

**Stone Column Trading House Ltd. v Beogradska
Banka A.D. in Bankruptcy**

2017 NY Slip Op 32077(U)

October 2, 2017

Supreme Court, New York County

Docket Number: 650228/13

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
STONE COLUMN TRADING HOUSE LIMITED,

Index No. 650228/13

Claimant,

-against-

BEOGRADSKA BANKA A.D. IN BANKRUPTCY

Claimant,

STONE COLUMN TRADING HOUSE LIMITED

-against-

Claimant.

-----X

Hon. C. E. Ramos, J.S.C.:

In motion sequence 07, claimant Stone Column Trading House Limited (Stone Column) moves for judicial notice of Cyprus and Yugoslav law as relates to the validity of certain powers of attorney (CPLR 4511).

In motion sequence 08, Stone Column moves for a determination of the applicable choice of law (CPLR 4511).

Claimant Beogradska Banka A.D. in Bankruptcy (the Beogradska trustee) cross-moves for an order finding that the powers of attorney at issue are valid and effective under New York law.

Stone Column Complaint

The relevant events at issue in this action arose in the midst of the protracted civil war that erupted in the former Socialist Federal Republic of Yugoslavia (Yugoslavia).

Stone Column is a Cyprus corporation that was engaged in the import and export of energy products and raw materials between private companies in the former Yugoslavia and outside trading partners. Stone Column was incorporated by three Yugoslav nationals, Dragojle Radonjic, Jovica Aleksic, and Orce Korunovski. According to Stone Column, the existing banking system in war-time Yugoslavia was unable to effectively support international transactions, because the Yugoslav currency was experiencing severe hyperinflation. Consequently, Stone Column sought to deposit its funds in a foreign banking institution.

On March 31, 1992, Stone Column deposited \$20 million in a newly-created account (Stone Column account) in Beogradska Banka New York Agency (Beogradska NY), the New York branch of a foreign-licensed Yugoslavian bank. The very next month, the United Nations imposed economic sanctions on Yugoslavia, followed by a U.S. imposed trade and economic embargo, and the fall of the Yugoslav government. In May 1993, a unit of the U.S. Treasury Department closed Beogradska NY, and froze its assets for over a decade.

Once the U.S. embargo on Yugoslavia (now known as the Republic of Serbia), was lifted, the Superintendent of Financial Services for the State of New York (Superintendent)¹ took

¹ The Superintendent is the statutory receiver tasked with liquidating failed foreign banks' New York assets and managing the claims process to pay off the bank's creditors (see generally

possession of Beogradska NY's New York office, in January 2002. Thereafter, the assets of Beogradska NY were the subject of protracted litigation in federal court between the Superintendent and a competing Serbian bank receiver. The litigation was ultimately settled.

On January 13, 2012, Stone Column presented its claim to the Superintendent for the balance of its account, \$20 million plus interest. On July 13, 2012, the Superintendent rejected Stone Column's claim. Shortly thereafter, Stone Column commenced this action challenging the Superintendent's rejection, under New York Banking Law § 625 (3).

Beogradska Banka A.D. in Bankruptcy Complaint

According to the Beogradska trustee's complaint, the \$20 million deposited in the Stone Column account constitutes a portion of a \$40 million loan issued by Beobanka dd Belgrade (Beobanka), a bank which operated within the Beogradska banking system, to the City of Belgrade for the purpose of building a sports stadium in Belgrade in the early to mid-1990s, and that it is the true owner of the funds in the Stone Column account.

The Beogradska trustee alleges that two of Stone Column's directors executed a power of attorney (POA) in favor of Zeljko Popovic, an executive at Beobanka, and Branislav Jerotic, a

In re Liquidation of Jugobanka, A.D., 46 Misc3d 615, 616-17 [Sup Ct, NY County 2014, Ramos, J.]

director of Limes d.o.o., a limited liability company incorporated in the former Yugoslavia.

Subsequently, Popovic and Jerotic, purporting to act as agents on behalf of Stone Column pursuant to the POA, sent letters to Beogradska NY requesting that Beogradska NY enter into an agreement with the National Bank of Yugoslavia (now the National Bank of Serbia [NBS]) for the purpose of facilitating NBS's "buy back" of the frozen funds in the Stone Column account, in exchange for the release of Yugoslav currency to Limes. In exchange, Beogradska NY purportedly agreed to pay NBS back with the frozen funds in the Stone Column account (Beogradska-NBS agreements).

Beogradska NY submitted its claim to the Superintendent, in its purported capacity as trustee to the legal successor of NBS and pursuant to the Beogradska-NBS agreements. The Superintendent rejected Beogradska's claim, and the Beogradska trustee commenced this action against the Superintendent.

Because Stone Column's and the Beogradska trustee's lawsuits arise out of the same account with Beogradska NY, the parties entered into a stipulation of consolidation and discharge (stipulation) (NYSCEF Doc No. 14). In that stipulation, the parties agreed to consolidate Stone Column's and Beogradska trustee's lawsuits into a single action before this Court, who will determine which party has the superior right to the Stone

Column account.

Discussion

I. Judicial Notice of Foreign Law

Stone Column maintains that Cyprus law applies to the validity of the POA because 1) Stone Column is a Cyprus based company, governed by Cyprus law; 2) the POA is broadly phrased, purporting to grant the agents power over Stone Column's "operations" without reference to any particular asset or its location; 3) at the time POA was purportedly executed, Stone Column did not have a bank account, office, asset or any other contact in New York; 4) all of Stone Column's directors were Yugoslav nationals who did not speak English and have never traveled to the United States; 5) the named agents in the POA were based in and doing business in Yugoslavia; and 7) the POA, if enforced, was to be used solely between parties based in Yugoslavia.

In its opposition, the Beogradska trustee argues that Stone Column has failed to conduct a proper conflicts analysis in its motion, and thus, New York law applies and the POA should be found valid.

Following oral argument on the motion and cross-motion, this Court permitted the parties to submit supplemental briefing on the issue of choice of law, specifically, with regard to the application of New York law (3/27/17 Tr 54-47).

In its supplemental submission, the Beogradska trustee "concedes" that Yugoslav law applies to the validity of the FOA in light of the Court's "determination that the weight of the activities took place in Yugoslavia" (Marion Supp. Aff., ¶ 20).

To be clear, this Court did not make any factual determinations. This Court plainly reserved decision on determination of choice of law, while giving the parties the opportunity to submit supplemental briefing on the potential applicability of New York law (3/27/17 Tr 44-47).

The first issue to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws (*Matter of Allstate Ins. Co. [Stolarz- New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). Only when it can be concluded that no conflict of laws exists can a choice of law analysis be dispensed with, whereupon the Court will apply New York law (*J. Aron & Co. v Chown*, 231 AD2d 426 [1st Dept 1996]). Correspondingly, where the Court identifies an actual conflict of laws, a choice of law analysis is required (*Id.*).

An additional complicating factor in this case is that the laws of two potentially applicable jurisdictions are foreign. A party who intends to raise an issue concerning the law of a foreign country shall give notice by, inter alia, a motion (CPLR 4511 [b]). "The court may choose to take judicial notice of the laws of a foreign jurisdiction, but it is only required to do so

when the party requesting the notice provides 'sufficient information to enable it to comply with the request,' " pursuant to CPLR 4511 (b) (*Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 484-85 [1st Dept 2013]; *Warin v Wildenstein & Co.*, 297 AD2d 214, 214 [1st Dept 2002])). "

Copies of statutes are prima facie evidence of the law when contained in publications generally admitted as evidence of the existing law of the jurisdiction where it is in force (*Sea Trade Mar. Corp.*, 111 AD3d at 484-85). Expert affidavits interpreting the relevant legal provisions can also be a basis for constructing foreign law when accompanied by sufficient documentary evidence (*Id.*).

The court can take judicial notice of foreign law even when the parties submit conflicting expert affidavits and need not hold an evidentiary hearing where either party submits sufficient persuasive information to determine the scope and effect of a particular law (*cf Korea Life Ins. Co., Ltd. v Morgan Guar. Trust Co. of New York*, 269 FSupp2d 424, 439-440 [SD NY 2003], *reconsideration denied* 2004 WL 1858314 [SD NY 2004]). In this regard, the motion court has broad discretion to take notice of the laws of a foreign country, based on the evidence presented (CPLR 4511 [b]).

A. Cyprus law

Stone Column has presented competent proof sufficient for

this Court to take judicial notice of Cyprus law. Stone Column submitted the sworn expert affidavit of Cypriot attorney, Yiannos Georgiades, Esq., accompanied by his curriculum vitae detailing his legal expertise, and authenticated by an apostille certificate.² Stone Column has also submitted certified translations of all of the Cyprus laws referenced in Georgiades' testimony, including the relevant portion of the Cyprus Companies Law, Certifying Officers Law, and caselaw interpreting these statutes (Exhibits 4-5, annexed to the Georgiades Aff.).

Georgiades concludes that the POA is invalid under Cyprus law because it was not properly executed before a certifying officer pursuant to chapter 39 of the Cyprus Certifying Officers Law, and was not issued following a valid decision or resolution of Stone Column's board of directors, pursuant to Stone Column's Articles of Association (Georgiades Aff., ¶¶ 8-11).

Georgiades explains that the Minister of Interior appoints

² Cyprus, Serbia and the US are signatories to the Hague Convention. An apostille is an authentication of a public document issued pursuant to the 1961 Hague Convention. The Hague Convention provides for the simplified certification of public (including notarized) documents to be used in countries that have joined the convention. Under the Hague Convention, signatory countries have agreed to recognize public documents issued by other signatory countries if those documents are authenticated by the attachment of an international recognized form of authentication, known as the apostille. The apostille ensures that documents issued in one signatory country will be recognized as valid in another signatory country (New York State Department of State, Division of Licensing Services, Authentication of Public Documents: <https://www.dos.ny.gov/licensing/apostille.html> [accessed Sep. 15, 2017]).

certifying officers, and upon appointment, an officer receives a personalized seal; when certifying a document, the certifying officer affixes his seal (*Id.*, ¶ 9). In addition, the person executing the document must be personally known to the certifying officer, or the person's identity must be attested by two persons personally known to the certifying officer who must also sign the document, in addition to affixing a stamp (*Id.*, ¶ 10).

Georgiades states that, even if a power of attorney has the proper seal and certification, it is unenforceable where it does not have the signature of all of the directors of the company, with certain exceptions (*Id.*, §§ 13-18). Georgiades explains that interpreting Stone Column's Articles of Association under Cyprus Law, any matter may be decided by a majority vote of all directors of the company.

The Beogradska trustee submitted a competing foreign law affidavit by a Cypriot attorney, Angelos Paphitis, who disagrees that a power of attorney need be certified in order to be deemed valid. He testifies that certification, obtaining an apostille and/or a notary on a power of attorney is merely a modern commercial trend, but is not a legally binding obligation. On this basis, he concludes that the POA is perfectly valid under Cyprus law (Paphitis Aff., Exhibit B, annexed to the Marion Aff.).

Paphitis also states that "all three directors of the

Company [Stone Column] were presented at the meeting" when the POA was purportedly executed (Exhibit B, annexed to the Marion Aff, ¶¶ 9-10).

Paphitis' affidavit is unsworn, does not contain an apostille certificate, and does not include certified translations of the statutory and common law that he references. Moreover, only two directors' signatures appear on the POA and the signature line for Jovica remains blank. Jovica has repeatedly denied in sworn testimony that he was notified of the board meeting where the POA was purportedly presented for approval, or ever approved it, for that matter. Paphitis's conclusion that the POA is valid because "all three directors of the Company [Stone Column] were presented at the meeting," is simply puzzling, in light of the evidentiary record.

The consequence of these critical omissions and the failure to adequately present Cyprus law is that the Beogradska trustee's expert witness statement is not to be given any weight, because it does not provide sufficient information for this Court to accord the construction of Cyprus law that its expert urges. Thus, the Beogradska trustee fails to rebut the presentation of Cyprus law by Stone Column's expert (see *Sea Trade Mar. Corp.*, 111 AD3d at 483).

B. Yugoslav Law

According to Stone Column's Yugoslav law expert, the

Yugoslav laws applicable in 1992 dictate that the POA is to be construed according to the laws of Cyprus because the POA was purportedly issued by Stone Column's directors at a board meeting in Cyprus, and the POA are instruments of corporate governance governed by Cyprus law because is where Stone Column is incorporated (A. Nikolic Aff., §§ 14-17).

In addition to the affidavit of the Yugoslavian law expert by an apostille, Stone Column presented the Court with certified translated copies of the statutes referenced in the law expert's testimony, including the Yugoslav "Law on Resolution of Conflict of Law with Regulations of Other Countries in Certain Relations," the "Law on Obligations," and the "Law on Companies," which were in force in March 1992 when the POA was purportedly executed (Exhibits G-I, annexed to the Nikolic Aff.).

The Beogradaska trustee submits a one-page, unsworn statement by an individual who identifies himself as Beogradaska Banka's counsel, Sava Andjelkovic, who flatly rejects the conclusion of Stone Column's Yugoslav law expert (Exhibit C, annexed to the Marion Aff.). Andjelkovic's conclusion is based on his observation that Stone Column's Yugoslav law expert is not authorized to interpret Serbian court decisions and laws, as only the Constitutional Court of Serbia is "exclusively competent" in this field. Andjelkovic does not cite to the relevant statute which establishes this (*Id.*).

Nonetheless, Andjelkovic opines that the POA is valid and enforceable under Yugoslav law because the agents designated by the POA (Orce and Dragojic) never directly revoked it, and the holders of the POA (Popovic and Jerotic) have also not demanded its revocation (Exhibit C, annexed to the Marion Aff.). Further, he opines that the POA cannot be cancelled "due to the expiry of deadlines," although he does not specify the applicable limitations periods he is referring to (*Id.*).

Andjelkovic's statement is unsworn and does not include an apostille certificate. Moreover, his statement does not include translated copies of any laws or caselaw he references, or any biographical information corroborating his legal expertise.

The Court concludes that the Beogradska trustee's expert has not provided sufficient evidentiary support for his opinion (see *e.g. Grynber v Giffen*, 119 AD3d 526 [2d Dept 2014], *lv appeal denied* 25 NY3d 905 [2015]). As a result, Andjelkovic's statement is wholly unpersuasive (see *Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 153 F3d 82, 92 [2d Cir 1998] ["[I]t is not the credibility of the (foreign law) experts that is at issue, it is the persuasive force of the opinions they expressed"]).

In its supplemental submission, the Beogradska trustee completely ignores the Court's unequivocal direction that the parties present their arguments as to the applicability, if any,

of New York law, to the validity of the POA (3/27/17 Tr 44:17-25, 45:19, 46:9-14, 22-26, 47:2-4). Instead, the Beogradska trustee submits three additional legal opinions from Yugoslav law experts. All three legal opinions conclude that the POA is effective and legally valid according to the laws applicable in the former Yugoslavia in 1992. The Court notes that the supplemental legal opinions offered by the Beogradska trustee completely contradict the position offered by the Beogradska trustee's original expert, Sava Andjelkovic.³ The three legal opinions offered by the Beogradska trustee in its supplemental submission appear to be precisely the type of incompetent and unauthorized evidence which its first expert, Andjelkovic, had rejected outright.

The Court completely rejects Beogradska's supplemental submission on Yugoslav law, presented in total disregard of this Court's instruction that the supplemental submission be limited to New York law. Moreover, the Beogradska trustee's supplemental submission is simply irreconcilable with the position its initial Yugoslav law expert presented, and thus, wholly unpersuasive.

³ Andjelkovic had rejected Stone Column's Yugoslavian law expert's presentation as incompetent evidence based on his assertion that only a Serbian court in the court of a regular litigation can opine on the validity of the POA, which authority is exclusive. Andjelkovic also concluded that in the case of a conflict of laws, the Constitutional Court of the Republic of Serbia is exclusively competent in this field (Andjelkovic Aff.).

The Court has considered all of the views presented by the expert witnesses and the sources provided, and concludes that Stone Column's experts sufficiently set forth the laws of Cyprus and Yugoslavia as they existed in 1992 and insofar as they pertain to the validity of the POA which permit this Court to take judicial notice of foreign laws, pursuant to CPLR 4511 (b).

C. New York law

New York General Obligations Law (GOL), which governs the validity of powers of attorney, was substantially amended in 2009. In 1992, when the POA was purportedly executed, GOL § 5-1501 set forth a sample statutory power of attorney form, and contained a notarization requirement (GOL § 5-1501 [1992]). GOL § 5-1501 also provided that different forms of powers of attorney were permissible, but is silent as to whether such other forms had to be notarized (*Id.*). Nonetheless, New York courts have consistently held that powers of attorney are invalid when not acknowledged before a notary or if defectively notarized (*Freedman v Oppenheim*, 80 AD2d 487 [2d Dept 1903]).

A defect in acknowledgment or lack of a notary is not necessarily fatal to the validity of a power of attorney under New York law, where the principal ratifies and confirms it (e.g. *Citibank, N.A. v Silverman*, 84 AD3d 425, 426 [1st Dept 2011]). "Ratification is the act of knowingly giving sanction or affirmance to an act which would otherwise be unauthorized and

not binding" (57 NY Jur2d Estoppel, Ratification, and Waiver § 87).

II. Conflict of Laws

The Court's examination of both Cyprus, Yugoslav, and New York law reveals a clear conflict between them. New York permits ratification of a power of attorney even where defectively acknowledged or unacknowledged before a notary, while Cyprus law requires certification and unanimous consent of the company's directors. Yugoslav law requires that powers of attorney be issued by the laws of the state of incorporation.

Because there is a clear conflict between New York law on the one hand, and Cyprus and Yugoslav law on the other as pertains to the validity of the POA under laws that existed in 1992, the Court must determine which jurisdiction's law to apply under New York's choice of law rules.

III. Choice of Laws

New York recognizes the "center of gravity" or "grouping of contacts" analytic approach to choice of law issues in order to determine which state has the most significant relationship to the transaction and the parties (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 [1994]). Under this approach, courts consider the spectrum of significant contacts, with "heavy weight" given to the traditional choice of law factors identified by the Restatement: the place of contracting, negotiation, and

performance; the location of the subject matter of the contract; and the domicile of the contracting parties (*Id.* at 317-18).

When the significant contacts are considered, in light of the fact that this is a contract case, it is plain that this dispute centers on Cyprus.

Stone Column was incorporated in Cyprus. According to the uncontroverted record, at the time that the POA was purportedly signed, the Beogradska NY account in New York City was not yet in existence; Stone Column's only existing bank accounts and assets were located in Cyprus. Stone Column submits the testimony of two directors who consistently testify that every single one of Stone Column's board and shareholder meetings were held at its headquarters in Cyprus, which is the only office it ever maintained (*Marios Prois Aff.*, ¶ 3).

The POA is dated March 31, 1992, is written in English, and is comprised of two documents attached to what appears to be the undated minutes of a meeting of Stone Column's board of directors (minutes). The minutes state that all three Stone Column directors were present for the meeting. At that time, Stone Column had three directors (Radonjic, Korunovski, and Aleksic). The minutes state that the board "unaminmous[ly] approved to appoint Mr. Popovic and Mr. Jerotic (the Beobanka and Limes executives) with full powers to issue a power of attorney to this effect." The minutes are followed by the two powers of attorney

[the POA] forms, one for Popovic and another for Jerotic. Given the testimony of Stone Column's directors, the board meeting where the POA was purportedly executed must have occurred in Cyprus.

Only two of Stone Column's directors, Radonjic and Korunovski, appear to have signed the POA; the signature line for Stone Column's third director, Aleksic, is blank.⁴ The POA purports to grant Popovic and Jerotic complete and unfettered authority over Stone Column's "operations." The POA contains no language of limitation pertaining to time, subject matter, scope of assets or geographic location. Specifically, there is no language in the POA referencing assets located in New York, acts to be undertaken in New York (or any location, for that matter), or an account located in Beogradska NY.

The POA does not contain a choice of law provision, and is

⁴ Radonjic died in 1999; Korunovski died in 2002. Neither could be deposed in this action.

Aleksic testified that he was completely unaware that Stone Column had ever appointed any third party agents through a power of attorney, and that he was never informed that Korunovski or Radonjic had signed a power of attorney in favor of Jerotic or Popovic, and, speaking through a translator, that neither himself, Radonjic or Korunovski speak or read English (Aleksic Aff., ¶¶ 5, 10). Aleksic also testified that he never received notification of a board meeting held on March 31, 1992 (*Id.*). Aleksic testified that he was the sole signatory on all of Stone Column's bank accounts, including the Beogradska NY account, and that he attended every single board meeting of Stone Column, all of which were held in Cyprus, and the POA was never introduced or voted upon at any of these meetings (*Id.*). He maintains that the POA is a forgery.

not notarized. No details concerning the place of negotiation or execution of the POA have been unearthed during extensive discovery.

In 1992, Stone Column's three directors and the principals purportedly appointed by the POA were Yugoslav citizens. Nonetheless, other significant factors identified by the Restatement are simply unknown, i.e. the place of negotiation and contracting of the POA, and the place of performance, given the POA's silence on these matters. In toto, insofar as Stone Column was incorporated in Cyprus, all of its board meetings were held in Cyprus, the presumed location of the POA's execution, and Stone Column's only bank accounts and assets were located in Cyprus at that time, the Court determines that Cyprus law applies.

III. Beogradska Trustee's Cross-motion

The Beogradska trustee seeks a declaration, in a cross-motion, that the POA is valid and effective under New York law. That portion of the cross-motion which seeks a determination that New York law applies to the validity of the POA is denied, for the reasons set forth above. As to the validity of the POA under Cyprus law, the Court will afford the parties an opportunity to brief the issue and present the full evidentiary record, on a motion for summary judgment, if so advised.

Accordingly, it is further

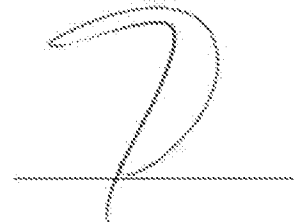
ORDERED that claimant Stone Column Trading House Limited's motion (007) is granted; and it is further

ORDERED that claimant Stone Column Trading House Limited's motion (008) is granted; and it is further

ORDERED that Claimant Beogradska Banka A.D. in Bankruptcy's cross-motion is denied.

DATED: October 2, 2017

ENTER:



CHARLES E. RAMOS

J.S.C.