

Shipcraft A/S v Arms Corp. of the Philippines, Inc.
2013 NY Slip Op 33589(U)
February 19, 2013
Sup Ct, New York County
Docket Number: 150651/2012
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN
J.S.C. Justice

PART 63

Shipcraft AIS

INDEX NO. 150651/2012

MOTION DATE 10/03/12

MOTION SEQ. NO. 001

Arms Corporation of the Philippines Inc.

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

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s).
Answering Affidavits - Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 2/19/13

Ellen M. Coin, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 63

----- X
SHIPCRAFT A/S,

Plaintiff,

Index No.: 150651/2012

Subm. Date: October 3, 2012

Mot. Seq. No.: 001

-against-

DECISION & ORDER

ARMS CORPORATION OF THE
PHILIPPINES, INC.,

ZaDefendant.

-----X

For Plaintiff :

Lyons & Flood LLP
By Jon Werner, Esq.
65 West 36th Street, 7th Floor
New York, New York 10008
212-594-2000

For Defendant:

Blau, Brown & Leonard, LLC
By Steven B. Blau, Esq.
224 West 30th Street, Suite 809
New York, New York 10001
212-725-7272

Papers considered in review of this motion for summary judgment in lieu of complaint:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Memo. of Law in Supp.....	2
Affidavit in Opposition.....	3
Def. Memo. of Law in Opp.....	4
Affirm. in Reply.....	5
Memo of Law in Reply.....	6

ELLEN M. COIN, J.:

Plaintiff Shipcraft A/S, a shipping company, moves pursuant to CPLR §§ 3213 and 5303 to domesticate a money judgment entered by the Maritime and Commercial Court of Denmark ("the Danish Court") on May 25, 2011 in the amount of € 240,829.00, plus costs in the amount of DKK 56,557.28 ("the Danish Judgment") against defendant Arms Corporation of the Philippines, Inc. ("Armscor"). The underlying debt arose out of a maritime contract of carriage of containers of ammunition from Manila, the Philippines, to

Hodeidah, Yemen, and expenses incurred as Shipcraft carried and stored the cargo for one year in the absence of necessary entry documents.

On November 8, 2010, Shipcraft commenced proceedings against Armscor in the Danish Court. An agent of the Royal Danish Consulate General in Manila effected service of process by delivering the writ of summons to Anne Ornales, an administrative assistant to Demetrio Tuason, Chairman of Armscor, on the sixth floor of the Strata 100 Building in Pasig City, on the outskirts of Manila. (Exh. 5 to Affirmation of Kirk M. Lyons, dated March 8, 2012). On May 25, 2011, the Danish Court issued a judgment of default against Armscor for failure to appear in the proceedings.

In opposition, Armscor argues against recognition of the Danish Judgment on the grounds of (1) lack of personal jurisdiction over Armscor in the Danish Court as a result of improper service of process, (2) lack of long-arm jurisdiction over Armscor in New York, and (3) *forum non conveniens*.

In support of its argument, Armscor submits an affidavit of Maria Victoria B. Mantala, corporate secretary of Squires Bingham Co. Inc., a holding company. (Exh. A to Affirmation of Steven Bennett Blau, dated June 12, 2012). Mantala alleges that Ornales is employed as a receptionist by Squires Bingham, a separate legal entity, and that she was not authorized to accept service

of process on behalf of Armscor, because she was neither an employee nor an agent of Armscor.

Armscor also submits an unsworn statement by Amelia Cayabyab¹, export sales manager of Armscor. (Blau Affirm., Ex. B). Cayabyab alleges that she received the writ of summons sometime in March 2011, past the six-week period for appearing in the Danish Court. (*Id.*). As a result, Cayabyab claims, Armscor was prevented from submitting a defense within the required period. (*Id.*). Cayabyab also alleges that Armscor was unaware of the Danish Judgment until Shipcraft's commencement of this action. (*Id.*).

Armscor further submits the affidavit of its counsel, Valeriano R. Del Rosario, who represents it in a court proceeding that Armscor separately commenced against Shipcraft in the Philippines on April 27, 2011, about a month prior to the entry of the Danish Judgment. (Blau Affirm., Ex. C). Del Rosario cites Section 11, Rule 14 of the 1997 Rules of Civil Procedure of the Philippines for the proposition that under Philippine law, "service upon a Philippine private juridical entity may be made on the president, managing partner, corporate secretary, treasurer, or in-house counsel. Under Philippine procedural law, the service of summons must be made only on those designated

¹ Although Cayabyab's statement is not notarized, plaintiff has not raised objection to its admissibility, and the Court deems the same waived.

persons, otherwise the service is deemed invalid." (*Id.*). Del Rosario adds that process *should* be delivered at the principal office of the corporation.

Finally, Armscor submits the affidavit of Gina Marie G. Angangco, executive vice-president of Armscor in charge of corporate planning and business development. (Blau Affid., Ex. D). Angangco alleges details in support of Armscor's contention that it does not conduct any business activities in New York State and thus is not subject to New York's long-arm jurisdiction.

In reply, Shipcraft submits the affidavit of Arturo Del Rosario, Jr., who represents Shipcraft in the Philippine litigation. Rosario alleges that Squires Bingham is a holding company and majority shareholder of Armscor and that Demetrio Tuason is the chairman and president of both. He also alleges that both companies share offices at the location where service of process was made. As proof, Rosario submits corporate information sheets from the Philippine SEC, which establish joint ownership and control (Exh. B to Affidavit of Arturo Del Rosario, Jr., sworn to July 16, 2012) and marketing materials showing that Armscor maintains offices on the sixth floor of the Strata 100 Building in Pasig City. (Rosario Affid., Ex. D). Del Rosario also appends a photograph taken by an investigator of the entrance door to the subject location, which clearly shows two

signs, one for Squires Bingham and one for Armscor, next to each other. (Rosario Affid., Ex. F).

Further, Rosario Jr. counters Cayabyab's assertion that Armscor was not aware of the Danish Judgment until the commencement of this proceeding in March 2012, alleging that as early as September 2011, almost six months before, Shipcraft submitted a copy of the Danish Judgment in furtherance of its motion to dismiss the action in the Philippine court. (Rosario Affid. ¶ 14).

In reply, Shipcraft's Danish counsel, Niles Jørn Friberg, submits unsworn correspondence with the Danish Consulate in Makati City, Philippines, explaining that service of process was not performed at Armscor's corporate headquarters because the office of its chairperson, Demetrio Tuason, was located at the 6/F Strata 100 Building address. The correspondence also indicates that the process server diligently verified that Anne Ornales was an administrative assistant to Demetrio Tuason. (Friberg Affid., Ex. 2).

DISCUSSION

New York has traditionally been a generous forum in which to enforce judgments for money damages by foreign courts, and, in accordance with that tradition, the state adopted the Uniform Foreign Money-Judgments Recognition Act as CPLR Article 53. "Article 53 was designed to codify and clarify existing case law

on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here." (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003] [citation omitted]).

Article 53 of the CLPR supports the enforcement of a foreign money judgment that is "final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." (CPLR §§5302, 5303). Foreign country judgments entered on default meet this definition. (See *John Galliano, S.A. v Stallion, Inc.*, 62 AD3d 415, 416 [1st Dept 2009], *affd by* 15 NY3d 75 [2010]). If a foreign country money judgment meets the requirements of CPLR §5303, the New York court performs the ministerial duty of entering judgment. This process, informally called "domestication," is not predicated on a showing of CPLR §§301 or 302 personal or in rem jurisdiction over the judgment debtor in New York. (See *Lenchyshyn v Pelko Electric, Inc.*, 281 AD2d 42, 47 [4th Dept 2001]; see also *Abu Dhabi Commercial Bank PJSC v Saad Trading*, 36 Misc 3d 389, 392-93 [Sup Ct, New York County 2012]).

However, there are ten exceptions to domestication of the foreign judgment, two of which mandate non-recognition and eight which leave the question of non-recognition to the court's discretion. CPLR §5304(a)(1) bars recognition of a foreign

country judgment if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law. That section does not demand that the foreign tribunal's procedures exactly match those of New York. (*CIBC Mellon Trust Co.*, 100 NY2d at 222). If a defendant is afforded notice and an opportunity to be heard in the underlying litigation, the basic requisites of due process are met. (See CPLR § 5304(b)(2); see also *Society of Lloyd's v Grace*, 278 AD2d 169 [1st Dept 2000]).

A second mandatory ground for non-recognition is the foreign court's lack of personal jurisdiction over defendant. (CPLR §5304(a)(2)). A New York court has an independent obligation to review the issue of personal jurisdiction, and "even if the rendering court had jurisdiction under the laws of its own state, a court . . . should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate . . ." (*CIBC Mellon Trust Co. v Mora Hotel Corp. N.V.*, 296 AD2d 81, 93 [1st Dept 2002][citation omitted]). "The inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law." (*John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 81 [2010] [citation omitted]).

A corollary to CPLR §5304(a)(2) is lack of fair notice under CPLR §5304(b)(2), one of the eight discretionary grounds for non-recognition. CPLR § 5304(b)(2) provides that a foreign country judgment need not be recognized if "the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend." The "notice" inquiry calls on the court to determine ". . . 'whether a reasonable method of notification [was] employed and reasonable opportunity to be heard [was] afforded to the person affected.'" (*Gondre v. Silberstein*, 744 F Supp 429, 434 [SDNY 1990] [citation omitted]).

When the challenge to personal jurisdiction in the foreign country is based on improper service of process (or equivalent initiatory papers), the Court's inquiry fuses subsections (a)(2) and (b)(2) of CPLR §5304: the proponent of the foreign judgment need not show that service of process was in strict compliance with the relevant foreign laws, but must instead establish "meaningful notice" under the circumstances, reasonably calculated to afford defendant an opportunity "in sufficient time to enable [it] to defend itself in that action." (See *John Galliano, S.A.*, 15 NY3d at 80-81, 82). The Court's inquiry centers on whether "the procedure used [for service of process] [was not] fundamentally unfair," with the issue of propriety of service under the relevant law left to the discretion of the

foreign forum issuing the judgment. (*Id.* at 81-82; see also *Sambataro v Compagnone*, 9 Misc 3d 128A [App Term, 1st Dept 2005]).

In the context of commercial agreements containing forum selection clauses, an additional gloss covers the court's analysis: "CPLR 5304's grounds for non-recognition of foreign money judgments must be read together with CPLR 5305, however, which provides in relevant part that a 'foreign country judgment shall not be refused recognition for lack of personal jurisdiction if . . . the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.'" (*John Galliano, S.A.*, 15 NY3d at 80; see also CPLR 5305[a][3]).

The facts in this case are materially indistinguishable from those in *John Galliano, S.A. v Stallion, Inc.* (15 NY3d 75). Armscor does not dispute that in the contract of carriage it consented to jurisdiction of the Danish courts.² The crux of Armscor's opposition is that service of process on it did not strictly comply with Philippine law.³ Section 11 of Rule 14 of

² While Shipcraft submitted only a redacted version of the bill of lading, providing for exclusive jurisdiction in "the courts and in accordance with the law of the place where the Carrier has his principal place of business. . . .", Armscor did not dispute its accuracy or applicability.

³ The parties agree that it was Philippine law that governed service of process on Armscor, as the Republic of the Philippines is not a signatory to the Hague Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters. (See Friborg Affid., ¶ 8).

the 1997 Rules of Civil Procedure provides as follows:

Service upon domestic private juridical entity. When the defendant is a corporation, partnership or association organized under the laws of the Philippines with a juridical personality, service may be made on the president, managing partner, general manager, corporate secretary, treasurer, or in-house counsel. (1997 Rules of Civil Procedure As Amended, available at http://www.lawphil.net/courts/rules/rc_1-71_civil.html#r13, accessed on February 11, 2013).

Philippine Supreme Court precedent indicates that strict compliance is required when serving a corporate entity. (See e.g., *Delta Motor Sales Corp. v Mangosing*, 70 SCRA 598 [1976], available at <http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/21594>, accessed on February 11, 2013). The rule enunciated in *Delta Motor Sales Corp.* provided that service on persons other than those mentioned in Section 13 was improper. On occasion, the Supreme Court liberalized the stringent rule, holding that "service must be made on a representative so integrated with the corporation sued as to make it *a priori* supposable that he will realize his responsibilities and know what he should do with any legal papers served on him." (*R. Transport Corp. v Hon. Court of Appeals et al*, G.R. No. 111187 [1995], available at <http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/32534>, February 11, 2013).

Thus, the Philippine Supreme Court deemed service on the secretary of the president of a corporation as sufficient service upon an "agent" within the meaning of Section 13, noting that unlike a mere clerk, the president's secretary has a direct professional relationship and contact with the president. (*Summit Trading and Development Corp. v Avendano*, 135 SCRA 397, G.R. No. 60038 [1985], available at <http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/26861>, February 11, 2013). In deeming service valid, the Supreme Court in *Summit Trading* noted that in light of the secretary's failure to account for what she did with the summons, it was reasonable to assume that she gave it to the president. (*Id.*).

According to this precedent, the Danish Consulate's delivery of process to Ornales, Tuason's administrative assistant⁴ would have complied with Philippine law before 1997. In 1997, as part of a general revision of the Rules of Civil Procedure, Section 13 of Rule 14 was amended and renumbered as Section 11. The 1997 amendment substituted "general manager" for "manager"; "corporate secretary" for "secretary"; and "treasurer" for "cashier." In addition, the amendment deleted the phrase "agent or any of its directors." As a result, the 1997 amendment rendered moot any

⁴ In defendant's submissions, Ornales' job description is demoted with each subsequent affidavit, from receptionist to telephone receptionist, with no intimation from Armscor as to whether she had daily contact with Tuason.

prior case law, including Summit Trading, which showed any flexibility in the manner of service on a corporation. Therefore, the service of the writ of summons by the Danish Consulate General in Manila on Ornales as Tuason's administrative assistant was not a functional equivalent of service on Tuason under current Philippine law.⁵

However, for purposes of determining whether the recognition requirements of Article 53 have been met, the court finds that service on the administrative assistant of Arm Scor's chairman was not fundamentally unfair to Arm Scor. (See *John Galliano, S.A.*, 15 NY3d at 81).⁶ The record reveals that Arm Scor, a highly sophisticated global arms manufacturer, decided not to hire European counsel to challenge the legality of the Danish proceedings, but apparently sat back in the hope that the perceived imperfection in service of process would preclude recognition of the Danish Judgment in jurisdictions where it holds assets.

Arm Scor failed to rebut Shipcraft's prima facie showing that it received effective service of the writ. Tellingly, while Arm Scor submits Mantala's and Cayabyab's affidavits, it offers no

⁵ Arm Scor's additional argument that service was deficient because it was not made at its corporate headquarters, however, is contrary to Philippine law. (See *Baltazar et al v Court of Appeals et al*, G.R. 78728 [1988]).

⁶ Although service in *John Galliano, S.A.* was performed under the Hague Convention, this distinction does not preclude its application to the issue in this case, as the distinction is immaterial.

submission from Ornales (the person actually served) herself or from Tuason with any attestation as to Ornales' title, duties or any information as to what she did with the writ of summons after its receipt.

The fact that Ornales was technically on the payroll of Armcor's parent holding company, and not Armcor per se, fails to suggest that she assists Tuason solely with matters for the holding company and not Armcor. Armcor also does not allege that Tuason, as chairman of both Squires Bingham and Armcor, has a separate, dedicated assistant in his office for each corporate entity's matters, with no overlap of duties.

Cayabayab's affidavit is likewise deficient in that it is utterly silent on what happened with the writ after its delivery to Ornales on February 2, 2011. Cayabayab conceded that she obtained a copy of the writ in March 2011, at least a month-and-a-half before the entry of the Danish Judgment on May 25, 2011.

Instead of contesting jurisdiction in the Danish Court, Armcor commenced a separate proceeding against Shipcraft in a Philippine court on April 27, 2011, in an attempt to circumvent the forum selection clause in the contract of carriage. In these circumstances, recognition of the Danish Judgment will not offend the notion of fundamental fairness: it will forestall Armcor's attempt to forum-shop.

Long-Arm Jurisdiction

Armscor argues that the Danish Judgment may not be domesticated in New York, because it does not have either minimum business contacts with, or assets in, New York. As New York is a hub of international commercial litigation, application of Article 53 does not rely upon the existence of either *in personam* or *in rem* jurisdiction. (See *Lenchyshyn v Pelko Electric, Inc.*, 281 AD2d 42, 47 [4th Dept 2001]).⁷

Further, the Court of Appeals positively cited *Lenchyshyn* for the rationale supporting recognition of a foreign country judgment notwithstanding lack of a separate basis for jurisdiction over a defendant in New York: ". . . '[I]n proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment.'" (*CIBC Mellon Trust Co. v Mora Hotel Corp., N.V.*, 100 NY2d 215, 222 [2003][citation omitted]).

⁷ This Court is bound to follow the Fourth Department's determination in the absence of First Department precedent. Moreover, a number of lower courts in this Department have found *Lenchyshyn* not only binding, but also quite persuasive. (*Abu Dhabi Commercial Bank PJSC v Saad Trading*, 36 Misc 3d 389, 392-93 [Sup Ct, New York County 2012]; *Cadles of Grassy Meadows II, LLC v Katz*, 2008 NY Slip Op 32674U, *9 [Sup Ct, New York County 2008]).

Armstrong's attempt to analogize the long-arm jurisdiction requirement for purposes of confirmation of foreign arbitral awards to domestication of foreign country judgments is misplaced. Arbitral awards have historically been confirmed and converted into judgments, or vacated, in forums that have connection to either the parties, the underlying dispute or the arbitration forum. (See *Frontera Res. Azer. Corp. v State Oil Co. of the Azer. Republic*, 582 F3d 393, 396 [2nd Cir. 2009][following a number of other federal circuit decisions in reading into the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) the requirement of personal or *in rem* jurisdiction in the forum in which confirmation is sought]).

However, once an arbitration award has been confirmed and converted into a judgment in a foreign forum, such foreign country judgment is no longer subject to the New York Convention and is enforceable under Article 53. This is because ". . . the federal law implementing the New York Convention does not supersede state law governing enforcement of foreign judgments." (McLaughlin, Joseph T., *Enforcement of Arbitral Awards under the New York Convention-Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law 249, 271 [1986]; see also e.g., *V. Corp Ltd. v Redi Corp. (USA)*, 2004 US Dist Lexis 20424, * 8 [SDNY 2004] [on distinction between foreign arbitral awards and judgments]). Accordingly,

even if the Danish Judgment emanated from an arbitration (which it did not), *in personam* or *in rem* jurisdiction over defendant in New York would not be required.

Forum Non Conveniens

CPLR §5304(b)(7) permits a court to deny recognition of a foreign country judgment if "[i]n the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action." This subsection applies only if the court's jurisdiction rested solely on local service of process on the judgment debtor, i.e., where there was no other jurisdictional nexus to which the foreign tribunal could lay claim. (Siegel, Practice Commentaries, McKinney's Consol. Laws of New York, 7B CPLR 5304:1, at 551 [1997]).

Shipcraft has established that Armscor was served with process in the Philippines, not in Denmark. Thus, it appears that CPLR §5304(b)(7) is inapplicable here, since jurisdiction was not based only on personal service. Furthermore, Armscor expressly agreed in writing to resolve all disputes under the contract of carriage in Shipcraft's home jurisdiction, Denmark.

Armscor's argument that the Court should dismiss the proceeding pursuant to CPLR 327 is without any sound basis. CPLR 327 applies to active litigation, not to ministerial recognition of already-issued judgments. This is so even against the

backdrop of ongoing litigation in the Philippines. Even if a Philippine court elects not to abide by the principles of international comity and withholds recognition of the Danish Judgment, such action need not be given official imprimatur by this Court. (See *Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 10 NY3d 243, 248 [2008]; see also CPLR §5304(b)).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3213 for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the Clerk of Court enter judgment in favor of plaintiff and against defendant in the amount of € 240,829.00, together with interest at the rate of 9% from May 25, 2011, as calculated by the Clerk, and in the additional amount of DKK 56,502.50, together with costs as taxed by the Clerk.

This constitutes the decision and order of the Court.

Date: 2/19/13

New York, New York

ENTER:



Ellen M. Coin, A.J.S.C.