

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 39

Justice

Index Number : 650097/2010
ITOCHU CORPORATION
vs
SIDERAR, S.A.I.C.
Sequence Number : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/8/12


BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----X
ITOCHU CORPORATION and
ITOCHU INTERNATIONAL INC.,

Plaintiffs,

- against -

DECISION/ORDER

Index No. 650097/10

Motion Seq. No. 003

SIDERAR, S.A.I.C. and
EXIROS AR, S.A.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

The instant action arises out of an alleged breach of contract between parties located in Japan and Argentina for the purchase and delivery of a shipload of coal in Alabama.

Background

Plaintiff Itochu Corporation ("ITC") is organized and existing pursuant to the laws of Japan. Plaintiff Itochu International Inc. ("III"), a subsidiary of ITC, is incorporated in New York and headquartered at 335 Madison Avenue, New York, New York. (Complaint, ¶¶ 2-3). The Coal and Minerals department of III in New York follows the market for metallurgical coal in order to develop purchasing opportunities for steel mills worldwide, and sales opportunities for U.S. and Canadian mines. III negotiates both sides of contracts between coal mines and steel mills, while ITC purchases the cargo from mines and resells it to steel mills. (Affidavit of Kotaro Suzuki in Opposition, ¶¶ 1, 9).

Defendant Siderar, S.A.I.C. ("Siderar") is a steel manufacturing company incorporated under the laws of Argentina. Headquartered in Buenos Aires, it primarily markets and sells its products to customers within South America. (Affidavit of Silvia Sanchez, Administrative Manager at Siderar, in Support, ¶¶ 2, 4, 7).

Defendant Exiros AR, S.A. ("Exiros"), which functioned as Siderar's disclosed purchasing agent in the transaction at issue, is also incorporated under the laws of Argentina.¹ It is headquartered in Buenos Aires and serves as a purchasing agent for many corporations throughout South America. (Affidavit of Francisco Maria Uranga, Exiros' Raw Material Manager, in Support, ¶¶ 2-4).

Neither Siderar nor Exiros is registered with the New York Secretary of State to do business in New York, maintains offices or manufacturing facilities in New York, or advertises or solicits business in New York. Both Siderar and Exiros maintain a bank account with Citibank in New York, however those accounts were not used in the events described in the Complaint. (Sanchez Affidavit, ¶¶ 6, 8, 13, 17, 19; Uranga Affidavit, ¶¶ 14, 19, 22, 24).

¹ Paragraph 5 of the Complaint states that Exiros is organized pursuant to the laws of Uruguay.

From about February through April, 2008, Exiros corresponded with ITC in an effort to negotiate a contract between Siderar and ITC under which ITC would supply a shipment of U.S. Coking Coal to Siderar.² (Uranga Affidavit, ¶ 4; Complaint, ¶ 9.) Siderar was represented in these negotiations by Buenos Aires-based Exiros employees Gabriel de Diego ("de Diego") and Nicholas Farandato ("Farandato"). Defendants claim that de Diego primarily corresponded with Jorge Browne ("Browne"), an employee of Itochu Argentina S.A. ("Itochu Argentina"), which is located in Buenos Aires, but he also corresponded with ITC employees located in Tokyo. (Uranga Affidavit, ¶¶ 6-7, 9-10; Uranga Affidavit in Further Support, ¶ 4).

Plaintiffs explain that in early 2008, Kotaro Suzuki ("Suzuki"), Manager of Coal and Minerals for III in New York,³ together with his colleagues, suspected that Siderar would want to diversify its sources of coking coal due to problems in its supply

² Drummond Coal Sales, Inc. ("Drummond"), which is a subsidiary of the Drummond Company, Inc., owns and operates the Shoal Creek mine in Alabama. In about March 2008, Drummond agreed to sell plaintiffs no more than two (2) cargoes of 43,000 metric tons (plus or minus 10%) each of Shoal Creek Coking Coal - a metallurgical coal that is desirable for use in making steel - for resale to defendants. The first cargo was for delivery in April 2009 and the second was for delivery in June 2009. (Complaint, ¶¶ 7-8; Suzuki Affidavit, ¶¶ 10, 13).

³ Suzuki's department is responsible for sales worldwide on behalf of ITC of coal from mines in the United States and Canada. (Suzuki Affidavit, ¶ 2).

line created by floods in Australia. Suzuki and his colleagues claim they were aware that Shoal Creek Coking Coal, which was in high demand but short supply, would be suitable for Siderar. (Suzuki Affidavit, ¶ 11).

On or about March 17, 2008, Suzuki's colleague Michael Cojerian ("Cojerian"), Coal Project Manager for III in New York, was informed by Drummond that Shoal Creek Coking Coal was sold out until April 2009, but that for Siderar, Drummond would be able to deliver one cargo of 43,000 metric tons (plus or minus 10%) in April 2009, and a second cargo of the same size in June 2009. Thus, Suzuki and Cojerian commenced negotiating from New York with Drummond to purchase the coal, and, at the same time, initiated discussions with Exiros and Siderar concerning a sale to them. (Suzuki Affidavit, ¶¶ 12-13).

On March 18, 2008, Hisayuki Kato ("Kato"), Manager of the Coal Department at ITC in Tokyo, sent a letter (the "March 18, 2008 Letter") to Exiros' offices in Buenos Aires offering to supply U.S. Coking Coal to Siderar under specific terms. (Uranga Affidavit, ¶ 5).

On March 19, 2008, Cojerian, in New York, spoke by telephone with de Diego concerning terms on which cargoes of Shoal Creek Coking Coal could be purchased by Siderar for delivery in April and

June 2009. Plaintiffs assert that Cojerian made specific price proposals for these cargoes and de Diego expressed interest in purchasing them. Plaintiffs further assert that de Diego and Cojerian discussed the establishment of a longer-term supply contract between ITC and Siderar. Cojerian memorialized the parties' telephone conversation in an email exchange with de Diego, dated March 20, 2008. (Suzuki Affidavit, ¶¶ 14; Ex. 1 to Suzuki Affidavit [3/20/08 emails between Cojerian and de Diego]).

After further exchanges between III in New York and de Diego in Buenos Aires, (see Ex. 2 to Suzuki Affidavit [3/21/08 and 3/25/08 emails between Cojerian and de Diego]), Suzuki traveled to Argentina from New York and met with de Diego on March 27, 2008 (the "Argentina Meeting"). Suzuki states in his affidavit, sworn to on December 8, 2011, that he hoped to arrange the sale of the April and June 2009 cargoes of Shoal Creek Coking Coal to Siderar as a way of initiating a regular trade with Siderar. (Suzuki Affidavit, ¶ 15).

Suzuki further states that, during the course of the Argentina Meeting, de Diego explained to him that III should regard Exiros as the purchasing department of Siderar and expressed interest in purchasing the cargoes Suzuki had proposed. Further, de Diego told Suzuki that, while lower shipping costs from Alabama to Argentina would make it possible for Siderar to pay more for Shoal Creek

Coking Coal than it was paying for Australian coal, the offering prices were still too high. De Diego outlined for Suzuki two alternative deals that would be acceptable to Siderar and requested that Suzuki negotiate with Drummond to achieve one or the other of such deals. (Suzuki Affidavit, ¶ 15).

On or about March 29, 2008, Suzuki returned to New York from Argentina. At that point, he and Cojerian began negotiating with Drummond - as requested by de Diego - and continued to negotiate with de Diego, in an effort to structure a deal that would be acceptable to all parties. Suzuki claims that he and Cojerian communicated directly with de Diego, but they also communicated with him through Browne of Itochu Argentina who, speaking both English and Spanish, was helpful in facilitating communications.⁴ (Suzuki Affidavit, ¶¶ 16-17).

On or about April 9, 2008, defendants solicited plaintiffs to make a proposal for a 45,000 metric ton (plus or minus 10%), single cargo of Shoal Creek Coking Coal for delivery no later than mid-May 2009.⁵ That same day, Cojerian, working in New York, agreed with

⁴ Suzuki maintains that de Diego understood that, unlike he and Cojerian, Browne was not a coal trader and, therefore, lacked the technical background necessary to negotiate those specialized coal contracts. (Suzuki Affidavit, ¶ 17).

⁵ Plaintiffs assert that this request was made by de Diego, through Browne, to III and ITC. (Suzuki Affidavit, ¶ 18).

Drummond that it would sell to ITC for Siderar 43,000 metric tons (plus or minus 10%) of Shoal Creek Coking Coal at a price of \$310 per metric ton, "FOBT Mobile" (i.e., free on board and trimmed, meaning the seller pays for delivery of the cargo on board the buyer's vessel and for ensuring that the cargo is evenly distributed). (Complaint, ¶¶ 10-11; Suzuki Affidavit, ¶ 19).

On April 10, 2008, plaintiffs offered this cargo to defendants at the price of \$316 per metric ton, "FOBT Mobile." That same day, de Diego responded to plaintiffs with a "firm counteroffer" of \$315 per metric ton, "FOBT Mobile." (Complaint, ¶¶ 12-13; Suzuki Affidavit, ¶¶ 20-21).

On April 11, 2008, Browne, with approval from Suzuki and ITC, formally accepted defendants' April 10 "firm counteroffer." He advised defendants that Suzuki in New York would work out the remaining details with defendants. (Complaint, ¶ 14; Uranga Affidavit, ¶ 11; Suzuki Affidavit, ¶ 22).

Later that same day, pursuant to Browne's instruction, de Diego sent an email to Suzuki regarding the remaining contract details to be negotiated. Specifically, de Diego stated that "[w]e are pleased to acknowledge that you have accepted our counteroffer for a Shoal Creek cargo for Siderar at 315 USD/WMT and therefore

that the cargo is firmly fixed now.”⁶ De Diego requested, and Suzuki agreed, that the tonnage of the cargo be increased to 45,000 metric tons (plus or minus 10%). (Complaint, ¶¶ 15, 17; Uranga Affidavit, ¶ 11; Suzuki Affidavit, ¶ 23; Ex. 4 to Suzuki Affidavit [4/11/08-4/12/08 email exchanges between de Diego, Suzuki and Browne]).

De Diego claims that even after this “initial contact” with III in New York, his primary contact continued to be Browne in Argentina. (Uranga Aff. ¶ 11.)

Plaintiffs contend that Cojerian, in reliance on de Diego’s April 11, 2008 statement that “the cargo is firmly fixed now,” made a firm agreement with Drummond on April 11, 2008 to purchase 45,000 metric tons (plus or minus 10%) of Shoal Creek Coking Coal to be delivered at the Port of Mobile, Alabama on a date to be mutually agreed between April 1, 2009 and May 15, 2009 for a price of \$307.50 per metric ton. (Complaint, ¶ 19; Suzuki Affidavit, ¶ 25).

On April 29, 2008, de Diego wrote to Suzuki and Browne to request that III provide a draft contract. (Suzuki Affidavit, ¶ 28; Ex. 5 to Suzuki Affidavit [4/29/08 email from de Diego to

⁶ Moreover, de Diego’s statement that the “cargo is firmly fixed now” is a term of art used to confirm that the parties had agreed to all of the material terms of the transaction. (Complaint, ¶ 18; Suzuki Affidavit, ¶ 24).

Suzuki and Browne])). Suzuki and Cojerian then began to develop a standard contract for use in connection with future shipments of Shoal Creek Coking Coal for Siderar. (Suzuki Affidavit, ¶ 28).

On May 15, 2008, Cojerian sent de Diego a draft "Contract Between Siderar S.A.I.C. and Itochu Corporation For the Sale and Purchase of Coking Coal." (Complaint, ¶ 21; Suzuki Affidavit, ¶ 28; Ex. 6 to Suzuki Affidavit).

Article 14 of the draft Contract provides for the arbitration in New York of any disputes arising out of or relating to the Contract. Article 15 provides that the Contract shall be governed by the laws of New York State.

Suzuki states that all material terms of both the contract with Drummond to supply the coal, and the Contract with defendants to purchase it, were negotiated by him and Cojerian. Further, Suzuki insists that de Diego clearly understood at all times that Suzuki and Cojerian were his contacts for the purpose of negotiating the defendants' agreement with ITC for the shipment of coal, and understood that Suzuki and Cojerian worked in New York for III. (Suzuki Affidavit, ¶¶ 26, 34).

Plaintiffs assert that, during June 2008, de Diego sought proposals from III for other possible shipments of Shoal Creek

Coking Coal and other coal, and, on or about July 3, 2008, while defendants were still working on the Contract, de Diego reassured plaintiffs that their deal for the April 2009 cargo was firm. (Complaint, ¶ 22; Suzuki Affidavit, ¶ 31).

On August 1, 2008, de Diego sent to Browne, Suzuki, Cojerian and certain other III and ITC employees a revised Contract. In the revised draft, defendants added to the arbitration clause the requirement that "[t]he arbitration proceedings shall be conducted in the English language," and the clarification that the arbitrators were not to act *ex aequo et bono*. They did not propose changes to the choice of New York law or the choice of New York as the place of arbitration. (Suzuki Affidavit, ¶ 32).

In early October 2008, after further exchanges of the draft Contracts between defendants and III, defendants informed plaintiffs that they had decided not to sign long-term written contracts for the purchase of raw materials. Nevertheless, de Diego reassured plaintiffs that defendants did not wish to cancel the parties' current Contract. (Complaint, ¶¶ 23-24; Suzuki Affidavit, ¶ 33).

Between November 11 and 13, 2008, plaintiffs' representatives met with defendants in Argentina in order to continue negotiations. During the course of these meetings, de Diego and Farandato again

reiterated that the parties had a deal in place. (Complaint, ¶¶ 25-26.)

On or about April 3, 2009, Drummond notified plaintiffs, and ITC in turn notified defendants by letter dated the same day, that the coal was ready to be lifted from the terminal in the Port of Mobile. The purchase price that plaintiffs were required to pay pursuant to their agreement with Drummond was \$13,837,500. The purchase price that defendants were required to pay pursuant to their agreement with plaintiffs was \$14,175,000. (Complaint, ¶¶ 27-29.)

On or about April 14, 2009, defendants responded to plaintiff's April 3, 2009 letter, stating that they were "under no obligation to accept delivery of any cargo." Defendants did not take delivery of the coal, nor did they pay for it. (Complaint, ¶¶ 30-31).

On April 30, 2009, ITC notified defendants that they were in breach of the Contract, that the coal would be sold at open market and that defendants would be liable for any difference between the contract price and the market price. Plaintiffs paid Drummond \$7 million in satisfaction of Drummond's claim against plaintiffs for the purchase price that plaintiffs had agreed to pay to Drummond for the coal. (Complaint, ¶¶ 32-33). Plaintiffs claim that after

all covering transactions which mitigated their damages, their total damages amount to \$7,337,500. (Complaint, ¶ 1.)

On May 22, 2009, ITC sent a letter to Siderar to demand that it submit to mediation in Argentina regarding the instant allegations (the "Mediation"). The Mediation took place on June 30, 2009, but concluded without an agreement between the parties. (Uranga Affidavit in Futher Support, ¶ 6.)

Plaintiffs filed a Summons and Complaint in this Court on February 9, 2010, alleging breach of contract and promissory estoppel.

Subsequently, plaintiffs moved, under motion sequences 001 and 002, for extensions of time in which to serve the Summons and Complaint on defendants. These motions culminated in two orders of this Court, dated March 17, 2010 and April 29, 2011, granting plaintiffs' motions and collectively extending the period for service through November 10, 2011.

By Notice of Motion dated November 18, 2011, defendants now move to dismiss the Complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction and/or pursuant to CPLR 327 for *forum non conveniens*.

Personal Jurisdiction

In the first instance, defendants base their motion on a lack of personal jurisdiction pursuant to CPLR 302 (i.e., long-arm jurisdiction).⁷

Defendants argue that their only contact with New York specifically alleged by plaintiffs in the Complaint is a single email, dated April 11, 2008, written by de Diego to III, (Complaint ¶ 16), and the exchange of the draft Contract between de Diego and III in New York. (Complaint, ¶ 21). Furthermore, defendants claim that it was plaintiffs, not defendants, who chose to involve New York in these negotiations by directing de Diego to communicate with III. (Complaint, ¶ 14).

Defendants contend that the exchange of a "single email" stating the proposed terms of an alleged transaction does not constitute transacting business in New York, *citing Arouh v. Budget Leasing Inc.*, 63 AD3d 506 (1st Dep't 2009) (defendants' negotiation of potential purchase of automobile via email and telephone, initiated by plaintiff, insufficient to constitute "'transaction' of business" within New York); *Granat v. Bochner*, 268 AD2d 365 (1st Dep't 2000) (sending faxes and making phone calls to New York,

⁷ Defendants also base their motion on lack of personal jurisdiction pursuant to CPLR 301 (i.e., "doing business" jurisdiction). However, plaintiffs do not rely on this section of the CPLR as a basis for maintaining their action in New York.

without more, insufficient to establish that defendant transacted business in state); *Digital Lab Solutions, LLC v. Strickler*, 2007 WL 700821, at *3 (SDNY Mar. 7, 2007) (“where a defendant’s contacts with New York consist of telephone calls, fax transmissions, and correspondence in connection with the negotiation of a contract that has a center of gravity well outside the state, there is no personal jurisdiction under C.P.L.R. § 302(a)(1).”) (internal quotations omitted).

Moreover, defendants argue that for personal jurisdiction over a defendant whose only contacts with New York are phone calls and negotiations with in-state entities, the defendant must “on his own initiative...project[] himself into” the state. *Parke-Bernet Galleries v. Franklyn*, 26 NY2d 13, 18 (1970); see also, *Pell v. Clarke*, 1994 WL 74075, at *5 (SDNY, March 9, 1994) (because the parties’ communication was initiated by plaintiff, the court found no basis for personal jurisdiction). Here, they argue personal jurisdiction is not established because plaintiff only contacted III in New York at ITC’s suggestion; defendants did not seek out the New York contact on their own initiative. See *Berkshire Capital Group, LLC v. Palmet Ventures, LLC*, 2007 WL 2757116 (SDNY Sept. 21, 2007) (Court found that the proper focus is defendants’ - not plaintiffs’ - activities in New York); compare *Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, 7 NY3d 65 (2006).

At oral argument held on the record on April 4, 2012, defendants conceded that a choice of law provision in a contract may be relevant to the question of long-arm jurisdiction, but it is not dispositive. *Executive Life Ltd. v. Silverman*, 68 AD3d 715 (2d Dep't 2009); *Berkshire Capital Group, LLC v. Palmet Ventures, LLC*, *supra*; . They further argued that there is no case which says that an arbitration clause in an unsigned agreement - such as the draft Contract here - is, alone, sufficient to establish personal jurisdiction.

In opposition, plaintiffs argue that dismissal of the Complaint would only be warranted if, as a matter of law, "New York lacks any possible basis to assert jurisdiction over defendant." *D&R Global Selections, S.L. v. Bodega Olegario Falcón Piñeiro*, 90 AD3d 403, 405 (1st Dep't 2011).

Moreover, they argue that CPLR 302(a)(1) is a "single act statute," meaning a defendant need engage in just one transaction within New York in order for New York courts to have jurisdiction. *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 (1988). The requisite contacts may take place by electronic communications - the defendant need never be present in New York. *Fischbarg v. Doucet*, 9 NY3d 375 (2007); *Parke-Bernet Galleries v. Franklyn*, 26 NY2d at 17-18. Indeed, they insist, "[w]ith the growth of national markets for commercial trade and technological advances in

communication and travel systems, [] an enormous volume of business may be transacted within a State without a party ever entering it."

Kreutter, 71 NY2d at 466. Accordingly, plaintiffs argue, CPLR 302 (a)(1) gives long-arm jurisdiction over commercial actors, like the defendants here, who use "electronic and telephonic means to project themselves into New York to conduct business transactions." *Deutsche Bank Securities, Inc.*, 7 NY3d at 71.

Plaintiffs explain that here, CPLR 302 long-arm jurisdiction is based on the fact that defendants, knowing that III is a New York corporation and that its employees, Suzuki and Cojerian, were working in New York, negotiated the terms of the draft Contract with III. Thus, they insist, defendants acted purposefully and there is a substantial relationship between their conduct and the claim herein.

Further, at the March 27, 2008 Argentina Meeting, de Diego directly requested that Suzuki negotiate specific terms with Drummond. Plaintiffs argue that their subsequent negotiations with Drummond were services solicited by defendants and performed in New York for defendants' benefit, constituting a transaction by defendants of business in New York. *Fischbarg v. Doucet, supra*; *Courtroom Tel. Network v. Focus Media*, 264 AD2d 351 (1st Dep't 1999). Notably, it was to Suzuki in New York that defendants sent their email that the "cargo is firmly fixed now," (Ex. 4 to Suzuki

Affidavit), written in English, confirming their agreement to the material terms of the Contract and asking Suzuki to secure Drummond's agreement to an increase in the tonnage to be delivered (i.e., to perform further work in New York in furtherance of the Contract).

Having negotiated and confirmed in writing the material terms of their Contract, defendants exchanged drafts with III in New York, written in English and intended to be used repeatedly for a series of shipments. Plaintiffs emphasize that the draft Contract contained a New York choice of law and designated New York as the forum for arbitration. Further, defendants did not seek to change these provisions, seeking only to add to the drafts that the arbitrations be conducted in English. Plaintiffs argue that defendants cannot avoid the effect of these communications on the theory that they occurred after the parties' contract was made. *Eaton & Van Winkle LLP v. Midway Oil Holdings Ltd.*, 2010 WL 1020087 (Sup Ct, NY Co, March 15, 2010).

Finally, plaintiffs argue that a plaintiff can defeat dismissal of its claims on personal jurisdiction grounds by demonstrating "a sufficient start" in proving jurisdiction, showing its position "not to be frivolous." *Shore Pharm. Providers, Inc. v. Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624 (2d Dep't 2009) (citing *Peterson v. Spartan Indus.*, 33 NY2d 463, 467 [1974]). Plaintiffs

contend they are, at a minimum, entitled to jurisdictional discovery, as expressly sanctioned by CPLR 3211(d). *85 Unleashed, LLC v. Florida Detroit Diesel-Allison, Inc.*, 2010 WL 4971112 at *2-*3 (Sup. Ct. Suffolk Co., November 23, 2010) (allegation that defendant solicited plaintiff's manager located in New York by telephone and other methods of communication sufficient to allow further discovery); see *Peterson v. Spartan Indus.*, *supra* at 466 (1974).

Under CPLR 302(a)(1), . . . long-arm jurisdiction over a non-domiciliary exists where a defendant transacted business within the state, and the cause of action arose from that transaction. "If either prong of the statute is not met, jurisdiction cannot be conferred" (citation omitted). Under the statute, "proof of one transaction in New York is sufficient to invoke jurisdiction...so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (citation omitted). "[J]urisdiction is not justified where the relationship between the claim and transaction is too attenuated" (citation omitted).

Copp v. Ramirez, 62 AD3d 23, 28 (1st Dep't 2009), lv denied 12 NY3d 711 (2009). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Fischbarg v. Doucet*, 9 NY3d at 380 (citations omitted).

Moreover, even if the out-of-state defendant's contacts with New York fall within the long-arm statute, the exercise of jurisdiction must also comply with due process. *Copp v. Ramirez*, *supra* at 30.

Due process is satisfied if (1) defendants had "minimum contacts" with New York State so they could reasonably foresee defending a suit here, and (2) the prospect of defending a suit in New York State comports with "traditional notions of fair play and substantial justice" (citations omitted). In determining the second prong of the test, "[a] court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief" (citation omitted), as well as "the interstate judicial system's interest in obtaining the most efficient resolution of the controversies" (citation omitted).

Id. at 30-31.

Here, the parties to the Contract - located in Japan and Argentina - were seeking to contract for the sale of coal for delivery to Mobile, Alabama. Defendants argue that their only contact with New York specifically alleged in the Complaint is the April 11, 2008 email from de Diego to III, (Complaint, ¶ 16), and the exchange of the draft Contract between de Diego and III (Complaint, ¶ 21). However, the Court notes that Suzuki asserts in his affidavit that defendants' contacts with III in New York were far more extensive than plaintiffs allege in the Complaint. (See Suzuki Affidavit, ¶¶ 14-17, 26, 28, 34; 3/20/08 emails between Cojerian and de Diego; 4/11/08 and 4/12/08 email exchanges between

de Diego, Browne and Suzuki; 4/29/08 emails between de Diego, Suzuki and Browne).

Defendants claim that it was plaintiffs who chose to involve New York in these negotiations by directing de Diego, by email dated April 11, 2008, to communicate with III in New York. However, plaintiffs present proof that defendants were in contact with III on a few occasions prior to April 11, 2008. (See Suzuki Affidavit, ¶¶ 12-13, 16-17; 3/20/08 emails between Cojerian and de Diego). Accordingly, the Court finds that the defendants purposefully availed themselves of the privilege of conducting activities within New York, (*Fischbarg v. Doucet, supra*), such that they could reasonably foresee defending a suit here (*Copp v. Ramirez, supra*). The Court, therefore, finds that personal jurisdiction over the defendants has been established and declines to dismiss the Complaint on those grounds.

Forum Non Conveniens

Defendants seek, in the alternative, to dismiss the Complaint based on the doctrine of *forum non conveniens* as codified in CPLR 327.

The Court of Appeals has held that among the factors to be considered by the Court in determining a motion to dismiss based on *forum non conveniens* are:

the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling. The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court.

Islamic Republic of Iran v. Pahlavi, 62 NY2d 474, 479 (1984), cert. denied, 469 US 1108 (1985) (internal citations omitted).

Defendants argue that Argentina is an available forum and, indeed, the parties have already mediated this dispute there. They further emphasize that three of the four parties are located outside of the United States, the locus of relevant activity is Argentina, any breach of the parties' agreement would have occurred in either Argentina or Alabama, and Siderar would incur hardships defending this action in New York given that the majority of the witnesses and evidence are purported to be located in Argentina or Japan.

Plaintiffs, in opposition, argue that to litigate in Argentina would require all of the parties to conduct proceedings in Spanish when, they contend, nearly all of the negotiations herein took place in English. Moreover, they insist it was the parties' intent

to resolve any dispute in New York, under New York law, and in English, in accordance with the terms of the draft Contract, albeit unsigned. Finally, plaintiffs argue that New York is a more convenient alternate forum than is Tokyo because Buenos Aires is far closer to New York than it is to Tokyo.

The Court finds that there is a substantial nexus between this case and New York for the reasons discussed *supra*. Given that the defendants negotiated extensively with III in New York, and the fact that all of III's records concerning the Contract and at least some of the witnesses are located in New York, the Court rejects the defendants' argument that litigation in New York would impose an undue hardship on them.

In addition, the burden on this Court is minor, as "[t]his action presents the Court with a...commercial dispute of the type resolved in the Courts of this Department on a frequent basis..." *Sambee Corp. v. Mohamed Moustafa*, 216 AD2d 196, 198 (1st Dep't 1995).

Accordingly, the Court denies defendants' motion to dismiss. Defendants are directed to serve an Answer within 20 days of the e-filing of this decision. The parties shall then appear for a preliminary conference in IA Part 39, 60 Centre St., Room 208 on

January 9, 2013 at 10:00 AM.

This constitutes the decision and order of this Court.

Date: *Nov. 8, 2012*



Barbara R. Kapnick

J.S.C.

BARBARA R. KAPNICK
J.S.C.