

United States District Court, E.D. Louisiana.

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Civil Action 00-2458 Section "T" (4) (E.D. La. Jan 14, 2002)

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Decided January 14, 2002

ITALTRADE INTERNATIONAL USA, L.L.C. v. SRI LANKA CEM. CORP

ITALTRADE INTERNATIONAL USA, L.L.C., AND AMJAD ZAK IMAM v. SRI LANKA CEMENT CORPORATION, PUTTALAM CEMENT CORPORATION, PUTTALAM CEMENT COMPANY, LTD., HOLDERBANK FINANCIERE GLARUS, AG, and Her Excellency CHANDRIKA BANDARANAIKE KUMARATUNGA, in her representative capacity as President of the Socialist Republic of Sri Lanka

- Civil Action 00-2458 Section "T" (4)
- United States District Court, E.D. Louisiana.
- January 14, 2002

PORTEOUS, U.S. District Judge

Before the Court is a Motion to Dismiss filed on behalf of defendant, Puttalam Cement Company, Ltd. This matter came before the Court on November 7, 2001, wherein the Court entertained oral argument before taking the matter under submission. The Court, having considered the arguments of counsel, the Court record, the evidence presented, the law and applicable jurisprudence, is fully advised in the premises and ready to rule.

ORDER AND REASONS

I. BACKGROUND:

In July 1990, Italtrade International Limited ("Italtrade"), a Gibraltar corporation, entered into two contracts with Sri Lanka Cement Corporation ("SLCC"), a Sri Lanka corporation, for the supply and delivery of cement clinker for the manufacture of Portland Cement. A performance bond in the amount of \$475,000.00 was supplied in accordance with these contracts. A dispute arose wherein Italtrade argued that SLCC breached the contracts by failing to provide confirmed letters of credit to Italtrade. Additionally, SLCC cashed the \$475,000.00 performance bond.

Pursuant to an arbitration clause contained in the two contracts, the matter was arbitrated in Sri Lanka, pursuant to Sri Lanka law, in accordance with the rules of the International Chamber of Commerce. In August 1997, the arbitrator found in favor of Italtrade finding that

SLCC had repudiated the contract and was therefore not entitled to the \$475,000.00 performance bond. Damages were awarded in the amount of \$475,000.00 for the wrongful encashment of the performance bond and \$1,325,000.00 for lost profits under the two contracts with interest at 5% per annum beginning October 28, 1992, through the date of payment.

Puttalam Cement Corporation ("PCC") was the first successor in interest to SLCC, which was then passed to Puttalam Cement Company Limited ("PCCL"). It has been submitted that in 1993, PCCL was formed out of the assets of the SLCC and also succeeded to the liabilities of SLCC. In July 1998, Holderfin purchased approximately 48% of the PCCL shares and then an additional 32% of the shares were purchased in April 1999.

Italtrade is now in liquidation and the arbitral award has been passed to the beneficial shareholder, Amjad Zak Imam, who formed Italtrade International USA, LLC for the purpose of holding the arbitral award as an asset and who now seeks to recover against the responsible parties. An action was filed in the courts of Sri Lanka, however, the matter was dismissed on a procedural problem. Plaintiffs, Italtrade International USA, LLC and Amjad Zak Imam, filed this Complaint for Declaratory Judgment and for Damages against PCCL and others pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards seeking a judgment declaring the arbitration award to be valid and enforceable. Defendant, PCCL, has filed this Motion to Dismiss on the basis of lack of personal jurisdiction and improper venue.

II. LAW AND ANALYSIS:

The United States Arbitration Act which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") provides in Section 203 that:

[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.
9 U.S.C. § 203. Moreover, Section 207 states that:

[w]ithin three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. 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.

9 U.S.C. § 207. As both the United States and Sri Lanka are signatories to the Convention, it is clear that this Court possesses subject matter jurisdiction over the present suit seeking to enforce an arbitral award rendered in Sri Lanka.

While PCCL does not argue that this Court lacks the ability to hear such an action to enforce an arbitral award as empowered by the statutes quoted, it is PCCL's position that this Court lacks personal jurisdiction over it. Plaintiffs, however, contend that lack of personal jurisdiction is not one of the specific grounds for denial of an otherwise valid arbitral award. Plaintiffs assert that the Convention commits the member states to enforce the awards under the signatory's procedural rules, not substantive law.

It is the opinion of this Court that while the Act provides this Court with the subject matter jurisdiction to hear such an action, it does not provided the Court with,

power over all persons throughout the world who have entered into an arbitration agreement covered by the Convention. Some basis must be shown, whether arising from the respondent's residence, his conduct, his consent, the location of his property, or otherwise, to justify his being subject to the court's power.

In re Transatlantic Bulk Shipping Ltd., 622 F. Supp. 25 (S.D.N.Y. 1985). See also, *CME Media Enterprises B.V. v. Zelezny*, 2001 WL 1035138 (S.D.N.Y. 2001) (court confirmed arbitral award only to the extent it had quasi in rem jurisdiction over defendant's property); *Fotochrome, Inc. v. Copal Co. Ltd.*, 517 F.2d 512 (2nd Cir. 1975) (Bankruptcy Court did not have personal jurisdiction over Japanese corporation until it filed a claim in the bankruptcy proceeding); *Carolina Power Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D.Cal. 1977) (California court did not have personal jurisdiction over French company but could attach property under quasi in rem jurisdiction). As such, it is the burden of the plaintiffs to show that this defendant, PCCL, has sufficient contacts with this forum to assert personal jurisdiction.

PCCL submits by affidavit that it has no contacts with the State of Louisiana whatsoever, nor the United States. With respect to both the State of Louisiana and the United States, PCCL is not authorized, registered, or licenced to do business here; owns no real or personal property; does not pay taxes; does not advertise or solicit business; does not do business; has not appointed an agent for service of process; does not maintain an agent, employee, office, bank account, mailing address or telephone listing; does not have a place of business; does not have books or records; and, sells no goods or services. The contracts giving rise to this case were not negotiated, performed, nor in any way were they associated with the State of Louisiana. (PCCL Memorandum in Support, Exhibit 1).

The plaintiffs have argued that a nationwide contacts basis would be appropriate herein and further that the contacts of PCCL's parent company, Holderbank, should be attributable to PCCL in a minimum contacts analysis. It is asserted that Holderbank, as the parent of PCCL, has extensive and systematic contacts with the United States through its other subsidiaries, such as Holnam, Inc. Plaintiffs contend that this would satisfy personal jurisdiction over the defendant PCCL.

In response, PCCL submits that Holderbank is a Swiss corporation which is not the parent corporation to PCCL. Rather, Holderfin, a Netherlands corporation, is the parent of PCCL. Holderbank is the parent to Holderfin. Furthermore, Holderbank has no contacts with Louisiana or any other state in the United States. Holderbank does list PCCL as one of its holdings in its Annual Report and on its website; however, it in no way advertises for or solicits business for PCCL. (PCCL Reply Memorandum, Exhibit 2).

Furthermore, PCCL argues that the contacts of another Holderbank subsidiary with the United States likewise cannot be imputed to PCCL for purposes of establishing jurisdiction. Neither Holderbank, nor any of its subsidiaries, was a party to the arbitration which gave rise to the award. None of these entities were parties to the underlying contract. PCCL did not even exist at the time of the arbitration. The only company that actually has contacts with the United States is Holnam, Inc. However, Holnam and PCCL did not own any interest in each other. They do not have a common parent corporation. Holnam is a direct subsidiary of Holderbank, not of Holderfin. Imputation of contacts is allowed only in cases where there has been extraordinary dominance over a related company that has the minimum contacts with the forum. PCCL submits that this is simply not the case here. PCCL owns no stock in Holnam, or vice versa. All of the companies have separate headquarters with independent boards of directors, and there is virtually no commonality of directors among any of them. All of the companies observe corporate formalities. Each maintain separate accounting systems and general policies are set by each company's respective Board. Each has authority over its own daily operations and none of the other companies were involved in the formation of PCCL. Accordingly, PCCL submits that the factors considered do not support imputation of contacts of any company to PCCL.

While PCCL argues that dismissal should not be delayed to permit discovery as the facts are not in dispute, this Court does not believe it is in a position to make such a finding at this time. There has been no discovery conducted in this case, and plaintiffs have not been afforded an opportunity to refute PCCL's allegations relative to personal jurisdiction. Accordingly, this Court will defer ruling on said motion to provide plaintiffs time to conduct discovery, limited to the issue of personal jurisdiction.

Accordingly,

IT IS ORDERED that the Motion to Dismiss filed on behalf of defendant, Puttalam Cement Company, Ltd., be and the same is hereby **CONTINUED** and reset on the Court's docket for hearing without oral argument on Wednesday, March 27, 2002, with supplemental memoranda to be submitted on or before Tuesday, March 19, 2002.

IT IS FURTHER ORDERED that discovery on the issue of personal jurisdiction is to be completed on or before Monday, March 4,