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Domestic Service on Foreign Corporation's Local Attorneys Deemed Proper Under Hague Convention And New York Law

By Lisa Lewis

On July 23, 2010, Judge Bernard J. Fried granted a petition for a temporary restraining order and preliminary injunction in aid of arbitration. *Invar International, Inc. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi*, Index No. 650628/2010 (Sup Ct, N.Y. County July 23, 2010). At issue was whether the petitioners' service of process on foreign respondent's U.S. attorneys violated the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the "Hague Convention").

Invar International, Inc. ("Invar") and Talex International, LLC ("Talex") (collectively with Invar, the "Petitioners") filed the petition for a temporary restraining order and preliminary injunction against respondent Zorlu Enerji Elektrik Uretim Anonim Sirketi ("Zorlu" or "Respondent"), a Turkish entity. The events giving rising to the action relate to an operating agreement dated January 31, 2006 (the "Operating Agreement") under which Invar, Talex and Zorlu formed a holding company called ICFS for the purpose of planning, developing and managing power plants in Moscow, Russia. Pursuant to the terms of the Operating Agreement, Zorlu held a majority 51% interest in the holding company. The Operating Agreement contained an arbitration clause which required that any dispute among the parties be settled by arbitration in Switzerland.

In 2007, the parties sought additional financing for their power plant projects in Moscow. Zorlu recommended an independent third-party, Bundoran, to provide the financing, and Bundoran provided a $780 million loan to ICFS and its wholly owned affiliates. Under the terms of the loan, the borrower had 120 days after a notice of default to cure the default before Bundoran could foreclose upon ICFS's pledged collateral, namely two power plants in Moscow owned by ICFS's wholly owned affiliates. In 2009, Zorlu notified Invar and Talex that it had "acquired" Bundoran. Because Zorlu was the majority owner ICFS, Invar and Talex requested that the loan agreement be restructured to remove any incentive for Zorlu to cause an event of default, thereby taking sole ownership of the pledged collateral. Although Zorlu initially agreed to restructure the loan agreement, the restructuring never took place.

In March 2010, Bundoran issued a default notice. Zorlu refused to refrain from foreclosing on

the power plants. In April 2010, pursuant to the terms of the Operating Agreement, Invar and Talex initiated arbitration against Zorlu in Geneva alleging that Zorlu fraudulently induced them into entering the loan agreement with Bundoran. In the Swiss arbitration, Zorlu was represented by U.S.-based counsel White & Case LLP ("White & Case").

On June 15, 2010, Petitioners filed a petition for a temporary restraining order and preliminary injunction in aid of arbitration. Petitioners also sought the court's permission to serve White & Case in D.C. on the basis that they did not have sufficient time to complete service pursuant to the Hague Convention because the 120-day grace period before Bundoran could foreclose on the power plants was about to expire. Respondent objected to the service as improper.

In reviewing whether service was proper, the court first looked at the threshold issue of whether service had violated the mandatory provisions of the Hague Convention. Judge Fried determined that the Hague Convention had not been violated because, although Zorlu was a Turkish entity and Turkey is a signatory to the Hague Convention, "the Hague Convention does not preclude domestic service on a foreign corporation pursuant to state statue, where such can be accomplished."

As a result, the court next looked at whether service on White & Case was proper under New York law. Judge Fried reviewed Section 311(b) of the New York Civil Practice and Law Rules (the "CPLR"), to determine whether service was proper. CPLR 311(b) states that if service upon a foreign corporation "is impracticable . . . service upon the corporation may be made in such a manner . . . the court . . . directs." In light of the imminent expiration of the grace period under the loan agreement, the court found that there was an adequate showing of impracticability since formal service under the Hague Convention would not have been complete by June 25, 2010. The court further held that service upon White & Case was proper since White & Case was currently representing Zorlu in the Switzerland arbitration and it was reasonable to expect that service upon White & Case would provide Zorlu with adequate notice. Thus, the constitutional requirements of notice were satisfied and service was deemed proper under New York law. As such, Judge Fried authorized service in the manner requested and Petitioners were permitted to serve White & Case.

This decision demonstrates that, in certain circumstances, domestic service on a foreign corporation can be proper. More specifically, the Hague Convention allows for domestic service on a foreign corporation where such service can be effectuated in compliance with state law. Under New York law, if foreign service pursuant to the Hague Convention is impracticable, the court can direct domestic service in a manner which meets the constitutional requirements of notice. As a result, foreign corporations with agents or attorneys located in the United States could be properly subject to service in the United States under New York law.

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