UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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HIGH HOPE ZHONGTIAN CORPORATION,

Plaintiff,

-against-

PEKING LINEN INC.,

Defendant.

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22-CV-7568 (VSB) (SN)

REPORT AND RECOMENDATION

SARAH NETBURN, United States Magistrate Judge.

TO THE HONORABLE VERNON S. BRODERICK:

This case concerns enforcement of an award of the China International Economic and Trade Arbitration Commission (the "Arbitration Commission") arising from contracts for the international sale of goods. Plaintiff seeks recognition and enforcement of a foreign arbitration award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), codified in Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201 *et seq*.

After the Defendant failed to appear, the Honorable Vernon S. Broderick entered an order granting default. ECF No. 24. Judge Broderick then referred this matter to my docket to conduct an inquest on damages. I recommend that the arbitration award be confirmed in full, and that the Plaintiff be awarded $928,767.99 plus the total Renminbi awarded converted to U.S. dollars at the time judgment is entered, and applicable prejudgment interest at nine percent per annum.

BACKGROUND

I. Factual Background

From December 29, 2016, through May 22, 2017, Plaintiff, a foreign corporation organized under the laws of the People's Republic of China, entered into 18 contracts for international sale of goods with the Defendant, a foreign business corporation registered to do business in New York. Compl. ECF No. 1, ¶¶ 2-7. The contracts were for the sale of bedding items from Plaintiff to Defendant for $945,618.51. Id. at ¶ 7, ECF No. 26, ¶ 1 ("FFCL"). Each contained a binding arbitration provision, providing that all disputes were to be litigated before the Arbitration Commission. FFCL ¶ 2. After the Plaintiff timely delivered the goods, the Defendant failed to pay. Id. at ¶ 3.

On September 7, 2021, the Arbitration Commission determined that: "(a) the contracts required disputes to be submitted for arbitration, (b) Plaintiff performed through delivery of the goods ordered, (c) Defendant failed to make payments, and (d) Defendant was served with the Notice of Arbitration along with other documents." FFCL ¶ 5-6. It granted judgment in favor of the Plaintiff in the amounts of (1) $928,767.99 in United States dollars (USD) for unpaid goods sold to the Defendant; (2) 150,000.00 in Renminbi (RMB) for attorney's fees; (3) RMB 4,870.00 for notary fees; and (4) RMB 186,097.00 for arbitration fees. Id. at ¶ 6, Compl., ¶ 28. Despite receiving a number of notices and opportunities to appear, the Defendant defaulted and did not defend itself in the arbitration. Compl. at ¶ 24.

II. Procedural Background

Plaintiff sued the Defendant for recognition and enforcement of a foreign arbitration award pursuant to the New York Convention. FFCL p. 2. Plaintiff successfully served the Summons and Complaint on the Defendant through the Secretary of State. ECF No. 6. The Defendant did not respond to the complaint. Upon the Plaintiff's request, the Clerk issued a

Certificate of Default. ECF No. 15. Subsequently, Plaintiff filed a motion for default judgment. After a show cause hearing, Judge Broderick granted the Plaintiff's Motion for Default. ECF No. 24.

Judge Broderick referred this matter to me for an inquest on damages, and the Plaintiff filed a Proposed Findings of Fact and Conclusions of Law in support of damages. ECF No. 26. To date, the Defendant has failed to appear.

DISCUSSION

I. Legal Standard

The Court of Appeals set forth the procedural rules applicable to the entry of a default judgment in City of New York v. Mickalis Pawn Shop, LLC:

> "Federal Rule of Civil Procedure 55 is the basic procedure to be followed when there is a default in the course of litigation." Vt. Teddy Bear Co. v. 1–800 Beargram Co., 373 F.3d 241, 246 (2d Cir. 2004). Rule 55 provides a "two-step process" for the entry of judgment against a party who fails to defend: first, the entry of a default, and second, the entry of a default judgment. New York v. Green, 420 F.3d 99, 104 (2d Cir. 2005). The first step, entry of a default, formalizes a judicial recognition that a defendant has, through its failure to defend the action, admitted liability to the plaintiff. . . . The second step, entry of a default judgment, converts the defendant's admission of liability into a final judgment that terminates the litigation and awards the plaintiff any relief to which the court decides it is entitled, to the extent permitted by Rule 54(c).

645 F.3d 114, 128 (2d Cir. 2011).

The Court of Appeals has stated, however, that "Rule 55 does not operate well in the context of a motion to confirm or vacate an arbitration award." D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 107 (2d Cir. 2006). Instead, "[w]here a petition to confirm an arbitration award is unopposed, the Second Circuit has instructed district courts to treat the petition "'as akin to a motion for summary judgment based on the movant's submissions' and the court 'may not grant the motion without first examining the moving party's submission to determine' that it satisfactorily demonstrates the absence of material issues of fact." Trustees of New York City

Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, & Apprenticeship, Journeyman Retraining, Educ. & Indus. Fund v. M & RR Constr. Corp., No. 22-cv-6467 (VSB) (SLC), 2022 WL 20652775, at *3 (Nov. 17, 2022), report and recommendation adopted, 2023 WL 5957120 (S.D.N.Y. Sept. 13, 2023) (internal citations omitted)). Thus, the Court analyzes the Plaintiff's petition as an unopposed motion for summary judgment. See id. at *3-4 (collecting cases). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" Vasquez v. Victor's Cafe 52nd St., Inc., No. 18-cv-10844 (VSB), 2019 WL 4688698, at *1 (S.D.N.Y. Sept. 26, 2019) (quoting Fay v. Oxford Health Plan, 287 F.3d 96, 103 (2d Cir. 2002)); see Fed. R. Civ. P. 56(a).

II. Confirmation of Award

A. Jurisdiction

"The Federal Arbitration Act creates a 'body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). The New York Convention is enforced in the United States through Chapter 2 of the FAA. 9 U.S.C. § 201 *et seq*. The United States and the People's Republic of China are signatories to the New York Convention.

The New York Convention "appl[ies] to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal," as well as "to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." New York Convention, art. I(1). In implementing the New York Convention, the FAA likewise provides that the New York Convention applies to "[a]n arbitration agreement or arbitral award arising out of a legal

relationship, whether contractual or not, which is considered as commercial . . . .” 9 U.S.C. § 202.

There are four basic requirements for enforcement of arbitration agreements under the Convention: “(1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope.” Drip Cap., Inc. v. M/S. Goodwill Apparels, 665 F. Supp. 3d 511, 518 (S.D.N.Y. 2023) (citing Dumitru v. Princess Cruise Lines, Ltd., 732 F. Supp. 2d 328, 335 (S.D.N.Y. 2010)). Here, the parties entered into 18 written contracts of sales with binding foreign arbitration provisions.

B. Confirmation

A district court shall confirm an arbitration award “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in” the New York Convention. 9 U.S.C. § 207. “Article V of the Convention specifies seven exclusive grounds[1] upon which courts may refuse to recognize an award.” Temsa Ulasim Araclari Sanayi v. Ticaret A.S., No. 22-cv-492 (JPC), 2022 WL 3974437, at *3 (S.D.N.Y. Sept. 1, 2022). The party opposing enforcement has the burden to prove that any one of the seven defenses applies. Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90 (2d Cir.

[1] “1. Recognition and enforcement of the award may be refused . . . if . . .(a) The parties . . . were . . . under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or . . .under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. . .; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority. . . .
2. Recognition and enforcement of an arbitral award may also be refused if . . .:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”
New York Convention, art. V.

2005). Confirmation under the New York Convention is a "summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm." Zeiler v. Deitsch, 500 F.3d 157, 164 (2d Cir. 2007). Courts are "extremely deferential to the findings of the arbitration panel." Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A., 49 F.4th 802, 809 (2d Cir. 2022) (citing Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 139 (2d Cir. 2007)); see Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 103 (2d Cir. 2013) ("The role of a district court in reviewing an arbitration award is 'narrowly limited' and 'arbitration panel determinations are generally accorded great deference under the [Federal Arbitration Act]' . . . This deference promotes the 'twin goals of arbitration, namely settling disputes efficiently and avoiding long and expensive litigation.'" (internal citations omitted)). "In sum, a district court must enforce an arbitral award unless a litigant satisfies one of the seven enumerated defenses [under the New York Convention]; if one of the defenses is established, the district court may choose to refuse recognition of the award." Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 106 (2d Cir. 2016).

The Defendant has failed to appear in this action, has not asserted any defenses against enforcement of the arbitration, and, therefore, has not disputed any of the proposed findings of fact. The Arbitration Commission assessed the merits of the evidence and reasonably determined that the Defendant "has defaulted on the payment of the goods, therefore, the [Plaintiff] had the right to require the [defendant] to pay all the amounts of the goods according to the Contracts and the law and bear the corresponding liability for default." Arbitral Award, ECF No. 26-6, 10; see D.H. Blair, 462 F.3d at 110 ("The arbitrator's rationale for an award need not be explained,

and the award should be confirmed 'if a ground for the arbitrator's decision can be inferred from the facts of the case.'" (internal citation omitted)). The undisputed evidence demonstrates that no material issue of fact remains. In light of the deferential standard, the Court recommends that the arbitration award is confirmed in full.

C. Damages

"The custom in U.S. courts is to convert any arbitration award issued in foreign currency to U.S. dollars." Qing Yang Seafood Imp. (Shanghai) Co. v. JZ Swimming Pigs, Inc., No. 21-cv-3587 (RPK) (TAM), 2022 WL 2467540, at *4 (E.D.N.Y. Apr. 15, 2022) (citing Yukos Capital S.A.R.L. v. Samaraneftegaz, 592 F. App'x 8, 12 (2d. Cir. 2014) (summary order); Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 954 (2d Cir. 1951); Nature's Plus Nordic A/S v. Nat. Organics, Inc., 78 F. Supp. 3d 556, 557 (E.D.N.Y. 2015)). Plaintiff argues that the currency conversion rate should be based on the day that Judge Broderick entered a default Order as to liability in this case. Although courts in this Circuit have taken different approaches in converting foreign currency awards into judgments, courts in diversity have generally applied New York Judiciary Law § 27(b), which uses "the rate of exchange prevailing on the date of entry of the judgment or decree . . . ." Qing Yang Seafood Imp. (Shanghai) Co., 2022 WL 2467540, at *5 (collecting cases). Thus, the Court recommends converting the arbitration award from RMB to USD based on the latest exchange rate reported by the Federal Reserve at the time the Court enters a final judgment. The Court recommends that Plaintiff's counsel submit a proposed order with the reported exchange rate between RMB to USD on the date when the final judgment is entered.

In conclusion, the Court recommends that the Plaintiff be awarded the full arbitral award: (1) USD $928,767.99 for unpaid goods sold to the Defendant; (2) RMB 150,000.00 for

attorney's fees; (3) RMB 4,870.00 for notary fees; and (4) RMB 186,097.00 for arbitration fees, with RMB converted to USD at the exchange rate reported by the Federal Reserve at the time that judgment is entered.

D. Prejudgment Interest

Plaintiff seeks an award of prejudgment interest at a rate of nine percent per annum. Prejudgment interest is available in actions brought under the New York Convention. Waterside Ocean Nav. Co. v. Int'l Nav. Ltd., 737 F.2d 150, 154 (2d Cir. 1984). It is within the Court's discretion whether to grant the Plaintiff's request for prejudgment interest. Seed Holdings, Inc. v. Jiffy Int'l AS, 5 F. Supp. 3d 565, 591 (S.D.N.Y. 2014) ("The decision whether to grant prejudgment interest in arbitration confirmations is left to the discretion of the district court." (internal citations omitted)). In this Circuit, there is a presumption in favor of prejudgment interest. See Waterside Ocean Nav. Co., 737 F.2d at 154.

The Arbitration Commission was silent as to any prejudgment interest in the arbitration award. However, "the common practice in this circuit 'is to grant interest at a rate of nine percent per annum—which is the rate of prejudgment interest under New York State law, N.Y. C.P.L.R. §§ 5001–5004—from the time of the award to the date of the judgment confirming the award.'" Seaport Glob. Holdings LLC v. Petaquilla Mins. Ltd., No. 19-cv-9347 (ER), 2020 WL 3428151, at *2 (S.D.N.Y. June 23, 2020) (citing 1199/SEIU United Healthcare Workers E. v. S. Bronx Mental Health Council Inc., No. 13-cv-2608 (JKG), 2014 WL 840965, at *8 (S.D.N.Y. Mar. 4, 2014)). Plaintiff requests prejudgment interest at a rate of nine percent per annum from September 7, 2021. I recommend granting that request and calculating the prejudgment interest from September 7, 2021, to the day that the Court enters a final judgment.

CONCLUSION

I recommend that the arbitration award be confirmed, and that Plaintiff be awarded $928,767.99 plus the total RMB awarded converted to USD at the time judgment is entered, and applicable prejudgment interest at nine percent per annum.

SARAH NETBURN
United States Magistrate Judge

DATED: April 15, 2024
New York, New York

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NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have 14 days from the service of this Report and Recommendation to file written objections under 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 6(a), 6(d). A party may respond to another party's objections within 14 days after being served with a copy. Fed. R. Civ. P. 72(b)(2); see Fed. R. Civ. P. 6(a), 6(d). These objections shall be filed with the Court and served on any opposing parties. See Fed. R. Civ. P. 72(b)(2). Courtesy copies shall be delivered to the Honorable Vernon S. Broderick if required by that judge's Individual Rules and Practices. Any requests for an extension of time for filing objections must be addressed to Judge Broderick. See Fed. R. Civ. P. 6(b). The failure to file timely objections will waive those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. James, 712 F.3d 79, 105 (2d Cir. 2013).