UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SERVAAS, INC., Plaintiff, -against- REPUBLIC OF IRAQ, and MINISTRY OF INDUSTRY OF THE REPUBLIC OF IRAQ, Defendants.	09 Civ. 1862 (RMB) (RLE) **DECISION & ORDER**

I. Background

On February 27, 2009, SerVaas Incorporated ("Plaintiff" or "SerVaas") filed a complaint, pursuant to New York's Uniform Foreign Country Money-Judgments Recognition Act, N.Y. C.P.L.R. §§ 5301 et seq. ("Recognition Act"), against the Republic of Iraq ("Iraq") and the Ministry of Industry of the Republic of Iraq ("Ministry," and together with Iraq, "Defendants"), seeking recognition of a final foreign money judgment in the amount of $14,152,800 entered in favor of Plaintiff by the Paris Commercial Court on April 16, 1991 ("French Judgment"). (Compl., dated Feb. 27, 2009, ¶¶ 1, 7.)

By Decision and Order, dated February 19, 2010, the Court denied Defendants' motion to dismiss this action pursuant to Rules 12(b)(1), (2), and (6) of the Federal Rules of Civil Procedure, finding, among other things, that (1) the Court had jurisdiction over both the Ministry and Iraq; (2) "[i]t is not disputed that the French Judgment is both final and enforceable where rendered"; and (3) "while Iraq was not a party to the French Judgment, in that the Ministry of Industry was the named party against whom the Judgment was rendered, under New York law the French Judgment can be recognized against Iraq by ordinary principles of contract and

agency." SerVaas Inc. v. Republic of Iraq, 686 F. Supp. 2d 346, 356–60 (S.D.N.Y. 2010) (internal quotation marks omitted).

On February 16, 2011, the United States Court of Appeals for the Second Circuit affirmed, holding that "although there may be cases in which it is difficult to distinguish between an independent instrumentality and a political subdivision of a foreign sovereign, this is not one of them." SerVaas Inc. v. Republic of Iraq, No. 10-828-cv, 2011 WL 454501, at *2–3 (2d Cir. Feb. 16, 2011) (internal quotation marks omitted). The Second Circuit stated, "we see no meaningful legal distinction between [the Ministry] and the Republic." Id.

On August 15, 2011, SerVaas filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure arguing, among other things, that (1) the French Judgment should be recognized against the Ministry; (2) the French Judgment should also be recognized against Iraq because the Ministry and Iraq are one in the same; and (3) the Defendants' affirmative defenses are "wholly unsupported in law or fact, and should be dismissed." (Pl. Mem. of Law in Supp. of Mot. for Summ. J., dated Aug. 15, 2011 ("Pl. Mem."), at 10–11, 14–18, 20–21.) Plaintiff also points out that the High Court of Justice, Queens Bench Division issued a decision ("English Judgment"), dated November 5, 2009, in which it recognized "the French Judgment against both Iraq and the Ministry in England and Wales."[1] (Id. at 24.)

[1] On November 5, 2009, the English High Court of Justice, Queens Bench Division ordered that the French Judgment be registered against both the Ministry of Industry and the Republic of Iraq "as a judgment . . . in England. . . ." (See Aff. of Jamie Edward Harrison, dated July 21, 2011, at ¶ 3, Exs. 1, 5 & Ex. 4 at ¶ 4 ("SerVaas has been advised that Iraq is responsible for the debts of the Ministry").) The English Judgment "became enforceable in England & Wales on 2 September 2010." (Id.)

On October 24, 2011, Defendants filed an opposition, arguing, among other things, that the French Judgment should not be recognized against Iraq because Iraq was not a party to the French proceeding and is a "separate juridical person from the Ministry," and Plaintiff has failed to "produce admissible evidence to prove the non-existence of Iraq's affirmative defenses." (Defs. Mem. in Opp'n to Pl.'s Mot. for Summ. J., dated Oct. 24, 2011 ("Def. Opp'n"), at 8–10.) With respect to the English Judgment, Defendants contend that "SerVaas improperly attempts to litigate by way of its summary judgment motion a claim under Article 53 that never has been the subject of a Complaint, has never been served on either the Ministry or Iraq in accordance with any of the strict due process service requirements of the [Foreign Sovereign Immunities Act ("FSIA")]." (Id. at 23.) Defendants did not respond to SerVaas's arguments that the French Judgment should be recognized against the Ministry. (See id.)

On November 14, 2011, SerVaas filed a reply. (See Pl. Reply Mem. of Law in Further Supp. of Mot. for Summ. J., dated Nov. 14, 2011.) The parties waived oral argument. (See Hr'g Tr., dated July 28, 2011.)[2]

Familiarity with the facts of this case, as well as the Decision and Order of this Court, dated February 10, 2010, and the opinion of the United States Court of Appeals for the Second Circuit, dated February 16, 2011, is assumed, and those facts are incorporated herein by reference.

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[2] Defendants have failed to submit a Rule 56.1 Statement in response to Plaintiff's submission as required by Local Civil Rule 56.1. See Local Civ. R. 56.1. Accordingly, the Court may deem the facts in SerVaas's Rule 56.1 statement as admitted to the extent that they are uncontroverted by the admissible evidence. See Shmueli v. City of N.Y., No. 03 Civ. 1195, 2007 WL 1659210, at *1 n.1 (S.D.N.Y. June 7, 2007); Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 72 (2d Cir. 2001) ("The facts set forth in a moving party's statement will be deemed to be admitted unless controverted by the opposing party's statement.").

For the reasons set forth below, SerVaas's motion for summary judgment is granted.

II. Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In evaluating the record to determine whether there is a genuine issue as to any material fact, the evidence of the [non-movant] is to be believed, and all justifiable inferences are to be drawn in his favor." Soc'y of Lloyd's v. Edelman, No. 03 Civ. 4921, 2005 WL 639412, at *3 (S.D.N.Y. Mar. 21, 2005) (internal quotation marks omitted). The non-movant must set forth specific facts showing that there is a "genuine factual issue for trial." Thomas and Agnes Carvel Found. v. Carvel, 736 F. Supp. 2d 730, 742 (S.D.N.Y. 2010).

"New York has a long-standing tradition of permitting the enforcement of foreign country money judgments." S.C. Chimexim S.A. v. Velco Enters. Ltd., 36 F. Supp. 2d 206, 211 (S.D.N.Y. 1999) (internal quotation marks omitted); see John Galliano, S.A. v. Stallion, Inc., 930 N.E.2d 756, 758 (N.Y. 2010).

"Where a plaintiff uses a summary judgment motion, in part, to challenge the legal sufficiency of an affirmative defense[,] . . . a plaintiff may satisfy its Rule 56 burden by showing that there is an absence of evidence to support an essential element of the non-moving party's case." F.D.I.C. v. Giammettei, 34 F.3d 51, 54 (2d Cir. 1994) (internal quotation marks omitted).

III. Analysis

(1) Recognition Against The Ministry

Defendants concede that the French Judgment is "final, conclusive and enforceable" against the Ministry. (Decl. of John Piskora, dated Aug. 12, 2011 ("Piskora Decl."), Ex. 2 at

¶ 21 ("The Ministry admits that the April 16, 1991, Order is final, conclusive and enforceable against the Ministry."); see Hr'g Tr., dated Feb. 18, 2010, at 5–6 (THE COURT: "So your position is that you acknowledge the debt of the Ministry of Industry. Is that your position?" DEFS. COUNSEL: "I acknowledge that there is a French court judgment and that that judgment is enforceable in France and in the EU." THE COURT: "And [Defendants] lost in each instance in the French courts and courts of appeal, if I understand it correctly." DEFS. COUNSEL: "Yes. We don't contest there is a final judgment of the French court, yes, your Honor.").) The French Judgment is recognized against the Ministry under N.Y. C.P.L.R. § 5302. See Carvel, 736 F. Supp. 2d at 746; Chimexim, 36 F. Supp. 2d at 212; CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 792 N.E.2d 155, 159–60 (N.Y. 2003).

(2) Recognition Against Iraq

SerVaas argues that the Ministry and Iraq are the "same party with no meaningful legal distinction." (Pl. Mem. at 19.) Defendants counter that the Ministry is an "independent and separate juridical entit[y] that cannot bind other ministries or Iraq." (Def. Opp'n at 11.)

New York's Recognition Act provides for recognition of "any foreign country judgment which is final, conclusive and enforceable where rendered." N.Y. C.P.L.R. § 5302. A foreign country judgment is "conclusive" if (1) the judgment was rendered under a system which provides impartial tribunals or procedures compatible with the requirements of due process of law, and (2) "the foreign court [had] personal jurisdiction over the defendant." N.Y. C.P.L.R. § 5304(a). "New York may, and appropriately should, recognize a foreign judgment predicated on any jurisdictional basis it recognizes in its internal law." Canadian Imperial Bank of Commerce v. Saxony Carpet Co., Inc., 899 F. Supp. 1248, 1252–53 (S.D.N.Y. 1995) (citing N.Y. C.P.L.R. § 5305(b)); see Chimexim, 36 F. Supp. 2d at 211 ("New York law governs actions

brought in New York to enforce foreign judgments."); Fed. R. Civ. P. 69(a).[3] For example, New York allows for personal jurisdiction over a nonsignatory to an arbitration agreement where the signatory "is so controlled by the other as to be a mere agent, department or alter ego of the other." People ex rel. Vacco v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 849–50 (N.Y. Sup. Ct. 1999). And, a nonsignatory may also be "estopped from asserting a lack of personal jurisdiction . . . . when it receives a direct benefit from a contract containing an arbitration clause." Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 352–53 (2d Cir. 1999) (internal quotation marks omitted).

As to the first prong, it is undisputed that the French courts provided impartial tribunals and adequate due process in rendering the French Judgment. (See Piskora Decl., Ex. 2 at ¶ 21); La Societe De Diffusion Vinicole, S.A. v. Peartree Imports, Inc., No. 83 Civ. 6478, 1984 WL 172, at *4 (S.D.N.Y. Apr. 5, 1984) ("[T]his Court has no basis for concluding that due process is not accorded there [in France]."); Galliano, 930 N.E.2d at 759.

As to the second prong, the Court finds that the French courts had personal jurisdiction over Iraq as an alter ego of the Ministry. See Chimexim, 36 F. Supp. 2d at 211; see also Palestine Monetary Auth. v. Strachman, 62 A.D.3d 213, 223 (N.Y. App. Div. 2009) (enforcing judgment against related government entities where the "evidence and testimony at the hearings tended to support the contention that the [Palestine Monetary Authority] is legally

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[3] The parties' suggestion that the Court analyze Iraq's alter-ego status under federal common law, international law, or Iraqi law pursuant to First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec"), 462 U.S. 611 (1983) and Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Federation, 361 F.3d 676 (2d Cir. 2004), is not compelling. (See Pl. Mem. at 19; Def. Opp'n at 12–13.) Neither Bancec nor Noga involved New York's Recognition Act, and these cases serve as persuasive, rather than controlling, authority.

indistinguishable from the [Palestinian Authority]."); Bancec, 462 U.S. at 632–34; Noga, 361 F.3d at 690. The following factors show irrefutably that Iraq is an alter ego of the Ministry:

> (A) the preliminary contract, entered into between SerVaas and the Ministry on September 10, 1988 ("Preliminary Contract"), required the Ministry to receive approval from "the appropriate governmental authority of Iraq" before the agreement could be finalized (Decl. of Dr. Beurt SerVaas, dated Aug. 11, 2011 ("2011 SerVaas Decl."), Ex. 1, § 5.1);
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> (B) the contract, entered into between SerVaas and the Ministry on August 8, 1989 ("Contract"), reflects that "approval by the appropriate governmental authority of Iraq" was given on October 10, 1988 (2011 SerVaas Decl., Ex. 1, § 5.1);
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> (C) the telex, dated October 6, 1988, confirms that such approval was given and states "that the contract has been approved by our higher authority" (Decl. of Dr. Beurt SerVaas, dated Aug. 13, 2009 ("2009 SerVaas Decl."), Ex. E; see 2011 SerVaas Decl., Ex. 1, § 5.1);
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> (D) the Central Bank of Iraq established a line of credit at an American bank branch, through which the Ministry paid SerVaas (see Hr'g Tr., dated Feb. 18, 2010, at 17:6–7);
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> (E) the freeze agreement, entered into between the Iraq, the Ministry, and SerVaas on August 27, 1992 ("Freeze Agreement"), provides that debts owed pursuant to the Contract were owed to SerVaas by "Iraq," i.e., "The State of Iraq, more in particular the Ministry of Industry" (2009 SerVaas Decl., Ex. K);
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> (F) the Freeze Agreement provides that the French Judgment obligated Iraq to pay SerVaas, (2009 SerVaas Decl., Ex. K, at 1);
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> (G) the Freeze Agreement was signed in the name of the "State of Iraq" by lawyers from the Ministry of Industry (2009 SerVaas Decl., Ex. K, at 4);
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> (H) at the time the Ministry entered into the Contract with SerVaas, the Ministry was an integral part of the executive branch of the Iraqi central government (Piskora Decl., Ex. 11 ("Iraqi Constitution") at art. 66), and Iraqi law regulated "the formation of ministries, their functions, and their specializations, and the authorities of the Ministry" (see id. at art. 86.);
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> (I) the head of the Ministry was the Minister of Industry and Minerals, who served directly under Iraq's prime Minister as a "politically-appointed" member of the Council of Ministries, which is the Prime Minister's cabinet (Pl.'s Local R. 56.1 Statement of Undisputed Facts, dated Aug. 15, 2011, at ¶¶ 6–7; see Iraqi Constitution arts. 66, 76, 78, 80, 86.);

(J) the Ministry was constitutionally required to "submit the draft general budget bill" through the Council of Ministries to the Iraqi legislature for approval (see Iraqi Constitution at arts. 48, 57, 62); and

(K) as the Paris Commercial Court determined, the Ministry is "an emanation of the Republic of Iraq." (2011 SerVaas Decl. Ex. 3, at 2.)

The Court is further persuaded that Iraq received "a direct benefit" from the Contract between the Ministry and SerVaas. Am. Bureau, 170 F.3d at 352–53; (see 2011 SerVaas Decl. Ex. 3, at 2 (stating that the Ministry received the benefits of services and materials).) Accordingly, Iraq is estopped from asserting that it was not bound by the French Judgment. See Am. Bureau, 170 F.3d at 352–53; All Metro Health Care Servs, Inc. v. Edwards, 884 N.Y.S.2d 648, 652 (N.Y. Sup. Ct. 2009).

The Court recognizes the French Judgment against Iraq as "final, conclusive, and enforceable" under N.Y. C.P.L.R. § 5302. See World Interactive, 714 N.Y.S.2d at 849–50 (N.Y. Sup. Ct. 1999). As the Second Circuit Court of Appeals stated, there is "no meaningful legal distinction between [the Ministry] and the Republic." SerVaas Inc. v. Republic of Iraq, No. 10-828-cv, 2011 WL 454501, at *2–3 (2d Cir. Feb. 16, 2011).

(3) The Ministry's Affirmative Defenses[4]

The Ministry's affirmative defenses are rejected as follows:

a) Personal Jurisdiction: As previously determined, the Court has personal jurisdiction with respect to the Ministry under the "commercial activities exception" of the FSIA. SerVaas,

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[4] Both Defendants appear to have taken a "kitchen sink" approach to stating their affirmative defenses. Internet Law Library, Inc. v. Southridge Capital Mgmt., LLC, No. 01 Civ. 6600, 2005 WL 3370542, at *6 (S.D.N.Y. Dec. 12, 2005) (dismissing affirmative defenses where party "included in their pleadings an everything-but-the-kitchen-sink list of affirmative defenses that they do not even attempt to support"). Any affirmative defenses not discussed in Section (3) have been considered by the Court and rejected (for substantially the same reasons set forth in the balance of this decision).

686 F. Supp. 2d at 356, aff'd 2011 WL 454501, at *1; see also Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 29 F.3d 79, 80 (2d Cir. 1994) (The "jurisdictional challenge is squarely foreclosed by our earlier opinion.").

b) Subject Matter Jurisdiction: Similarly, as previously determined, the Court has subject matter jurisdiction with respect to the Ministry under the "commercial activities exception" of the FSIA. SerVaas, 686 F. Supp. 2d at 356, aff'd 2011 WL 454501, at *1; see Seetransport, 29 F.3d at 80.

c) Public Policy: The Court finds no reason whatsoever to conclude that the Ministry's obligation—"which does not appear to be seriously contestable"—is violative of New York's public policy. (French J. at 4); see Carvel, 736 F. Supp. 2d at 749 ("To avoid recognition of a foreign judgment on public-policy grounds, the defendant must satisfy a very challenging standard."); Galliano, 930 N.E.2d at 759.

d) Laches: The Court finds no evidence that SerVaas delayed unnecessarily in initiating this action or that the Ministry was prejudiced by delay. See Carnival Carting, Inc. v. N.L.R.B., Nos. 10–3408, 10–3410, 2012 WL 10968, at *3 (2d Cir. Jan. 4, 2012) ("The doctrine of laches requires proof of lack of diligence and prejudice.").

e) Statute of Limitations: SerVaas filed its claim on February 27, 2009 which was well within the twenty-year limitations period (running from entry of the French Judgment on April 16, 1991). See N.Y. C.P.L.R. § 211(b); JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. and Trade Servs., Inc., 295 F. Supp. 2d 366, 377 (S.D.N.Y. 2003); Solow v. Domestic Stone Erectors, Inc., 645 N.Y.S.2d 17, 17 (N.Y. App. Div. 1996).

f) Sovereign Immunity: The Ministry is not entitled to sovereign immunity because the "commercial activities exception" of the FSIA applies. SerVaas, 686 F. Supp. 2d at 356, aff'd 2011 WL 454501, at *1; see Seetransport, 29 F.3d at 80.

(4) Iraq's Affirmative Defenses[5]

Iraq's affirmative defenses are rejected as follows:

a) Failure to State a Claim: The Court has previously concluded that SerVaas's complaint states a claim for relief under New York's Recognition Act. See SerVaas, 686 F. Supp. 2d at 359; see also supra Section II.2.

b) Subject Matter Jurisdiction: The Court has previously determined that it has subject matter jurisdiction with respect to Iraq under the "commercial activities exception" of the FSIA. SerVaas, 686 F. Supp. 2d at 358 n.10, aff'd 2011 WL 454501, at *3; see Seetransport, 29 F.3d at 80.

c) Personal Jurisdiction: The Court has previously determined that it has personal jurisdiction over Iraq under the "commercial activities exception" of the FSIA. SerVaas, 686 F. Supp. 2d at 358 n.10, aff'd 2011 WL 454501, at *3; see Seetransport, 29 F.3d at 80.

d) Public Policy: The Court finds no reason whatsoever to conclude that recognition of the French Judgment against Iraq is violative of New York's public policy. Quite the contrary, France "shares [New York's] notions of procedure and due process of law." Galliano, 930 N.E.2d at 759; see Carvel, 736 F. Supp. 2d at 749.

e) Laches: The Court finds no evidence that SerVaas delayed unnecessarily in initiating this action or that Iraq was prejudiced by delay. See Carnival, 2012 WL 10968, at *3.

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[5] See supra note 4 at p8.

f) Comity: The doctrine of international comity does not bar this action. Quite the opposite is true, i.e., the Recognition Act "codifie[s] the principles of comity by statute." Chimexim, 36 F. Supp. 2d at 211.

g) Statute of Limitations: SerVaas filed its claim on February 27, 2009, which was well within the twenty-year limitations period (running from entry of the French Judgment on April 16, 1991). See N.Y. C.P.L.R. § 211(b); JSC Foreign, 295 F. Supp. 2d at 377; Solow, 645 N.Y.S.2d at 17.

h) Sovereign Immunity: Iraq is not entitled to sovereign immunity because the "commercial activities exception" of the FSIA applies. SerVaas, 686 F. Supp. 2d at 356, aff'd 2011 WL 454501, at *1; see Seetransport, 29 F.3d at 80.

i) "All Applicable Rules of Federal Civil Procedure": Defendants' asserted affirmative defense under "all applicable rules of federal civil procedure" is totally unpersuasive. It fails to meet the minimum pleading requirements under Fed. R. Civ. P. 8(a). See Arbitron Inc. v. Tralyn Broadcasting, Inc., 526 F. Supp. 2d 441, 447 (S.D.N.Y. 2007); Aspex Eyewear, Inc. v. Clariti Eyewear, Inc., 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2008); F.D.I.C. v. Giammettei, 34 F.3d at 54.

(5) The English Judgment

SerVaas argues that it "obtained recognition of the French Judgment as against both the Ministry and [Iraq] in England and Wales," and that the Court should recognize "the English Judgment as against both the Ministry and [Iraq]." (Pl. Mem. at 24.) Defendants argue that "SerVaas improperly attempts to litigate by way of its summary judgment motion a claim under Article 53 that never has been the subject of a Complaint, has never been served on either the Ministry or Iraq in accordance with any of the strict due process service requirements of the FSIA." (Def. Opp'n at 23.)

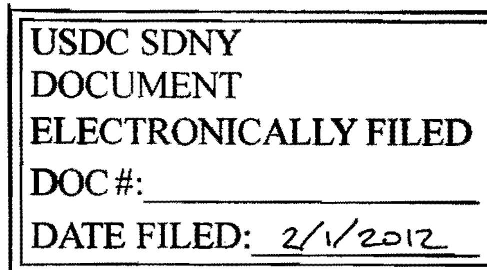
Because the Court recognizes the French Judgment against the Ministry and Iraq, the Court need not reach the question whether the English Judgment should also formally be recognized. See Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 573 n.4 (2d Cir. 2005).

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment [#50] is granted.

Dated: New York, New York
February 1, 2012

RICHARD M. BERMAN, U.S.D.J.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