inc. v. Comm. of Receivers for A.W. Galadari, 12 F.3d 317, 325 (2d Cir. 1993) (burden is on defendant to present prima facie case that it is a foreign sovereign), cert. denied, 511 U.S. 1069 (1994); but see Rhoza, 143 F.R.D. at 533, n.6 (burden is on party claiming sovereign immunity sufficiently to demonstrate that it is an instrumentality of a foreign state within the meaning of § 1603 of FSIA). As a matter of judicial economy, I will assume arguendo that respondent has demonstrated that it is the instrumentality of a foreign state, and I will consider whether the FSIA provides the respondent with immunity from its obligation to post security pursuant to NY Ins. Law § 1213(c).

I note that the burden to prove sovereign immunity is a shifting burden. Initially, the party claiming immunity must present a prima facie case that it is a foreign sovereign within the meaning of the act. Then, the burden switches to the party opposing immunity to come forward with a showing that under the exceptions to the FSIA, immunity should not be granted. However, the ultimate burden of persuasion remains with the alleged foreign sovereign claiming immunity. Drexel Burnham Lambert Group, 12 F.3d at 325, citing Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993).

Under the FSIA, foreign states are not immune from the jurisdiction of foreign courts with respect to their commercial activities, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. 28 U.S.C. § 1602. However, § 1609 of the FSIA provides that,

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property of the United States or a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

Respondent, relying on Stephens v. National Distillers & Chem. Co., 69 F.3d 1224 (2d Cir. 1996), argues that as a foreign state, respondent can not be required to post security under the Insurance Law, because the posting of such security is effectively a pre-judgment attachment.

In Stephens, the Second Circuit Court of Appeals held that the posting of security, required under NY Ins. Law § 1213(c), constituted a pre-judgment attachment for FSIA purposes, Stephens, 69 F.3d at 1229, citing S&S Machinery Co. v. Masinexportimport, 706 F.2d 411, 418 (2d Cir. 1983). The court then found that as such, foreign sovereigns were immune from posting security under NY Ins. Law § 1213(c). The court found immunity despite the McCarran-Ferguson Act of 1946, 15 U.S.C. §§ 1011-1012, which granted states widespread authority to regulate insurance law without federal law preemption.

However, Stephens did not involve an arbitration action, and the court in Stephens specifically stated that there was no relevant treaty that predated the FSIA or that would preempt the provisions of the FSIA. 69 F.3d at 1229. Section 1609 of the FSIA explicitly states that the FSIA is 'subject to existing international agreements to which the United States is a party at the time of enactment of this Act.' This clause was discussed in Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp 383 (D.N.J. 1979) in which the court stated,

> the (FSIA) does not abrogate any existing international agreement to which the United States was a party prior to the Act's enactment. Congress was obviously careful not to abrogate the existing agreements by the passage of the (FSIA). To the extent such international agreements set forth a waiver of immunity, those agreements are to be given effect.

Id. at 393. Therefore, the question is whether the New York Convention, to which both Argentina and the United States are signatories, was an 'existing' international agreement, and, if so, whether it allows this Court to order the posting of pre-judgment attachments.

1. The New York Convention

The United States acceded to the New York Convention on September 30, 1970, and enacted the FSIA on October 21, 1976. Therefore, the New York Convention was an 'existing international agreement' that was enacted before the adoption of the FSIA, and was, therefore, incorporated by the FSIA. 28 U.S.C. § 1609.

[1] Although the burden for meeting a prima facie case is extremely low, the only evidence respondent submitted of its sovereign status is a Spanish-language document that respondent claims is the charter of Caja.

The purpose of the New York Convention was to effectuate arbitration proceedings and their enforcement between companies of different nationalities. This purpose was articulated by the Supreme Court in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). The Court stated,

> (t)he goal of the [New York] Convention, and the principal purpose underlying the American adoption and implementation of it, was to encourage 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 510 n. 15. In light of this purpose, in a decision discussing United States jurisdiction over arbitration agreements,[9] the Second Circuit Court of Appeals has stated that,

> the [New York] Convention should be broadly interpreted to effectuate the goals of the legislation. Moreover, when the [New York] Convention is read together with the FSIA's arbitration exception, which gives jurisdiction if an arbitration agreement 'is or may be governed' by a treaty, 28 U.S.C. § 1605(a)(6)(B), [sic] it evinces a strong legislative intent to provide enforcement for such agreements.

Cargill, 991 F.2d at 1018.

Because part of the purpose of the New York Convention was to encourage the enforcement of arbitral awards, the New York Convention allows for the posting of prejudgment security. Specifically, Article VI of the New York Convention provides 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. I note that under Article V(1)(e), a competent authority is 'a competent authority of the country in which, or under the law of which, the award was made.' 9 U.S.C. § 201, Art. V(1)(e). Therefore, this Court would constitute a competent authority and could, on application of petitioner, order the respondent to post adequate security.

In light of the purpose of the New York Convention and the Second Circuit's instruction to interpret the New York Convention broadly, I find that Article VI of the New York Convention allows us to require sovereigns to post pre-judgment security if they move to set aside or suspend an arbitration award, which would allow us to order the posting of pre-judgment security pursuant to N.Y. Ins. Law § 1211(c).[10]

Article VI of the New York Convention, however, allows a competent authority to order the respondent to post suitable security only if the respondent makes an 'application for the setting aside or suspension of the award. . . .' In one of respondent's later letters, respondent argues that it is not moving for the 'setting aside or the suspension of the award' as required by Article VI of the New York Convention. (Sheppard letter, June 6, 1996 at 2.) On this point, respondent's papers are internally inconsistent. In one part of respondent's objection to the petition respondent appears to challenge only the prejudgment interest and attorney's fees. However, elsewhere, respondent argues that petitioner's petition is per se deficient because petitioner failed to submit the original award or a duly certified copy thereof as required under Article IV(1) of the New York Convention.[11] Finally, in another section of its opposition, respondent argues that 'judgment on the petition must be denied because Skandia seeks relief that may not be granted in this proceeding.' (Mem. in Opp. to Pet. to Confirm Arb. at 7.) Therefore, in light of these contradictory statements, the fact that respondent has failed to pay the award as ordered, and the Second Circuit Court of Appeals' direction to interpret the New York Convention broadly, I find that respondent has in effect moved to suspend the award.

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[9] The FSIA provides an exception to sovereign immunity from United States jurisdiction where a foreign state has agreed to arbitrate. § 1605(a)(6)(B). See, e.g., Cargill Inter. S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1017 (2d Cir. 1993).

[10] Petitioner also claims that respondent is not immune from posting security under § 1610(d) of the FSIA. Because I find that the New York Convention was an existing international agreement that was not abrogated by the FSIA, I need not decide this issue. I note that under § 1610, which establishes an exception to a sovereign's immunity to post pre-judgment security, the sovereign must explicitly waive its immunity. 28 U.S.C. § 1610(d)(1). It is unlikely that I would find that respondent's invocation of the New York Convention constitutes such an explicit waiver as required by § 1610. See, e.g., Hill Machinery, 706 F.2d at 416 (language of waiver of immunity in United States-Romanian trade agreement did not constitute explicit waiver of immunity from pre-judgment attachment as required by § 1610), Reading & Bates Corp. v. Nat'l Iranian Oil Co., 478 F. Supp. 724, 728-29 (S.D.N.Y. 1979)(provision of Treaty of Amity does not constitute explicit waiver required under 28 U.S.C. § 1610(d)).

[11] Although petitioner did file the original award with the Court, it did fail to submit the original or a duly certified copy of the parties' arbitration agreement as also required by Article IV(1). Petitioner explains this failure as a result of its original belief that it could petition to confirm the award under the FAA instead of the New York Convention. Because Respondent has submitted duly certified copies of the arbitration agreement to the Court, this second requirement has now been met.

Accordingly, pursuant to the New York Convention, respondent is not immune from the posting requirement of New York Insurance Law. I therefore order respondent to post adequate security in an amount to be determined by the parties, but in any event not less than $394,462.19, within thirty days from the date of this order. If respondent fails to post security within that time I will consider granting the petition by default.

III. Conclusion

For the foregoing reasons, I hereby order respondent to post security in an amount to be agreed on by the parties, but in any event not less than $394,462.19, within thirty days of the date of this order. If respondent refuses to post security within thirty days of the date of this order, it risks having the petition confirmed by default.

SO ORDERED.

DATED: New York, New York
May 21, 1997

Kimba M. Wood
United States District Judge

Copies of this order have been mailed to counsel for the parties.

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