

US 265

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION  
OF LURGI METALLURGIE GmbH,

Petitioner,

FOR A JUDGMENT STAYING THE  
ARBITRATION COMMENCED BY

NEWMONT GOLD COMPANY,

Respondent.



MEMORANDUM DECISION

97 Civ. 4842 (DC)

loc #12

APPEARANCES:

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CHIN, D.J.

After oral argument yesterday in the above-captioned case, I issued a ruling from the bench dismissing the petition to stay a portion of the arbitration. During oral argument, Newmont argued that in addition to diversity jurisdiction, this Court has federal question jurisdiction in this case pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), which is implemented through Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 et seq. (the "FAA"), because this matter involves a "non-domestic" arbitration

agreement related to international commerce. In so arguing, Newmont relied on the language of 9 U.S.C. §§ 202 and 203 and Bergeson v. Joseph Müller Corp., 710 F.2d 928 (2d Cir. 1983).

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In response, Lurgi argued that this Court does not have subject matter jurisdiction under the Convention because the Convention, as its title suggests, only applies to the enforcement of foreign arbitral awards, and no award has yet been made here. I decided the motion on independent grounds and did not reach the issue of whether this Court has federal subject matter jurisdiction. After considering the issue further, I now conclude that this Court has subject matter jurisdiction under the Convention.

Section 202 provides, in relevant part:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title, falls under the Convention.

9 U.S.C. § 202. Section 203 then provides:

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 203.

The plain language of these sections provides that district courts have original jurisdiction over actions or proceedings falling under the Convention, and that either an arbitration agreement or an arbitral award may fall under the

Convention. And courts in this circuit have so held. See Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1018 (2d Cir. 1993) ('Congress vested federal district courts with original jurisdiction over any action or proceeding 'falling under the Convention,' having deemed such an action 'to arise under the laws and treaties of the United States.' 9 U.S.C. § 203.\*); see also Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., [ 1997 WL 458785, at \*3-8 (S.D.N.Y. Aug. 11, 1997) (finding subject matter jurisdiction solely under the Convention); Dworkin-Connell Interair Courier Services, Inc. v. Avraham, 728 F. Supp. 156, 158-59 (S.D.N.Y. 1989) (same); Filanto, S.p.A. v. Chilewich Intern. Corp., 789 F. Supp. 1229, 1234 (S.D.N.Y. 1992) (finding 'independent jurisdictional basis' under the Convention); Bergeson, 710 F.2d at 931.

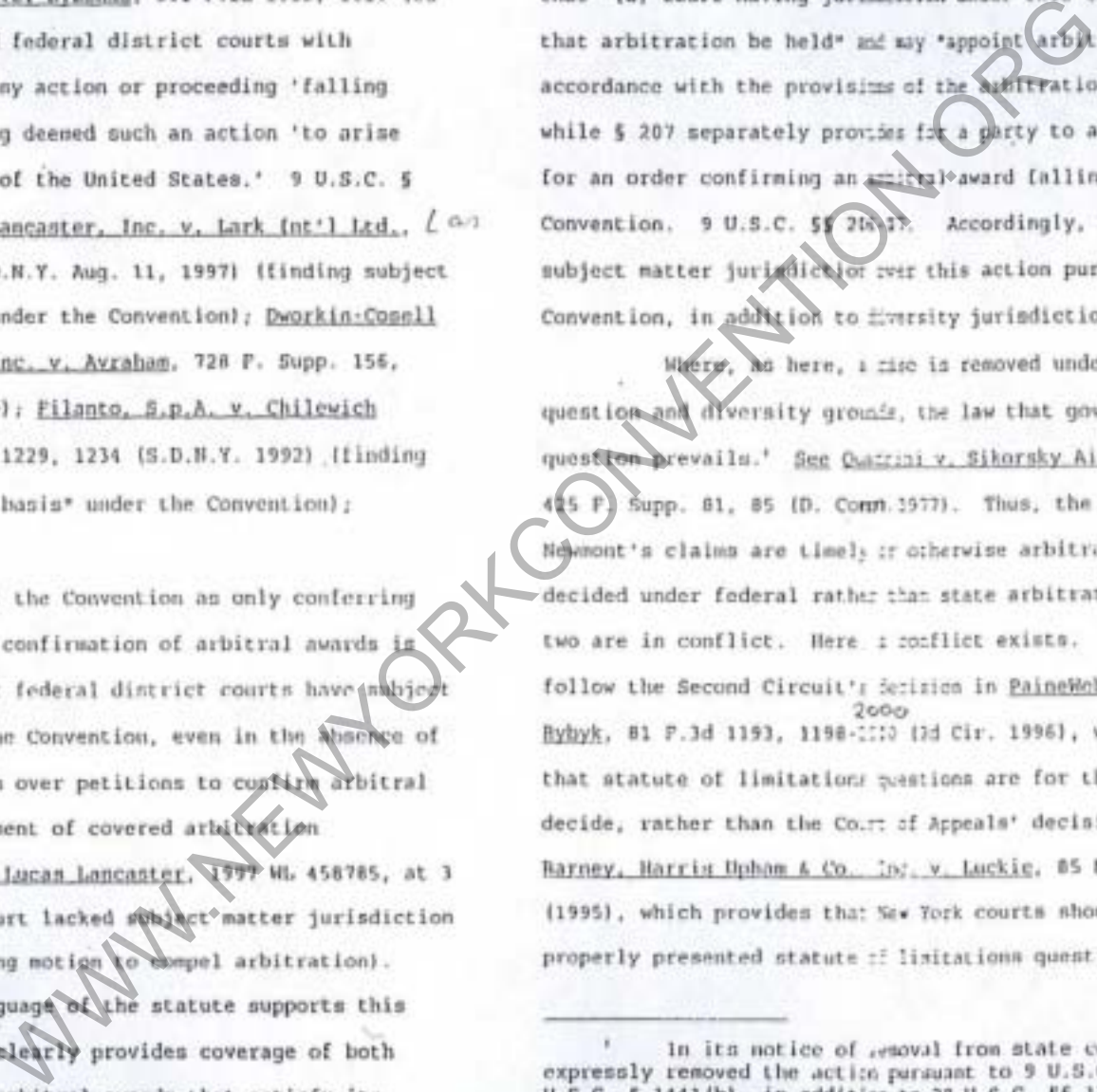
Lurgi's reading of the Convention as only conferring jurisdiction in the case of confirmation of arbitral awards is incorrect. It is clear that federal district courts have subject matter jurisdiction under the Convention, even in the absence of diversity jurisdiction, both over petitions to confirm arbitral awards and over the enforcement of covered arbitration agreements. See, e.g., Kahn Lucas Lancaster, 1997 WL 458785, at 3 (rejecting argument that court lacked subject matter jurisdiction under Convention and granting motion to compel arbitration).

Moreover, the language of the statute supports this conclusion. Section 5 202 clearly provides coverage of both arbitration agreements and arbitral awards that satisfy its

requirements. See 9 U.S.C. § 202. In addition, § 206 provides that '[a] court having jurisdiction under this chapter may direct that arbitration be held' and may 'appoint arbitrators' in accordance with the provisions of the arbitration agreement, while § 207 separately provides for a party to apply to the court for an order confirming an arbitral award (falling under the Convention, 9 U.S.C. §§ 206-7). Accordingly, this Court has subject matter jurisdiction over this action pursuant to the Convention, in addition to diversity jurisdiction.

Where, as here, a case is removed under both federal question and diversity grounds, the law that governs the federal question prevails.<sup>1</sup> See Quatrini v. Sikorsky Aircraft Division, 425 F. Supp. 81, 85 (D. Conn. 1977). Thus, the issue of whether Newmont's claims are timely or otherwise arbitrable must be decided under federal rather than state arbitration law, if the two are in conflict. Here a conflict exists. I therefore must follow the Second Circuit's decision in PaineWebber Inc. v. Bytyk, 81 F.3d 1193, 1198-1200 (2d Cir. 1996), which provides that statute of limitations questions are for the arbitrators to decide, rather than the Court of Appeals' decision in Smith Barney, Harris Opham & Co., Inc. v. Luckie, 85 N.Y.2d 193, 203-06 (1995), which provides that New York courts should decide properly presented statute of limitations questions. Lurgi's

<sup>1</sup> In its notice of removal from state court, Newmont expressly removed the action pursuant to 9 U.S.C. § 205 and 28 U.S.C. § 1441(b), in addition to 28 U.S.C. §§ 1332(a)(2) and 1441(a).



*Reason to deny a motion of the arbitrator is resubmitted for  
consideration by the court pursuant to the procedural provisions of the*

this reason, in addition to the grounds articulated yesterday on  
the record.

SO ORDERED.

Dated: New York, New York  
November 25, 1997

  
DENNY CHIN  
United States District Judge

Copies Filed to Counsel of Record 11/26/97

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MEALEY'S International Arbitration Report