nor diversity jurisdiction were present. 28 U.S.C.A. §§ 1331, 1332.

MEMORANDUM OPINION

MOTLEY, District Judge.

[1] Petitioner, Joseph Riccio, has alleged that this court has subject matter jurisdiction pursuant to § 10 of the Federal Arbitration Act, 9 U.S.C. § 10. However, "section 10 of the Arbitration Act does not confer subject matter jurisdiction on the district court." *Harry Hoffman Printing, Inc. v. Graphic Communications, Intern. Union, Local 261*, 912 F.2d 608, 611 (2d Cir.1990); *see also Southland Corp. v. Keating*, 465 U.S. 1, 15 n. 9, 104 S.Ct. 852, 861 n. 9, 79 L.Ed.2d 1 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 942 n. 32, 74 L.Ed.2d 765 (1983); *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F.Supp. 957, 959–61 (S.D.N.Y.1988) (*Southland, Moses*, and *Drexel*, all cases which construe §§ 3 and 4 as not granting jurisdiction, apply to § 10). "There must be an independent basis of jurisdiction before a district court may entertain petitions under the Act." *Harry Hoffman*, 912 F.2d at 611.

[2] A federal court is granted subject matter jurisdiction when the cause of action involves a federal question or when diversity jurisdiction exists. Jurisdiction lies in federal courts for actions "arising under" federal law. 28 U.S.C. § 1331. "[T]o determine whether the court has federal question jurisdiction to decide the case, the complaint must contain either a federal cause of action or state a cause of action embodying a substantial federal question." *City of New York v. Rappgal Associates*, 703 F.Supp. 284, 287 (S.D.N.Y.1989) (citing *West 14th Street Commercial Corp. v. 5 West 14th Street Owners Corp.*, 815 F.2d 188, 192–193 (2d Cir.1987) *cert. denied*, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 107 (1987), and *cert. denied*, 484 U.S. 871, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987)).

Federal courts have diversity jurisdiction over all civil actions where the amount in controversy exceeds $50,000 and is between citizens of different states. 28 U.S.C. § 1332.

[3] The cause of action underlying the arbitration award here is neither a federal cause of action nor a cause of action embodying a substantial federal question. Being that the amount in controversy is less than $9,000 and no other independent basis for subject matter jurisdiction exists, this case will be dismissed.

HOOGOVENS IJMUIDEN VERKOOPKANTOOR B.V., Plaintiff,

v.

M.V. "SEA CATTLEYA," her engines, boilers, etc.,

v.

VAN OMMEREN BULK SHIPPING B.V.; South Success Shipping Inc.; and Sanko Steamship Co., Ltd., Defendants.

No. 93 Civ. 3859 (WK).

United States District Court, S.D. New York.

May 3, 1994.

In admiralty action relating to damages caused to steel coils during voyage, one carrier moved to stay proceedings against it pending arbitration in the Netherlands. The District Court, Whitman Knapp, Senior District Judge, held that clause in charter party did not require parties to submit all disputes arising in connection with the charter to arbitration in the Netherlands.

Motion denied.

1. Arbitration ⇐1.1

First inquiry in case governed by Convention on the Recognition of Foreign Arbi-

tral Awards is whether parties have made any agreement in writing to arbitrate the subject in dispute; where no such agreement exists, court has no jurisdiction under the Convention and its implementing legislation to stay a federal action or to compel arbitration. 9 U.S.C.A. § 201 et seq.

2. Shipping ⇐39(7)

Clause in charter party did not require parties to submit all disputes arising in connection with the charter to arbitration in the Netherlands; rather, arbitration clause was no more than an agreement that, if arbitration were to be conducted, whether voluntarily agreed upon or required by some other contractual clause, it would proceed in the Netherlands.

William R. Connor III, Bigham, Englar, Jones & Houston, New York City, for plaintiff.

Christopher H. Mansuy, Walker & Corsa, New York City, for Van Ommeren Bulk Shipping, B.V.

Thomas H. Healey, New York City, for South Success Shipping, Inc. and Sanko S.S. Co., Ltd.

MEMORANDUM AND ORDER

WHITMAN KNAPP, Senior District Judge.

This is an admiralty action relating to damage caused to steel coils during their carriage from the Netherlands to the United States. Defendant Van Ommeren Bulk Shipping B.V. ("Van Ommeren"), one of the parties which shipped the coils, moves pursuant to the Convention on the Recognition of Foreign Arbitral Awards ("Arbitration Convention"), 9 U.S.C. § 201 *et seq.*, to stay proceedings against it pending arbitration in the Netherlands. Defendant Sanko Steamship Co. Ltd. ("Sanko") moves to amend its answer to state a cross-claim for indemnity and contribution against Van Ommeren.

Van Ommeren asserts that according to the terms of the charter party which it and plaintiff entered into on January 12, 1989, in Ijmuiden, Netherlands, for the purpose of shipping plaintiff's steel coils to Bridgeport, Connecticut, plaintiff must arbitrate its cargo damage claim in the Netherlands. Clause 24 of that charter states: "General Average and arbitration to be settled in the Netherlands." Def. Ex. A at 3. Van Ommeren interprets this clause to require the parties to submit *all* disputes arising in connection with the charter to arbitration in the Netherlands. In support of this interpretation, it cites Judge Leisure's decision in *Oriental Commercial & Shipping Co. v. Rosseel, N.V.* (S.D.N.Y.1985) 609 F.Supp. 75, 77.

In *Rosseel*, defendant moved to compel arbitration under the Arbitration Convention, based on the clause in a sales contract, "Arbitration: If required in New York City." Applying federal law to determine whether or not the parties to a foreign contract have agreed to arbitrate, the court ruled that the clause bound the parties to arbitration of all claims arising with respect to the contract. 609 F.Supp. at 78. It reasoned that "[a]rbitration clauses must be interpreted broadly, and all doubts as to whether a dispute is encompassed by a particular clause must be resolved in favor of arbitration, even where the problem is the construction of the contract language itself," 609 F.Supp. at 77, relying on *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1983) 460 U.S. 1, 23–26, 103 S.Ct. 927, 941–42, 74 L.Ed.2d 765.

Plaintiff, on the other hand, asserts that the clause merely states the parties' choice of situs for any arbitration relating to the charter, *if* the parties were to voluntarily decide to arbitrate claims, or if such arbitration were otherwise required. Alternatively, plaintiff suggests that the clause only requires the parties to arbitrate general average claims in the Netherlands, no such claims being asserted in this suit.

Regretfully, we must disagree with Judge Leisure's interpretation of a very similar clause in *Rosseel*. In so doing, we note that the contractual clause actually involved in *Moses Cone*, unlike the clauses at issue here and in *Rosseel*, unambiguously imposed compulsory arbitration. The *Moses Cone* clause provided, 460 U.S. at 5, 103 S.Ct. at 931:

[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, ... *shall be decided by arbitration* ... unless the parties mutually agree otherwise. (Emphasis added).

[1, 2] The first inquiry in a case governed by the Arbitration Convention is whether or not the parties have made "any agreement in writing to arbitrate the subject in dispute." *Filanto, S.P.A. v. Chilewich Intern. Corp.*[1] (S.D.N.Y.1992) 789 F.Supp. 1229, 1236, *quoting Ledee v. Ceramiche Ragno* (1st Cir.1982) 684 F.2d 184, 186–87. Where no such agreement exists, the court has no jurisdiction under the Arbitration Convention and its implementing legislation to stay a federal action or to compel arbitration. *Id.* We find that clause 24 of the January 1989 charter party is no more than an agreement that, if arbitration were to be conducted whether voluntarily agreed upon or required by some other contractual clause, it would proceed in the Netherlands. Therefore, we have no authority under the Arbitration Convention to stay proceedings against Van Ommeren pending arbitration.

CONCLUSION

For the above mentioned reasons, we deny defendant Van Ommeren's motion. However, we grant defendant Sanko's motion, which received no opposition at argument, to amend its answer to state a cross-claim for indemnity and contribution against Van Ommeren.

SO ORDERED.

1. An appeal from *Filanto* was dismissed for lack of appellate jurisdiction in *Filanto, S.p.A. v. Chilewich Intern. Corp.* (2nd Cir.1993) 984 F.2d 58, 61.

Carl O. BROWN, Jr.

v.

R.J. REYNOLDS TOBACCO COMPANY, et al.

Civ. A. No. 92–836.

United States District Court, E.D. Louisiana.

April 13, 1994.

Smoker brought products liability suit against cigarette manufacturers, alleging that their cigarettes were unreasonably dangerous in design. Manufacturers filed motion for summary judgment. The District Court, Beer, J., held that smoker failed to create genuine issue of material fact regarding existence of feasible alternative cigarette design.

Motion granted.

1. Products Liability ⇐59

Under Louisiana law, plaintiff claiming cigarettes were unreasonably dangerous in design had burden to prove: that feasible alternative cigarette design existed; that it existed at time cigarettes allegedly consumed by plaintiff left manufacturer's hands; that it would have prevented plaintiff's damage; and that it would have satisfied statutory risk-utility test. LSA-R.S. 9:2800.56.

2. Federal Civil Procedure ⇐2515

Documents published by one cigarette manufacturer regarding development of cigarette that produced smoke without burning tobacco did not create genuine issue of material fact regarding existence of feasible alternative cigarette design that would preclude summary judgment on smoker's products liability suit against cigarette manufacturers for selling product that was unreasonably dangerous in design, in light of evidence that test market of new cigarette was a failure, inapplicability of documents to smoking that occurred before development of new cigarette, and inadmissibility of documents

which was confirmed by the Swiss Federal Tribunal on April 17, 1990. Thereupon, Hilmarton began a second arbitration. This resulted in a second arbitral award, rendered on April 10, 1992, also in Geneva, which ruled in favor of Hilmarton.

Despite its annulment in Switzerland, the first award of August 19, 1988 was rendered enforceable in France through the issuance of an order of *exequatur* by a French court of first instance. This order of *exequatur* was upheld in the Court of Cassation decision of March 23, 1994 referred to above, which applied Articles V.1(e) and VII of the New York Convention and Article 1502 of the French New Code of Civil Procedure, mentioned above.

However, enforcement of the decision of the Swiss Federal Court of April 17, 1990 (which set aside the first arbitral award) and of the second award of April 10, 1992, has also been granted in France. These two *exequatur* decisions are currently on appeal before the Court of Appeal of Versailles.

The current situation in *Hilmarton* can be summed up as follows: (i) the first award, which was set aside in Switzerland, is now (following the Court of Cassation decision) definitively enforceable in France; (ii) the second award, which directly contradicts the first, has also been made enforceable in France; and (iii) the decision of the Swiss Federal Court that set aside the first award is also enforceable in France. However, the second arbitral award and the Swiss Federal Court decision setting aside the first arbitral award are not yet definitively enforceable, as their *exequatur* orders are on appeal.

The main concern of the drafters of the New York Convention was to facilitate the enforcement of awards rendered in international matters by limiting the grounds on which enforcement could be denied. *Hilmarton* shows, however, that in certain cases, admittedly unusual, an excess of liberalism may lead to a result that is contrary to the original intent of the liberalization. The current situation in *Hilmarton* is absurd, as two completely opposite awards in relation to the same subject matter are enforceable in France. If the enforcement of the second award were to be confirmed on appeal, it would then be impossible to execute either one of them.

Developments in the United States

Southern District of New York Refuses to Stay Proceedings, Finding No Agreement to Arbitrate

The United States District Court for the Southern District of New York has held that a clause in a charter party providing that "General Average and arbitration to be settled in the Netherlands" did not constitute a binding agreement to arbitrate any disputes arising under the charter party, but was merely an agreement that if arbitration were to proceed, it would proceed in the Netherlands; the court therefore refused to stay an admiralty action pending arbitration. *Hoogovens Ijmuiden Verkoopkantoor B.V. v. M.V. Sea Cattleya*, 852 F. Supp. 6 (S.D.N.Y. 1994).

Plaintiff brought an admiralty action against defendant Van Ommeren and one other defendant shipper. Van Ommeren moved pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.*, to stay proceedings against it pending arbitration in the Netherlands. It argued that the above-quoted clause required the parties to submit all disputes arising in connection with the charter party to arbitration in the Netherlands. Van Ommeren relied on *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 75 (S.D.N.Y. 1985), which held that the clause, "Arbitration: if required in New York City," bound the parties to arbitration of all claims arising with respect to the contract.

The *Hoogovens* court disagreed with the holding in *Rosseel*:

> The first inquiry in a case governed by the Arbitration Convention is whether or not the parties have made "any agreement in writing to arbitrate the subject in dispute." [...] Where no such agreement exists, the court has no jurisdiction under the Arbitration Convention and its implementing legislation to stay a federal action or to compel arbitration. [...] We find that clause 24 of the January 1989 charter party is no more than an agreement that, if arbitration were to be conducted whether voluntarily agreed upon or required by some other contractual clause, it would proceed in the Netherlands. Therefore, we have no authority under the Arbitration Convention to stay proceedings against Van Ommeren pending arbitration.

852 F. Supp. at 8 (citations omitted).

New Decisions from the Second, Seventh and Eighth Circuits Regarding Preliminary Relief in Aid of Arbitration

Seventh and Eighth Circuits Grant Injunctions in Aid of Arbitration

Two recent decisions show that inconsistencies still exist among federal courts concerning the circumstances in which courts will grant preliminary relief in aid of arbitrations governed by Chapter One of the Federal Arbitration Act ("FAA"). In decisions released less than two weeks apart in September, 1994, the Eighth Circuit held that an injunction requiring continued performance of the parties' contract pending arbitration should be granted if the parties' contract contains "qualifying language" contemplating continued performance during dispute resolution, while the Seventh Circuit held that an injunction requiring performance of the parties' contract pending arbitration may issue regardless of any contractual terms relating to such relief. *Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46 (8th Cir. 1994); *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134 (7th Cir. 1994).

Peabody involved a dispute between a coal supplier and an electric utility. The utility purported to cancel the parties' coal supply contract and refused to accept coal shipments. Both parties sought to compel arbitration, and the supplier also moved for an injunction requiring the parties to continue performance of the contract pending arbitration. The district court refused to grant the injunction. The Eighth Circuit reversed, holding that where the FAA applies and "qualifying contract language" is present, the district court errs in refusing to order the parties to continue performance pending arbitration. *Peabody*, 36 F.3d at 47-48. The court held this to be consistent with its earlier decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984), in which it ruled that "where the [FAA] is applicable and no qualifying contractual language has been alleged, the district court errs in granting injunctive relief." *Id.* at 1292, *quoted in Peabody*, 36 F.3d at 47.

Under these decisions, "qualifying language" is language that provides the court with clear grounds to grant preliminary relief without addressing the merits of the underlying arbitrable dispute. *Id.* at 78 n. 3. The court stressed that granting relief in the *Peabody* case would not implicate the *Hovey* court's concern with becoming entangled in the merits, because the parties' contract expressly required continued performance of the contract as part of the dispute resolution procedure, regardless of how the dispute would ultimately be resolved. *Id.* at 48. Indeed, the court held that an order compelling arbitration "'in accordance with the terms of the agreement' must necessarily include an order requiring continued performance." *Id.*

US 209

489. UNITED STATES: DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK – 3 May 1994 – *Hoogovens Ijmuiden Verkoopkantoor B.V. v. M.V. "Sea Cattleya", Van Ommeren Bulk Shipping B.V., South Success Shipping Inc., and Sanko Steamship Co., Ltd.* *

Effects of an arbitration agreement on judicial proceedings – Existence of an arbitration agreement

(See Part I.B.4)

MEMORANDUM AND ORDER

WHITMAN KNAPP, Senior District Judge.

This is an admiralty action relating to damage caused to steel coils during their carriage from the Netherlands to the United States. Defendant Van Ommeren Bulk Shipping B.V. ("Van Ommeren"), one of the parties which shipped the coils, moves pursuant to the Convention on the Recognition of Foreign Arbitral Awards ("Arbitration Convention"), 9 U.S.C. § 201 *et seq.*, to stay proceedings against it pending arbitration in the Netherlands. Defendant Sanko Steamship Co. Ltd. ("Sanko") moves to amend its answer to state a cross-claim for indemnity and contribution against Van Ommeren.

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* The text is reproduced from 852 *Federal Supplement*, p. 7 f. (1994)

age claims in the Netherlands, no such claims being asserted in this suit.

Regretfully, we must disagree with Judge Leisure's interpretation of a very similar clause in *Rosseel*. In so doing, we note that the contractual clause actually involved in *Moses Cone*, unlike the clauses at issue here and in *Rosseel*, unambiguously imposed compulsory arbitration. The *Moses Cone* clause provided, 460 U.S. at 5, 103 S.Ct. at 931:

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[1, 2] The first inquiry in a case governed by the Arbitration Convention is whether or not the parties have made "any agreement in writing to arbitrate the subject in dispute." *Filanto, S.P.A. v. Chilewich Intern. Corp.*[1] (S.D.N.Y.1992) 789 F.Supp. 1229, 1236, *quoting Ledee v. Ceramiche Ragno* (1st Cir.1982) 684 F.2d 184, 186–87. Where no such agreement exists, the court has no jurisdiction under the Arbitration Convention and its implementing legislation to stay a federal action or to compel arbitration. *Id.* We find that clause 24 of the January 1989 charter party is no more than an agreement that, if arbitration were to be conducted whether voluntarily agreed upon or required by some other contractual clause, it would proceed in the Netherlands. Therefore, we have no authority under the Arbitration Convention to stay proceedings against Van Ommeren pending arbitration.

CONCLUSION

For the above-mentioned reasons, we deny defendant Van Ommeren's motion. However, we grant defendant Sanko's motion, which received no opposition at argument, to amend its answer to state a cross-claim for indemnity and contribution against Van Ommeren.

SO ORDERED.

1. An appeal from *Filanto* was dismissed for lack of appellate jurisdiction in *Filanto, S.p.A. v. Chilewich Intern. Corp.* (2nd Cir.1993) 984 F.2d 58, 61.