

SHANGHAI FOODSTUFFS IMPORT & EXPORT CORPORATION, Petitioner, -against-
INTERNATIONAL CHEMICAL, INC., Respondent.

99 CV 3320 (RCC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 1423

February 3, 2004, Decided

February 4, 2004, Filed

DISPOSITION: [*1] Petitioner's petition for confirmation of arbitration award granted. Respondent's cross-petition to vacate award and petitioner's request for attorney's fees denied. Petitioner granted judgment plus interest.

CORE TERMS: arbitrator, arbitral, manifest, tribunal, cross-petition, arbitration, vacate, subject matter jurisdiction, nonconformance, post-judgment, specifications, shipment, petition to confirm, arbitration award, domestic, abroad, Federal Arbitration Act, burden of persuasion, property located, date of judgment, nondomestic, date of payment, plus interest, disregarded, manifestly, conform

COUNSEL: For Shanghai Foodstuffs Import & Export Corporation, PETITIONER: Chris X Lin, Lin & Li, LLC, New York, NY USA.

JUDGES: Richard Conway Casey, U.S.D.J.

OPINIONBY: Richard Conway Casey

OPINION:

MEMORANDUM & ORDER

Richard Conway Casey, U.S.D.J.:

Shanghai Foodstuffs Import & Export Corporation ("Petitioner") brings this petition to confirm an arbitration award under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. International Chemical, Inc. ("Respondent") cross-petitions to vacate the award. For the reasons that follow, the Court **GRANTS** the petition to confirm the award and **DENIES** the cross-petition to vacate the award.

I. Background

The controversy [*2] between the parties arose out of a series of agreements to buy and sell foodstuffs. (Petition P 5.) The agreements each contained identical arbitration clauses requiring arbitration of "any controversy of claim [sic] relating to the interpretation, performance, or enforcement of the contract[s] ... in the country of the defendant in accordance with the country's arbitration rules governing international commercial transactions." (Id.) Petitioner commenced arbitration, alleging that Respondent failed to pay for eight shipments. (Id. P 6.)

A three-member arbitral panel, appointed under the Rules of the American Arbitration Association ("AAA"), rendered an award for Petitioner for \$ 647,244.00, plus interest at the rate of 6% per year from September 1996 through the date of payment. n1 (Id. P 8.) Petitioner then filed this petition for confirmation of the award, and for costs and attorney's fees. Respondent filed a cross-petition to vacate the award due to the arbitrators' manifest disregard of the law. (Answer P 4.) In addition, Respondent asserts that this Court lacks subject matter jurisdiction over the case. (Id.) n2

----- Footnotes -----

n1 The Petition only demands interest beginning March 2, 1999. [*3]

n2 The Court notes that Respondent failed to file a memorandum of law in support of its cross-petition. The time for filing one has long passed, however, and the Court will treat the petitions as fully submitted.

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

II. Discussion

A. Subject Matter Jurisdiction

As an initial matter, the Court possesses subject matter jurisdiction over the suit pursuant to 9 U.S.C. § 203. Chapter 2 of the Federal Arbitration Act ("FAA") incorporates the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, which was signed in New York. See 9 U.S.C. § 201. Section 203 provides, "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts ... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203. Thus, the Court has subject matter jurisdiction if the award falls [*4] under the New York Convention.

The New York Convention applies to awards "not considered domestic awards in the State where their recognition and enforcement are sought." Art. I, 330 U.N.T.S. at 38. While the Convention itself does not define nondomestic or domestic awards, the FAA does. See *Yusuf Ahmed Alghanim & Sons v. Toys "R" Ua, Inc.*, 126 F.3d 15, 18-19 (2d Cir. 1997). Section 202 provides:

An agreement or award arising out of such [a legal] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

9 U.S.C. § 202. Thus, "any commercial arbitral agreement [or award], unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention." *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995), quoted with approval in *Toys "R" Ua*, 126 F.3d at 19. [*5]

Here, Petitioner is a corporation organized under the laws of the People's Republic of China, with its principal place of business in Shanghai, China. (Petition P 3.) The relationship between the parties involved the international shipment of goods, and a significant part of the relationship occurred abroad. Therefore, the award falls under the New York Convention. The Court has subject matter jurisdiction pursuant to 9 U.S.C. § 203.

B. Manifest Disregard of the Law

Respondent seeks to vacate the award on the ground that the arbitral tribunal rendered the award in manifest disregard of the governing law. "Manifest disregard of the law" by arbitrators is a judicially created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37, 98 L. Ed. 168, 74 S. Ct. 182 "Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Baker", 808 F.2d 930, 933 (2d Cir. 1988). Although manifest disregard of the law is not a ground for setting aside an arbitral award under the New York Convention, see N.Y. Convention, art. V, 330 U.N.T.S. at 41-42, the Second Circuit has held that district [*6] courts have the authority to set aside nondomestic arbitral awards that are rendered in the United States on the basis of manifest disregard of the law. See *Toys "R" Ua*, 126 F.3d at 23 ("The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law...."). Because this award was rendered in the United States, the Court may examine the merits of Respondent's argument.

Respondent contends that the arbitral tribunal manifestly disregarded provisions of the Uniform Commercial Code ("UCC"), which, according to Respondent, governed the parties' dispute. (See Answer P 9.) Respondent identifies four specific examples of manifest disregard: (1) The arbitrators incorrectly placed the burden of proof on Respondent, the buyer, to establish nonconformance of the goods with contract specifications; (2) the arbitrators failed to find that Respondent did not timely reject the goods; (3) the arbitrators did not apply the UCC provisions requiring that goods conform to contract specifications before payment is due; and (4) the arbitrators failed [*7] to credit Respondent's evidence showing that the goods did not conform to contract specifications. (*Id.*) None of these arbitrator errors, even if they actually occurred, demonstrate that the award was rendered in manifest disregard of the law.

To qualify as manifest disregard of the law:

The error must have been obvious and capable of being readily and instantly perceived by the average person

qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Merrill Lynch, 808 F.2d at 933. Factual findings and conclusions of law are not reviewable. See *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 214 (2d Cir. 2000); *Conn Tech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 687 (2d Cir. 1996). Respondent's second and fourth challenges cannot meet this stringent standard because they focus on the arbitrators' factual findings and not on their application of the law. Respondent's third challenge also fails because it suggests--and examination of the award [*8] confirms--that the arbitral tribunal never discussed the applicability of the UCC provisions to which Respondent alludes. There is nothing to suggest that the tribunal determined that the UCC applied, or, more importantly, that it acknowledged its application but consciously decided to ignore the provisions. There can be no manifest disregard if there is no acknowledgment by the arbitrators that the UCC applied. See *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003). In any event, the tribunal did seek to determine if the shipments conformed to contract specifications and reduced the contract price for the goods according to its determination that six of the eight shipments were nonconforming. (See Award of Arbitrators, Mar. 2, 1999, Exhibit B to Petition ["Award"].)

Finally, Respondent's argument that the tribunal manifestly disregarded the law by placing the burden of persuasion on it to prove nonconformance of the goods also is without merit. Respondent does not identify what provision of law clearly places the burden of persuasion on the Petitioner to prove nonconformance, nor is there anything in the arbitral [*9] award that suggests the arbitrators (1) determined that the law required Petitioner to prove nonconformance, but (2) decided to disregard that law. See *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000). Therefore, Respondent's petition to vacate the award is denied.

C. Costs and Attorney's Fees

Petitioner seeks costs and attorney's fees that it incurred in bringing the arbitration proceeding and this petition. Respondent insists that each side should bear its own expenses consistent with the language of the arbitral award. (Answer P 4). The award states that the arbitrators' compensation and the AAA administrative fees shall be borne equally by the parties. According to Petitioner, the parties agreed in a purchase contract that the arbitration fees would be paid by the losing party. However, the arbitrators' decision on costs and attorney's fees was part of the arbitral award, and Petitioner has articulated no grounds for modifying it. Petitioner's request for costs and attorney's fees is therefore denied.

D. Post-Judgment Interest

Petitioner requests post-judgment interest pursuant to 28 U.S.C. § 1961. The Second [*10] Circuit has held that a district court judgment affirming an arbitration award is governed by this statute. *Carte Blanche (Singapore) PTE, Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 269 (2d Cir. 1989). The award must be modified, consistent with the law of this Circuit, to allow for post-judgment interest only in the amount provided for in § 1961. Therefore, Respondent shall pay interest at the rate of 6% per year from March 2, 1999 until the date of this judgment. From the date of judgment until the judgment is paid, Petitioner shall receive interest at "a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding" the date of judgment. 28 U.S.C. § 1961. The applicable interest rate to this judgment is 1.25%. See Federal Reserve Statistical Release, available at <http://www.federalreserve.gov/releases/H15/Current>.

III. Conclusion

For the foregoing reasons, the petition to confirm the arbitral award is **GRANTED** and the cross-petition to vacate the award is **DENIED**. Petitioner is granted judgment [*11] in the amount of \$ 647, 244.00, plus interest of 6% per year from March 2, 1999 through February 2, 2004, for a total of \$ 215,051.45 in interest, and a total sum of \$ 862,295.45. Petitioner shall also receive post-judgment interest from February 2, 2004 through the date of payment at a rate of 1.25%. The Clerk of the Court is directed to close this case and remove it from the Court's active docket.

So Ordered:

February 3, 2004

Richard Conway Casey, U.S.D.J.