

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

PRESENT: Schwartz
Justice

PART 45

Imagery Holdings I et al

INDEX NO. 601061-09

MOTION DATE _____

- v -
Israel Aerospace Industries LTD
ET AL

MOTION SEC. NO. 001

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 _____
Repeating Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss is granted
in part, and denied in part,
per the attached Decision and
Order.

FOR THE FOLLOWING REASON(S):

Dated: December 11, 2009

Melvin L. Schwartz

MELVIN L. SCHWEITZER S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

THIS INFORMATION IS BEING ELECTRONICALLY FILED WITH THE CLERK OF THE COURT.

by the government of Israel, with its principal place of business there (IAI), Elbit Systems Ltd. and Elbit Systems Electro-Optics Elop Ltd., Israeli corporations with their principal place of business in Israel (together, Elbit), and certain of ImageSat's directors (the directors) (collectively, defendants).

Plaintiffs plead eight causes of action: (1) fraud, as against all defendants; (2) breach of contract as against IAI; (3) breach of a Securityholders Agreement dated as of July 25, 2000 as against defendants IAI and Elbit regarding a provision relating to the appointment of independent directors (the Securityholders Agreement); (4) breach of fiduciary duty, as against all defendants; (5) corporate waste, as against all defendants; (6) self-dealing, as against all defendants; (7) fraudulent conveyance, as against defendant IAI; and (8) unjust enrichment, as against defendants IAI and Elbit.

The motion to dismiss on the basis of *forum non conveniens* is granted except as it relates to the cause of action for breach of the provision of the Securityholders Agreement pertaining to independent directors. IAI's motion to dismiss on the basis of comity as it relates to the claim pertaining to independent directors is denied.

The facts as alleged are that ImageSat was formed by IAI and Elbit to commercialize the Israeli military satellite program after the Israeli Ministry of Defense lost funding for its program following a series of failed launch attempts. ImageSat was to engage in the sale of exclusive rights for the use of two high-resolution earth observation satellites and satellite imagery to government entities which did not operate their own satellites. IAI and Elbit were to be responsible for supplying these two satellites. Imaging purports to be the largest independent investor in ImageSat by a significant factor.

Since late 1999, IAI and Elbit solicited millions of dollars of investments from Imaging in New York by representing that ImageSat would be an independent company run by an independent board of directors. According to the complaint, contrary to these representations and contrary to their fiduciary and contractual obligations, defendants have raided ImageSat of many hundreds of millions of dollars in value, having usurped its corporate opportunities and used its funds and plaintiffs' investment for their own benefit, resulting in more than \$1.5 billion of damages to plaintiffs.

Other ImageSat investors brought suit against many of these same defendants in federal district court in the Southern District of New York. The court there succinctly characterized similar claims as follows:

“Plaintiffs claim that IAI and Elbit, with the complicity and sometimes assistance of the individual defendants, have squandered ImageSat's commercial promise-and thereby diminished the value of the plaintiffs' investments in order to further the interests of IAI and Elbit. Defendants' alleged perfidy takes various forms, including: overbilling ImageSat for satellites and services rendered in connection with satellites that the defendants knew to be deficient and therefore not capable of ultimately being constructed; usurping ImageSat's corporate opportunities and breaching contracts establishing ImageSat's exclusivity rights for the commercialization of Israeli military earth observation satellite technology; and subordinating the company's commercial and financial interests to the needs of the Israeli government.”

Wilson v ImageSat Int'l, N.V., No. 07 Civ. 6176 (DLC), 2008 WL 28515111, at * 1 (SDNY 2008), *affd*, *Wilson et al. v ImageSat International N.V. et al.*, Nos. 08-3751-cv (L), 08-4116-cv (con) 2009.

The facts alleged here are in many material respects the same as alleged in *Wilson*. Here, however, plaintiffs have adjusted the thrust of their legal theories so that each of their claims arguably is predicated on the alleged breaches of the Securityholders Agreement, which

embodies a number of corporate governance and internal affairs arrangements the parties designed for ImageSat. These provisions pertain to transfers of securities, including a right of first offer, control rights relating to a public offering, preemptive rights, put rights, use of insurance proceeds and delivery of financial information. They also contain detailed provisions relating to the composition of ImageSat's Board of Directors, including a requirement that at least two independent directors be included on the Board. Plaintiffs allege that IAI and Elbit wilfully violated this provision in order to maintain total control of ImageSat so they could engage in the actions complained of for their exclusive benefit.

The Securityholders Agreement contains the following choice-of-law and consent to jurisdiction provisions:

“Section 4.4. Governing Law; Jurisdiction. (a) This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York, without regard to principles of conflicts of law.

(b) Each party hereto (other than the Company) hereby irrevocably submits to the exclusive jurisdiction, and the Company submits to the non-exclusive jurisdiction, of the courts of the City of New York, State of New York in any action, suit or proceeding arising in connection with this Agreement, and agrees that any such action, suit or proceeding shall be brought only in such court (and waives any objection based on *forum non conveniens* or any other objection to venue therein). Service of process upon any party hereto in any action, suit or proceeding arising in connection with this Agreement may be made anywhere in the world.”

Plaintiffs assert that their claims of fraud, breach of contract, breach of fiduciary duty, corporate waste and self-dealing, etc., all stem from defendants breach of the corporate governance arrangements of the Securityholders Agreement; thus, argue plaintiffs, the jurisdiction provision of that agreement controls for all purposes here and the *forum non conveniens* objections of

defendants were contractually waived. Defendants counter that the Securityholders Agreement is but one of a large number of contractual arrangements referred to by both sides in this action, and that many of these other contracts have clauses which designate the law of Israel as the governing law for interpreting those agreements, and select the courts of Israel as the forum for adjudication of disputes. They urge, therefore, that since the Securityholders Agreement, in context, is such a minor part of this action, even the claims thereunder should be dismissed here, as should the entire action.

Discussion

At the outset, before addressing defendants' *forum non conveniens* motion, the court addresses plaintiffs' assertion that the Securityholders Agreement is the predicate for all of their claims and that its forum selection and governing law clauses are dispositive here. The court is not at all persuaded by this argument. Except where plaintiffs' claim pertains to the specific provision of the Securityholders Agreement that allegedly was breached, that is, the requirement for there to be two independent directors on the Board (Securityholders Agreement § 3.6), the rest of plaintiffs' claims relate not to the governance structure of ImageSat but to the commercial relationships between ImageSat and the defendants. These relationships are exceedingly complex and are embodied in numerous financial and other agreements, many of which contain forum selection and governing law clauses specifying Israel, not New York, as the relevant forum or governing law. It defies reason that the parties to one agreement, focused primarily on the corporate governance of an entity, would have intended that agreement's governing law and forum selection protocol to nullify the effect of the different forum and law choices repeatedly made by the signatories to these other agreements where their operative provisions deal more

directly with ImageSat's capital structure and operation. In this respect, the court notes that the key financing agreements related to a 2006 restructuring of plaintiffs' investment in ImageSat, to which defendants IAI and Elbit are parties, have Israeli governing law and choice of forum provisions. That restructuring, in fact, is at the heart of many of plaintiffs' claims.

While the court is cognizant that contracts with governing law and forum selection clauses similar to the one in the Securityholders Agreement have been interpreted to encompass contract and fraud claims, as well as those based in equity (*see Triple Z*, 13 Misc 3d 1241, 2006 WL 3393259 [2006]), the court finds no precedent for reading such a clause in a corporate governance agreement to encompass all claims arising under a broad network of contracts and relationships such as the one presented here. The test the court applies in this instance is whether the plaintiff's web of claims depends on rights and duties that must be analyzed with reference to the Securityholders Agreement. Except as that agreement relates to the requirement of independent directors, it does not.

Asserting the primacy of the jurisdiction and governing law clauses in the Securityholders Agreement because another clause in that agreement essentially states that the Securityholders Agreement controls where there are inconsistencies with other agreements also does not advance plaintiff's position. Such a clause is common boilerplate in finance-related agreements and is not properly interpreted to expand the reach of a governance arrangement to embrace the entirety of a network of commercial relationships. Accordingly, the forum selection clause of the Securityholders Agreement does not control for all purposes here (*see discussion infra*, however, as to the force of that clause of the Securityholders' Agreement as it does pertain to the dispute regarding independent directors).

Turning, then, to the *forum non conveniens* motion, under CPLR 327(a), as it pertains to the other causes of action, a court may dismiss a claim on this ground when it finds that, in the interest of substantial justice, the action should be heard in another forum. Defendants, as the parties challenging plaintiffs' forum selection, bear the heavy burden of demonstrating "relevant private or public interest factors which militate against accepting the litigation." *Bank Hapoalim (Switz.) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 (1st Dept 2006). To satisfy their burden, defendants must come forth with specific evidence, beyond broad and conclusory allegations of inconvenience, which establishes that litigation in New York would cause substantial hardship relative to litigation in another forum. In considering whether to dismiss, New York courts consider the residency of the parties; whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction; and private and public factors, including potential hardships to defendants, the unavailability of an alternative forum in which plaintiffs may bring suit, and the burden on our courts. No one factor is controlling. The great advantage of the rule is its flexibility based on the facts of each case. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984).

Here, neither plaintiffs nor defendants are New York residents. Plaintiffs are Delaware limited partnerships that are not licensed to do business in New York; all defendants reside in Israel. This favors dismissal, but certainly does not mandate it. Plaintiffs contend, for example, that New York is the appropriate forum because the transactions giving rise to their claims all stem from the investments they made which were solicited here by IAI and Elbit in late 1999 and again in 2006. They point to their due diligence which was conducted in New York, the key deal documents, including the Securityholders Agreement, that were drafted and negotiated in

New York, and the closing of their ImageSat investments which took place here. These factors are overshadowed, however, by the fact that ImageSat has its principal place of business in Israel and does not conduct business in New York; none of its customers reside here; each of the principal defendants, IAI and Elbit, are substantial commercial business entities with their primary activities carried on in Israel; and perhaps most telling of all, the alleged misconduct which plaintiffs claim led to the purported diminution in value of ImageSat and, in turn, their investment, was carried out in Israel by Israeli residents. These factors favor dismissal here. *Banco do Estado des Sao Paulo S.A. v Mendes J. Int'l Co.*, 249 AD2d 137 (1st Dept 1998).

Also, in considering whether certain private and public factors favor one forum over the other, an analysis of both facets points to Israel. Regarding private interests, the principal documents and witnesses pertaining to the underlying commercial and corporate claims are located primarily in Israel. Most of the relevant employees of IAI, Elbit and ImageSat are located in Israel, as are the individual defendants who reside there. The relevant books and records of the business dealings of ImageSat, IAI and Elbit are in Israel. As with the *Wilson* case in the Southern District, *supra*, because discovery may touch upon sensitive or classified information under Israeli law, it may require the testimony of Israeli government officials and employees. That testimony, if it is to be available at all, will be more readily available in an Israeli forum. The court thus is of the view that from the perspective of the parties and the witnesses, it will be far more efficient, less expensive and involve a greater probability of a complete record for both sides if the case is adjudicated in Israel.

In weighing the public factors, New York courts look at the interest of each jurisdiction in having the claims adjudicated in its forum, the application of relevant law and the burden

imposed on the capacity of the courts (*Pahlavi, supra*, 62 NY2d at 480). It is indisputable that Israel has a strong interest in having this case adjudicated in its courts. This is a commercial dispute principally involving the behavior of individual Israelis, the Israeli corporations through which they act and the impact of their behavior on an enterprise having its principal place of business in Israel. As the court said in the similar *Wilson* litigation “...Israel has a strong stake in insuring that the affairs of ImageSat are conducted with integrity and that its judicial system deals efficiently and fairly with complaints about ImageSat’s management.” *See Wilson v ImageSat Int’l, N.V.*, 2008 WL 2851511, at *7; *see also Shin-Etsu Chem. Co. Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d 171, 178 (1s Dept 2004) (dismissing in favor of India since “Indian courts are keenly interested in governing the affairs of its financial institutions to insure uniformity and consistency in the processing of financial transactions and in the interpretation of Indian banking statutes and laws”). To be sure, New York courts also have an interest in such matters, as New York holds itself out to be the world’s financial center and ImageSat raised substantial capital in New York. But, the gravamen of this action does not focus on the raising of capital here, rather on the individual, corporate and commercial conduct of Israeli residents in Israel.

As to the application of relevant law, it is likely that the law of the Netherlands Antilles will apply to many of the plaintiffs’ claims relating to the internal affairs of ImageSat, as that is the jurisdiction of its domicile. The other claims, such as fraud or waste relating to the commercial contracts, are likely to be governed by Israeli law. Only the claims relating to breach of the Securityholders Agreement, and a Letter Agreement entered into in 2006, among plaintiffs, IAI and Elbit relating to the sale of ImageSat, each of which are far from the center of this case,

are governed by New York law. Accordingly, this factor also weighs in favor of dismissal here. *Shin-Etsu Chem. Co. Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d at 178.

With regard to the capacity of the courts of New York, it is clear ours are among the busiest in the country, and have little interest in assuming an additional burden on court personnel and their juries in a case with so few fundamental ties to New York. The court also notes that courts here recognize Israel as providing an adequate forum for the adjudication of commercial disputes. *See Shibobeth v Yerushalmi*, 268 AD2d 300 (1st Dept 2000). These public interest factors also weigh heavily in favor of adjudication of this case in Israel.

Taking account of each of the factors discussed, *supra*, and giving significant weight to the public and private interest factors involved, the court thus finds that defendants have met their heavy burden associated with their motion and dismisses all claims for *forum non conveniens*, other than the claim specifically arising under the Securityholders Agreement *viz.* the appointment of independent directors. As the court said in *Wilson*, 2008 WL 28515111 at *2 “[h]aving invested in an Israeli-based corporation, and having chosen to bring suit based on claims that the corporation has mismanaged its affairs and has acted to benefit its two largest shareholders, both of which are Israeli companies, the plaintiffs have no fair ground to complain that these defendants insist on being sued in Israel.”

Returning to the claim under the Securityholders Agreement (which the court has not viewed as central to plaintiffs’ other commercial claims alleging the diminution in value of ImageSat) it would be far more efficient for this claim also to be adjudicated with the others in Israel. Efficiency alone, however, is not the test of where this claim should be adjudicated.

As noted *supra*, when the Securityholders Agreement was drafted, the parties specifically provided that the laws of New York would apply to the resolution of any dispute thereunder, and they each agreed to submit to the jurisdiction of the courts of this State in any action, suit or proceeding arising in connection with the agreement. Also, each party waived any objection to the New York venue based on *forum non conveniens* or any other objection.

New York law clearly contemplates provisions such as those in the Securityholders Agreement. CPLR 327 (b) provides:

“Notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.”

Section 5-1402 of the General Obligations Law (GOL) provides in relevant part:

“ . . . any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.”

Section 5-1401 of the GOL, in turn, provides in relevant part:

“The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, . . . may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state.”

Given this statutory construct, the court has clear instructions that it must grant jurisdiction over the plaintiffs' claims relating to the provisions of the Securityholders Agreement with respect to

their claim concerning independent directors, and also must apply the laws of the State of New York to the resolution of this claim. *Nat'l Union Fire Co. of Pittsburgh, P.A. v Worley*, 257 AD2d 230 (1st Dept 1999). The court has little discretion in this regard.

Defendants' argument that despite the New York law and forum provisions of the Securityholders Agreement, Israel is the proper venue for resolution of this specific dispute, is unavailing. The claim under the Securityholders Agreement must be adjudicated in New York in accordance with the express agreement of the parties notwithstanding this court's holding that the relevant *forum non conveniens* tests mandate resolution of the other claims in Israel.

Defendants also argue that the reasoning of *Base Metal Trading SA v Russian Aluminum*, 253 F Supp 2d 681 (SDNY NY 2003), *affd*, 8 Fed App 47 [2d Cir. 2004], applies here and is a strong argument for a *forum non conveniens* dismissal of the Securityholders Agreement claim. They assert that CPLR 327 (b) does not bar such a dismissal where enforcing a forum selection provision would be unreasonable in the circumstances, citing *3H Enterprises v Bennett*, 276 AD2d 965 (3d Dept 2000). *Base Metals* is clearly distinguishable from the present case, however, in that it involved a set of circumstances that the federal district court there referred to as "nothing but foreign shopping by the plaintiffs" (*Base Metals* at 697). That case contains no analysis of CPLR 327 (a) or CPLR 327 (b) or GOL 5-1402. It stands for the proposition that a federal district court, applying a *forum non conveniens* analysis spelled out by the United States Court of Appeals for the Second Circuit, will not grant jurisdiction in a complex commercial case where there "is no indication that the parties anticipated litigating disputes in the United States or that the choice of laws of this forum is based on true motives of convenience" (*Base Metals* at 699). And, the court in *3H Enterprises* did not discuss the applicability of

CPLR 327 (b), but there noted that both defendants were senior citizens suffering from health problems which made it difficult and inadvisable to travel. The court does not consider the case persuasive precedent with respect to the issue here.

Defendants' further argument that the federal district court's refusal to grant jurisdiction with respect to the Securityholders Agreement in *Wilson, supra*, is precedent for a like holding here is misplaced. In *Wilson*, the court made a specific finding that there was strong evidence of forum shopping. It also found that while there were a number of contracts which included a New York governing law provision as well as a clause in which the parties consented to the jurisdiction of the New York State courts, the plaintiffs did not attempt to show that those contracts, either singly or together, formed the basis for their claims or that any defendants were forbidden as a matter of law by any of the contracts from moving for dismissal on the ground of *forum non conveniens*. *Wilson* at *4.

Finally, even if GOL 5-1402 were inapplicable in the circumstances, it is well-settled that where a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on *forum non conveniens* grounds unless extraordinary circumstances render the forum selection agreement unenforceable. The First Department has stated that:

As this court has previously noted, the "very point" of forum selection clauses, which render the designated forum convenient as a matter of law, is to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute (CPLR 302 [a]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395, 397-398 [1996]; and see *VOR Assoc. v Ontario Aircraft Sales & Leasing*, 198 AD2d 638, 639 [1993]), and it is the well-settled "policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation" (*Koob v IDS Vin. Servs.*, 213 AD2d 26, 33 [1995], see also *Boss v American Express Fin. Advisors, Inc.*,

15 AD3d 306, 307 [2005], *affd* 6 NY3d 242 [2006]). Forum selection clauses, which are prima facie valid (*Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534 [1996]; *Koko Contr. v Continental Envtl. Asbestos Removal Corp.*, 272 AD2d 585, 586 [2000]), are enforced “because they provide certainty and predictability in the resolution of disputes” (*Brooke Group, supra*; *see also Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006]), and are not to be set aside unless a party demonstrates that the enforcement of such “would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court” (*British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1991], *see also Boss*, 15 AD3d at 307-308).

Sterling Nat’l Bank ex rel. NorVergence, Inc. v Eastern Shipping Worldwide, Inc., 35 AD3d 222 (1st Dept 2006).

Such is manifestly not the case here as it relates to plaintiffs’ discrete claim under the Securityholders Agreement relating to the appointment of independent directors. Defendants IAI and Elbit used the capital raising markets of New York in order to facilitate the financial needs of ImageSat. They entered into the Securityholders Agreement with its forum selection provision as part of this process. The courts of this State are among the most sophisticated in the world when adjudicating such issues. Adjudicating this claim in New York courts will not impose burdens which for all practical purpose would deprive defendants of their fair day in court.

Defendant IAI also argues that all of the claims against it should be dismissed on the basis of comity. As this court is dismissing all other claims against IAI on *forum non conveniens* grounds, it is not necessary to consider IAI’s comity motion regarding those, and addresses the comity argument only with regard to the claim pertaining to independent directors under the Securityholders Agreement. IAI argues this entire case is deeply entangled with the political and sovereign decisions of the Israeli government and should be dismissed because it will require the

court to examine the decisions of Israeli governmental agencies with respect to Israel's security interests. However telling an argument this is with respect to some of the claims the court is dismissing for *forum non conveniens*, it certainly is not valid for the claim relating to independent directors under the Securityholders Agreement. This claim has nothing to do with the political or sovereign decisions of Israel. IAI has not even argued that this is the case with regard to the independent directors claim itself. The claim is a discrete issue invoking certain practices that are common in the finance-related transactions of New York's capital markets. It has no nexus to the Israeli government or its security interests. It does not involve the hearing of a claim that would require the court to review the actions of a foreign sovereign. The court, accordingly, declines to dismiss this claim relating to independent directors under the Securityholders Agreement on the basis of comity.

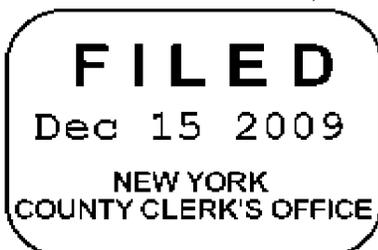
Accordingly, it is

ORDERED that the motion to dismiss by defendants is granted on the basis of *forum non conveniens* as to all causes of action except breach of the Securityholders Agreement as it relates to the provision regarding independent directors by IAI and Elbit; and it is further

ORDERED that with respect to the claim pertaining to independent directors in the Shareholders Agreement, the motion to dismiss by IAI on the basis of comity is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 11, 2009



ENTER:

J. S. C.