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

PRESENT: HELEN E. FREEDMAN *Justice* **PART** 39

Banco Amazonas, S.A.
Plaintiff,

- v -

BNP Paribas (Suisse), S.A.
Defendant

INDEX NO. 601507/05

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

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

Plaintiff Banco Amazonas, S.A. ("Banco Amazonas"), an Ecuadorian bank, brought this "motion-action" for summary judgment in lieu of complaint (pursuant to CPLR 3213) after defendant BNP Paribas (Suisse) S.A. ("Paribas"), a Swiss bank, refused to honor Banco Amazonas' draw on four standby letters of credit that Paribas had issued. When it moved for summary judgment, Banco Amzaonas also applied by order to show cause (1) for an attachment of Paribas' New York assets pursuant to CPLR 6212(a) in order to obtain *quasi in rem* jurisdiction over the Swiss bank and (2) for an order temporarily restraining Paribas and its affiliates from transferring any assets in New York, pursuant to CPLR 6210. The application for a temporary restraining order was denied when the order to show cause was issued, and the motion for attachment is now denied for the reasons set forth below.

Background – Banco Amazonas is organized under the laws of Ecuador and primarily conducts business in that country. Paribas is a Swiss banking institution whose principal offices are in Geneva; it is not authorized to do business anywhere in the United States and does not maintain offices or solicit business in this country.

Banco Amazonas' claims against Paribas before this Court derive from a sale in 2004 of fuel oil by a state-owned Ecuadorian company, Empresa Estatal Petroleos del Ecuador ("PetroEcuador") to two affiliated Swiss companies, Vitol S.A. Inc. and VNT S.A. (collectively, "Vitol"), pursuant to four contracts (the "Sale Contracts"). Vitol is a customer of To secure Vitol's performance under the Stale Contracts, In connection with each Sale Contract, Paribas arranged for Banco Amazonas to issue a performance bond in the amount of $ 1 million (collectively, the "Bonds"). Paribas in turn secured Banco Amazonas' payment under the Bonds by issuing four standby letters of credit (collectively, the "L/C's") in favor of Banco Amazonas.

Each L/C from Paribas acknowledged that Banco Amazonas might be called upon to pay

under the relevant Bond and that

> IT IS WELL UNDERSTOOD THAT [BANCO AMAZONA'S] PERFORMANCE BOND IS ISSUED UNDER [PARIBAS'] ENTIRE RESPONSIBILITY (sic), THEREFORE, WE HEREBY OPEN OUR IRREVOCABLE STANDBY LETTER OF CREDIT . . . IN YOUR FAVOR AND AUTHORIZE YOU TO DRAW AT SIGHT ON OUR US DOLLARS ACCOUNT WITH BNP PARIBAS, NEW YORK, FOR ANY AMOUNT UP TO [$ 1 million] . . .
>
> [BANCO AMAZAONAS] MIGHT BE CALLED UPON TO PAY UNDER YOUR SAID PERFORMANCE BOND AND THIS (sic) UNDER SIMULTANEOUS TELEX ADVICE TO [PARIBAS], CERTIFYING THE AMOUNT OF [BANCO AMAZONA'S] DRAWING REPRESENTS THE AMOUNT [BANCO AMAZONAS] HAD TO PAY TO PETROECUADOR AND THAT YOU AIRMAILED TO US THE COPY OF THEIR WRITTEN DEMAND/CLAIM YOU HAD TO HONOUR ON THE STRENGTH OF YOUR PERTAINING COMMITMENT.

In early 2005, after a dispute apparently had arisen between Vitol and PetroEcuador about the petroleum sale, PetroEcuador demanded payment from Banco Amazonas under the Bonds. Before Banco Amazonas paid, Vitol brought a lawsuit in the Courts of First Instance in Geneva, Switzerland against PetroEcuador, Banco Amazonas, and Paribas (the "Swiss Action"), in which Vitol claimed that PetroEcuador had fraudulently demanded payment under the Bonds by falsely claiming that Vitol had breached its obligations under the Sale Contracts. On February 8, the Geneva court issued an *ex parte* injunction (the "Swiss Injunction") which among other things explicitly restrained Paribas from paying Banco Amazonas under the L/C's until the Geneva court held a hearing on Vitol's fraud claims.

By February 25, Banco Amazonas had duly demanded payment from Paribas under the L/C's, but Paribas refused to honor the draw on the ground that the Swiss Injunction restrained it. On March 2005, however, Banco Amazonas paid PetroEcuador under the Bonds in an amount totaling nearly $ 4 million, and then filed this "motion-action" for summary judgment in lieu of complaint in this Court. Banco Amazonas contended that Paribas wrongfully dishonored its draw on the L/C's and sought the principal sum owed under the L/C's, plus interest and incidental damages.

After this motion was a submitted, the parties sent the the Court a series of letters to notify it of later developments in the Swiss proceeding. On July 8, 2005, the Geveva Court lifted the Swiss Injunction against Paribas, which thereupon paid Banco Amazonas the principal it had claimed on the L/C's (about $ 3.96 million), plus interest at the Swiss statutory rate of 5 % per annum (about $ 64 thousand), which Paribas calculated as accruing from the date on which Banco Amazonas allegedly first made a valid demand for payment under the L/C's. Paribas argues that its payment mooted Banco Amazonas's pending claims before this Court.

Banco Amazonas disagrees, arguing that, regardless of the Swiss injunction, Paribas' failure to immediately honor Banco Amazonas draw on the L/C's, gave rise to a claim for wrongful dishonor in New York, and accordingly Paribas was still liable for additional interest (calculated at New York's statutory rate of 9%) and incidental damages.

Motion for Attachment – In connection with its summary judgment motion, Banco Amazonas now moves under CPLR 6201 for an order attaching correspondent accounts which Paribas maintains with various New York banks. To obtain an attachment order, a plaintiff must demonstrate that it seeks a money judgment in a non-matrimonial action, and that (1) one of the grounds for attachment set forth in section 6201 applies, (2) the amount a plaintiffs seek from the defendant exceeds all known counterclaims, and (3) plaintiff will probably succeed on the merits of its cause of action. CPLR 6212(a).

Inasmuch as Paribas is a foreign corporation that is unqualified to do business in New York, sub-section 1 of CPLR 6201 provides a threshold basis for attachment. Also, the amount that Banco Amazonas seeks from Paribas exceeds any counterclaims. However, the application for an attachment order is denied because Banco Amazonas is highly unlikely to succeed on the merits. The crux of Banco Amazonas' argument is that this Court should refuse to recognize the Swiss Injunction because it conflicts with New York public policy.

Under the doctrine of international comity, New York Courts recognize foreign orders and judgments "absent a showing of fraud in the procurement of the foreign judgment or unless recognition of the judgment would offend the public policy of New York." *Lasry v. Lasry*, 180 A.D.2d 488, 489 (1st Dept. 1992) (citing *Greschler v. Greschler*, 51 N.Y.2d 368 (1980)). Neither exception applies here. Banco Amazonas does not claim that Vitol procured the Swiss Injunction by fraud. Moreover, recognizing the Swiss Injunction, which a Swiss Court issued at the request of Swiss corporations to restrain a Swiss bank's payment on letters of credit before it received any payment demand, would not offend the public policy of this state. Banco Amazonas points to certain cases in which New York Courts denied comity to foreign injunctions, but they are inapposite because the injunctions in those cases implicated fundamental public policies. For example, in *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227-28 (1980), the Court of Appeals refused to recognize an "anti-semitic" injunction that excused the Ugandan government from honoring a payment demand by Israelis. In *Tal v. Tal*, 158 Misc.2d 703, 707-10 (Sup. Ct. N.Y. Co. 1993), the Court denied comity to an Israeli divorce judgment where the wife, who lived in New York was not notified of the proceeding in Israel, and the resulting division of assets was "manifestly unfair" to her.

Banco Amazonas also cites to *Cantrade Privatbank AG Zürich v. Bangkok Bank Pub. Co. Ltd.*, 256 A.D2d 11 (1st Dept. 1998), in which the First Department declined to extend comity to a Thai court injunction that restrained a Thai bank from paying under a letter of credit, and referred to "New York's strong public policy in favor of enforcing letter of credit agreements according to their terms." 256 A.D.2d at 11 (citing *First Comm. Bank v. Gotham Originals*, 64 N.Y.2d 287, 298 (1985). In *Cantrade Privatbank*, however, the Thai court enjoined the issuing bank after it had already accepted the documents that immediately triggered its obligation to pay. By contrast, the Swiss court enjoined Paribas more than five weeks before Banco Amazonas presented it with a conforming demand for payment. *See Cantrade Privatbank*, 256 at 11 (stating that the timing of the Thai court's injunction was one of two factors that weighed against extending comity).

Accordingly, the Swiss Injunction is probably entitled to recognition by this Court, and likely immunizes Paribas from any liability for delaying payment until the Swiss court vacated it.

Plaintiff's motion for an order of attachment is denied. Defendant has not filed opposition papers to the CPLR 3213 motion, and is directed to file them within ten days after plaintiff serves

it with a copy of this order. The parties are directed to appear before the Court for a status conference on October 11, 2005 at 9:30 a.m. This is the order of the Court.

Dated: September 13, 2005

Helen E. Freedman, *J.S.C.*

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**