AGROENGINEERING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
AGROENGINEERING,

Petitioner,

- against -

AMERICAN CUSTOM SERVICE, INC.,

Respondent.
----------X

95 CV 2238 (SJ)

MEMORANDUM AND ORDER

A P P E A R A N C E S

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JOHNSON, District J.:

Petitioner has moved pursuant to 9 U.S.C. § 207 for an order confirming a foreign arbitral award against respondent. Respondent opposes this motion and has cross-moved to vacate the award. For the reasons stated below, petitioner's motion is granted and respondent's cross-motion is denied.

BACKGROUND

Petitioner Agroengineering is a joint venture organized under the laws of the Commonwealth of Independent States with its principal place of business in Moscow, Russian Federation. Respondent, American Custom Service, Inc. ("ACS"), is incorporated under the laws of the state of New York and has its principal place of business in Jamaica, New York.

On or about November 16, 1990, petitioner and respondent entered into a written contract for delivery of certain goods to Moscow. On or about September 26, 1991, Agroengineering commenced a proceeding before the Arbitration Court in Moscow asserting claims for breach of that contract. In conformity with the Regulations of the Arbitration Court, on October 14, 1991, a notice of the filed claims was sent to respondent. The notice appended a copy of the claim statement and a list of potential arbitrators. ACS was directed to select an arbitrator and to respond to the claims.

After receiving no response, the Arbitration Court notified respondent of the claims through a telex dated April 13, 1991. Again on April 21, 1991, the Court forwarded claim papers to respondent with a request to

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acknowledge their receipt by telex. When respondent still failed to answer, petitioner had the claim papers delivered to respondent on or about June 30, 1992, by "DHL," a courier delivery service.

Following a hearing held in Moscow at which respondent did not appear, the arbitrators issued an opinion dated July 1, 1993, awarding judgment to petitioner. On or about June 5, 1995, petitioner filed the present motion to confirm the foreign arbitral award.

Respondent now has moved to vacate the award. ACS denies that it ever agreed to arbitrate disputes, despite an arbitration clause found on the second page of the November 1990 contract. Paragraph six on page two of the contract provides that "All disputes or differences which may arise out of or in connection with the present contract are to be settled ... by the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry, Moscow, in accordance with the Rules of Procedure of the said Commission. The award of Arbitration is final and binding upon both parties."

Peter Stern, who signed the contract on respondent's behalf, insists that he only signed a one-

page contract. Petitioner, in contrast, asserts that a three-page contract was signed, and has produced three pages with what appear to be Mr. Stern's signature or initials on each page. Petitioner also points out that the first page of the contract, which both parties agree that they signed, explicitly refers to subsequent pages. See Pet.'s Ex. 2 ("The conditions set forth on the following pages of the contract are binding for both parties. All other conditions concerning the Basis of delivery are set forth in Appendix 1.").

Respondent claims that Mr. Stern's signatures on pages two and three of the contract are forgeries, and thus that no agreement to arbitrate was ever entered into. Respondent attributes the alleged forged signatures to "a gentleman who claimed to be associated ... with Agroengineering (Moscow)." Stern Aff. ¶ 3. Because Mr. Stern cannot remember this man's name, he refers to him as "Mr. X." Mr. Stern explains that "Mr. X" was in New York for approximately five days at the time the contract at issue was signed and that "Mr. X" had unrestricted access to ACS's office and supplies during this visit. As further evidence that respondent did not receive or sign the second or third pages of the contract, Mr. Stern and the President of ACS, Jack

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Lacertosa, assert that it was ACS policy not to enter into any contract that would require arbitration or litigation in Russia.

DISCUSSION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), was implemented by legislation in the United States as 9 U.S.C. § 201 et seq. Section 207 provides that:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207. A strong policy in favor of enforcing international arbitral awards exists "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate ... are enforced in the signatory countries." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

When assessing whether to confirm an arbitral award, "courts must first consider whether or not the parties agreed in writing to arbitrate the subject in

dispute. Hoogovens Ijmuiden Verkoopkantoor v. M/V SEA CATTLEYA, 852 F. Supp. 6, 8 (S.D.N.Y. 1994). Once this is established, the "burden of proving that an award should be overturned is on the party challenging the enforcement and recognition of the award." La Societe Nationale v. Shaheen Natural Resources, 585 F. Supp. 57, 61 (S.D.N.Y. 1983), aff'd, 733 F.2d 260, cert. denied, 469 U.S. 883 (1984); see also Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974); American Const. v. Mechanized Const. Of Pakistan, 659 F. Supp. 426, 428 (S.D.N.Y.), aff'd, 828 F.2d 117 (2d Cir. 1987), cert. denied, 484 U.S. 1064 (1988). Article V of the Convention provides certain narrowly prescribed situations where recognition and enforcement of arbitral awards may be refused, including where the agreement award was procured by fraud. See 9 U.S.C. § 201; Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982)(finding that defenses such as fraud, mistake, duress and waiver were intended to be defenses to confirmation of a foreign arbitral award).

Respondent argues that this court has no jurisdiction over this action since it never signed the

second or third pages of the contract, and thus there was no agreement to arbitrate disputes under the contract. In addition, respondent argues that, because petitioner fraudulently obtained the arbitral award by forging Mr. Stern's signature, the award should be vacated.

This Court finds that a valid agreement to arbitrate disputes was agreed upon by the parties. Because both parties agree to having signed the first page of the contract that specifically states that the parties agree to be bound by the conditions contained in the subsequent pages of the contract, it is fair to hold respondent liable for the contents of the entire agreement. Moreover, while it is true that a district court will not enforce an arbitral award procured by fraud, this Court is not convinced that a "Mr. X" forged Mr. Stern's signature on the contract.

The Court is also unpersuaded by respondent's final argument that 9 U.S.C. § 206 requires an order compelling arbitration prior to proceeding with arbitration. Section 206 provides that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206 (emphasis added). The language of this provision is clearly not mandatory, and, because respondent previously could have moved to challenge or stay the arbitration proceedings, petitioner's failure to receive an order compelling arbitration does not provide grounds to vacate the arbitral award.

CONCLUSION

Accordingly, the petition to confirm the foreign arbitral award is hereby granted and respondent's cross-motion is denied.

SO ORDERED.

U.S.D.J.

Dated: Brooklyn, New York
June 7, 1996

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