OVERSEAS COSMOS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEC 8 1997

MANAGING CLERK'S DEPT.
RECEIVED BY PICKED UP FROM CHAMBERS

In the Matter of the Arbitration

- between -

OVERSEAS COSMOS, INC.,

Petitioner,

- and -

NR VESSEL CORP.,

Respondant.

MEMORANDUM DECISION

97 Civ. 5898 (DC)

APPEARANCES:

HEALY & BAILLIE, LLP
Attorneys for Petitioner
By: Glen T. Oxton, Esq.
29 Broadway
New York, New York 10006

ANDREW A. LEVY, ESQ.
Attorney for Respondent
375 Park Avenue, Suite 2805
New York, New York 10152

CHIN, D.J.

Petitioner, Overseas Cosmos, Inc., seeks an order confirming an arbitration award rendered by a three-member London Maritime Arbitrators' Association panel on February 19, 1997, amended March 31, 1997, in London, England. Respondent, NR Vessel Corp., moves to dismiss the petition on the ground that the arbitral award on which the petition is based is not entitled to recognition and enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), as implemented by 9 U.S.C. §§ 201-208 (Supp. 1997). For the following reasons, respondent's motion to dismiss is denied, and the arbitration award is confirmed.

BACKGROUND

By a Memorandum of Agreement dated August 9, 1996 (the "MOA"), petitioner agreed to sell the vessel "MURANO" to respondent, upon the terms and conditions set forth therein. Respondent, in turn, intended to resell the vessel to another purchaser for a profit. Ultimately, the vessel was to be demolished for scrap. Respondent signed the MOA on August 16, 1996. Petitioner's broker, J.C. O'Keefe Shipbroking Ltd., signed the MOA on behalf of petitioner on August 19, 1996.

Pursuant to paragraph 2 of the MOA, respondent was obligated to pay a 10% deposit by the close of business in London on August 22, 1996. Due to the declining market price of vessels for scrap, the ultimate buyer backed out of its deal with respondent. Respondent attempted to locate another buyer, but in the meantime failed to pay the 10% deposit to petitioner as agreed. Eventually, petitioner sold the vessel to a third party, but for a substantially lower price than provided for in the MOA entered into with respondent.

Paragraph 11 of the MOA states that any dispute under the agreement was to be referred to arbitration in London. The arbitration clause provides as follows:

> If any dispute should arise in connection with the interpretation and fulfilment [sic] of this Agreement, same shall be decided by arbitration in the city of London in accordance with the London Maritime Arbitrators' Association Terms 1994 and shall

Mealey Publications, Inc., Wayne, PA. Vol. 12, #12, 12/97

MEALEY'S International Arbitration Report

be referred to a single Arbitrator to be appointed by the parties hereto. If the parties cannot agree upon the appointment of a single Arbitrator, the dispute shall be settled by 3 (three) Arbitrators, each party appointing one Arbitrator, the third being appointed by the London Maritime Arbitrators' Association.

. . .

The award rendered by the Arbitration Tribunal shall be final and binding upon the parties and may if necessary be enforced by a Court or any other competent authority in the same manner as a judgement in the High Court of Justice, London.

(Pet'n, Exh. B, ¶ 11). Believing respondent to be in breach of the MOA, petitioner commenced an arbitration proceeding in London, consistent with the terms of the MOA, seeking damages. As respondent neglected to appoint an arbitrator, one was appointed on its behalf by the London Maritime Arbitrators' Association. A panel of three arbitrators held that respondent indeed breached the MOA and rendered an award in favor of petitioner, directing respondent to pay petitioner $604,936.83, plus interest.

Petitioner petitions this Court to confirm the London arbitration award pursuant to Article III of the Convention and 9 U.S.C. § 207. Respondent moves to dismiss the petition, arguing that this Court lacks subject matter jurisdiction to confirm the arbitration award because (1) the MOA is invalid and therefore the arbitration provision is unenforceable; (2) an arbitration award entered on default cannot be confirmed; and (3) petitioner has failed to comply with certain requirements of the Convention

and therefore is barred from commencing an action under 9 U.S.C. § 207 to confirm the arbitration award.

DISCUSSION

A. Motion to Dismiss

1. Legal Standards

United States district courts have original jurisdiction over actions or proceedings arising under the Convention. See 9 U.S.C. § 203. Any party to an arbitration may apply to a district court for an order confirming an arbitral award within three years of the arbitral decision. Id. § 207; see also Ukrynashprom State Foreign Econ. Enter. v. Tradeway, Inc., No. 95 Civ. 10278, 1996 WL 107285, at *2 (S.D.N.Y. Mar. 12, 1996). "[T]he district court's role in reviewing a foreign arbitral award is strictly limited: '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.'" Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., No. 96-9692, 1997 WL 560044, at *4 (2d Cir. Sept. 10, 1997) (quoting 9 U.S.C. § 207).

Article V of the Convention enumerates seven circumstances in which a district court is justified in refusing to recognize or enforce a foreign arbitration award. See Convention, Art. V, reprinted in the text following 9 U.S.C. § 201.[1] The Convention clearly manifests a "general pro-

[1] The seven grounds for refusal to confirm an arbitration award are as follows: (a) a party to the arbitration agreement lacked capacity or the agreement is otherwise invalid; (b) the

enforcement bias," however. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974); accord American Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pakistan Ltd., 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). Accordingly, the party opposing confirmation bears the burden of proving that one of the seven grounds enumerated in Article V applies and provides a basis for the court to refuse to confirm the arbitration award. Parsons & Whittemore Overseas Co., 508 F.2d at 973. Respondent relies on Articles II, IV, and V(1)(a) and (b) in support of its motion to dismiss, but fails to meet its burden on any of these grounds for dismissal.

2. Validity of the Agreement to Arbitrate

Respondent first contends that this Court may refuse to recognize and enforce the London arbitration award because "the [MOA] is not valid under the law to which the parties subjected it," Convention, Art. V(1)(a), and because the arbitration clause is not an "'agreement in writing' . . . signed by the parties," id. Art. II(2). Respondent argues that because the MOA was never

party against whom the award is invoked had insufficient notice of the arbitration proceeding; (c) the dispute is beyond the scope of the arbitration agreement; (d) the composition of the arbitral authority or the arbitration procedures were not in accordance with the arbitration agreement or with the law of the country where the arbitration took place; (e) the award is not yet final or binding on the parties; (f) the dispute is not capable of settlement by arbitration under the law of the country where confirmation of the award is sought; and (g) confirmation of the award would violate the public policy of the country where confirmation of the award is sought. See Convention, Art. V.

signed by petitioner, but rather by J.C. O'Keefe Shipbroking Ltd, "as brokers only," neither the underlying agreement between the parties for the purchase and sale of M/V MURANO, nor the agreement to arbitrate contained therein, is enforceable. Respondent advances two theories to support its argument that the MOA is unenforceable. First, the agreement fails to satisfy the Statute of Frauds. Second, a disposition of property made by an agent without the authority of the principal is not binding on the principal.

As an initial matter, the Court notes that respondent had ample opportunity to raise its objection to arbitration on the ground that the agreement to arbitrate is unenforceable prior to and during the London arbitration proceeding. It chose not to do so, however. Thus, the Court finds that this ground for dismissal of the petition to confirm "is not properly raised at this time and therefore has been waived." La Societa Nationale Pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Shaheen Natural Resources Co., 585 F. Supp. 57, 62 (S.D.N.Y. 1983) (holding that respondent waived objection to confirmation of award on ground that it was not bound by the arbitration provision because such objection was not raised before the arbitration panel), aff'd, 733 F.2d 260 (2d Cir.), cert. denied, 469 U.S. 883 (1984).

Even assuming respondent has not waived this objection to confirmation of the award, it should be rejected because respondent has not demonstrated that the MOA is unenforceable.

Paragraph 11 of the MOA clearly provides that English law governs. (See Pet'n, Exh. B, ¶ 11). Respondent has utterly failed, however, to cite any persuasive authority to support its position that the underlying agreement between the parties is unenforceable under English law.[3] Thus, respondent has not established that "the . . . agreement is not valid under the law to which the parties have subjected it." Convention, Art. V(1)(a).

Moreover, the arbitration agreement contained in the MOA is clearly enforceable under U.S. law. "[I]t is well-established that a party may be bound by an agreement to arbitrate even absent a signature." Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 846 (2d Cir. 1987). While Article II of the Convention indeed requires that an agreement to arbitrate be in writing to be enforceable, "it does not require that the writing be signed by the parties," id., and "ordinary contract principles dictate when the parties are bound by a written arbitration provision absent their signatures." Sarhoun

[3] Indeed, a cursory review of English authority suggests that both of respondent's theories are unavailing. First, the U.K. Sale of Goods Act of 1979 provides that "a contract of sale may be made in writing, either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties." Halsbury's Laws of England, vol. 41, ¶ 643 (4th ed. 1983) (footnotes omitted). In England, therefore, contracts for the sale of goods no longer need to be in writing to be enforceable, regardless of their value, as the Statute of Frauds relating to sale of goods contracts has been repealed by statute. Id. ¶ 645. As for respondent's agency argument, under U.K. law, "[a] broker employed to buy or sell has implied authority to make and sign on behalf of his principal a written contract or memorandum where necessary to make the contract enforceable in law." Id. ¶ 649.

Aktiengesellschaft v. Societa Industriale Agricola "Tresse" di Dr. Domenico e Dr. Antonio Dal Ferro, 471 F. Supp. 1163, 1170 (S.D.N.Y. 1979). Even if this Court assumes that Mr. O'Keefe's signature on the MOA was not an adequate substitute for that of petitioner, the relevant inquiry is whether the agreement to arbitrate nevertheless satisfies the Statute of Frauds, binding both parties to the agreement.

Pursuant to the Uniform Commercial Code, a contract for the sale of goods for $500 or more is binding if it is in writing and signed by the party against whom enforcement is sought. See U.C.C. § 2-201(1). Here, respondent claims that the arbitration provision is unenforceable because petitioner, as seller, never signed the underlying agreement. There is no dispute that respondent, the party against whom enforcement is sought, signed it. Whether petitioner signed the agreement is irrelevant for Statute of Frauds purposes, and therefore both the underlying agreement and the arbitration clause are enforceable against respondent. Accordingly, for all of the above reasons, respondent's Article V(1)(a) defense to confirmation of the award is hereby rejected.[3]

[3] Respondent's reliance on San Mar, Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879 (S.D.N.Y. 1991) is misplaced. There, Judge Edelstein held that the agreement to arbitrate was unenforceable because it was contained only in petitioner's telex. Respondent's responsive telexes were "not only devoid of arbitration language, they also disavow[ed] the entire contents of [petitioner's] . . . telexes." Id. at 883. Thus, Article II's writing requirement was not satisfied because the arbitration clause was not signed by respondent, the party to be charged, and was, in fact, objected to by respondent. Id.

Mealey Publications, Inc., Wayne, PA. Vol. 12, #12, 12/97

3. Arbitration Award Entered On Default

As an additional basis for dismissal, respondent contends that this Court cannot confirm the London arbitration award because it was rendered on default. The Court construes this ground for dismissal as one based on Article V(1)(b) of the Convention. It, too, is entirely without merit.

To invoke the Article V(1)(b) defense, respondent "must establish that it was denied the opportunity to be heard at a meaningful time or in a meaningful manner." Ukrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc., 1996 WL 107285, at *5. The only evidence respondent offers in support of its position that it did not "appear" in the London arbitration consists of a statement in the affidavit of its CEO, Andrew A. Levy, that it "did not appoint an arbitrator in that proceeding" (Levy Aff. ¶ 25), and its attorney's statements in its reply brief that it "did not hire counsel in England, did not answer the arbitration petition, (and) did not deliver any Points of Defense and

---

Here, the MOA contained a written arbitration clause that was indeed signed by respondent, the party to be charged. Furthermore, there is no indication that respondent objected to the terms of the MOA or the arbitration provision contained therein at the time of signing. Respondent's claim that it did not believe that petitioner's broker's signature on the MOA could create a binding contract is dubious in light of the fact that respondent signed the MOA itself only three days later. (See Pet'n, Exh. B at 10). Moreover, respondent's cover letter enclosing the MOA containing its signature does not take the position that the parties did not have a binding agreement. (See Levy Aff., Exh. E). Finally, in a December 9, 1996 letter to its appointed arbitrator, respondent conceded that it had breached the MOA. (See Oxton Aff., Exh. A). These facts demonstrate respondent's acknowledgement that the MOA was an enforceable contract.

Authorities." (Resp.'s Reply Brief at 2).

The documents submitted by petitioner tell a different story, however. Respondent corresponded with A.S. Christofides, the arbitrator appointed on its behalf, on December 9, 1996, raising two issues that respondent wished the arbitrators to consider in their deliberations. (See Oxton Aff., Exh. A). Hence, respondent did assert, in writing, defenses to petitioner's claims. Furthermore, the arbitration was conducted on the written submissions of the parties; therefore, no personal appearance was required or made by either party. In fact, a second arbitrator on the panel, Christopher Moss, advised the parties by fax dated January 15, 1997 that the panel had received no objection from either party to conducting the arbitration in this manner, and that if either party did so object, to make a demand for an oral hearing within a set time period. (See id., Exh. B). No such demand was made by respondent, nor did it lodge an objection to the arbitration going forward at all, despite having had ample opportunity to do so.

In light of the above facts, respondent cannot seriously contend that it lacked notice of the London arbitration so as to justify this Court's refusal to confirm the award pursuant to Article V(1)(b) of the Convention. Respondent's alleged lack of participation in the arbitration proceeding, even if true, could only be interpreted as intentional. The proper course, however, would have been for respondent to object to the proceeding entirely, see La Societa Nationale, 585 F. Supp. at

62, which it clearly did not do, rather than simply refuse to participate. In any event, the record indicates that respondent did participate. Accordingly, because the Court finds that respondent was given "ample notice of the arbitration and an adequate opportunity to present its defenses" and objections, Geotech Lizenz AG v. Evergreen Sys., Inc., 697 F. Supp. 1248, 1253 (S.D.N.Y. 1988), respondent's second ground for dismissal is also rejected.

4. Failure to Comply with Convention Requirements

Finally, respondent argues that this Court should dismiss the petition to confirm because petitioner has failed to comply with Convention requirements, specifically the requirements that a petitioner seeking confirmation of an award under the Convention submit a "duly authenticated original award or a duly certified copy thereof and the original of the agreement to arbitrate or a duly certified copy of the agreement to arbitrate." (Resp.'s Brief at 7). This argument for dismissal, too, is meritless.

Article IV of the Convention provides that to obtain recognition and enforcement of a foreign arbitration award, "the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original [arbitration] agreement . . . or a duly certified copy thereof." Convention, Art. IV(1). Petitioner has appended to its petition a copy of the MOA, containing the arbitration provision, and a

copy of the Final Award, both of which are certified by petitioner's solicitor in the London arbitration. (Gen Pet'n, Exhs. A-D).

"The purpose for requiring submission of the original agreement or a certified copy is to prove the existence of an agreement to arbitrate." Al Haddad Bros. Enters., Inc. v. M/S Agapi, 635 F. Supp. 205, 209 (D. Del. 1986), aff'd, 813 F.2d 396 (3d Cir. 1987). Here, respondent does not challenge the existence of the arbitration provision, but rather only its enforceability. Similarly, the genuineness of the arbitration award is not in dispute. Respondent is merely grasping at straws, attempting to persuade the Court to refuse to confirm the award on the basis of a mere technicality. In these circumstances, the certification of petitioner's solicitor, who participated in the London arbitration and has personal knowledge that the agreement and the award are genuine, is sufficient to satisfy the requirements of Article IV. Cf. Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir. 1983) (holding that certification by a member of the arbitration panel provided sufficient basis upon which to enforce arbitration award); Hewlett-Packard, Inc. v. Berg, 867 F. Supp. 1126, 1130 n.11 (D. Mass. 1994) (overlooking failure to submit original or certified copy of agreement to arbitrate and award because neither party contested their validity), vacated on other grounds, 61 F.3d 101 (1st Cir. 1995); Al Haddad Bros., 813 F. Supp. at 209-10 (holding that court's prior rulings that agreement to arbitrate existed

Mealey Publications, Inc., Wayne, PA. Vol. 12, #12, 12/97

were sufficient to meet requirements of Article IV(1). Accordingly, the Court rejects respondent's final argument for dismissal.

B. Motion to Confirm

"Confirmation of a foreign arbitration award is proper under 9 U.S.C. § 207 if (1) the party moving for confirmation of the arbitration award has complied with the requirements of the Convention; and (2) the party opposing the motion has failed to show the existence of any of the grounds stated in Article V of the Convention that would bar confirmation of the arbitration award." Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd., No. 90 Civ. 3792, 1995 WL 361303, at *1 (S.D.N.Y. June 16, 1995), aff'd, 79 F.3d 295 (2d Cir. 1996). Both prerequisites are satisfied in this case for the reasons set forth above. Accordingly, the arbitration award rendered February 19, 1997, amended March 31, 1997, is hereby confirmed.

CONCLUSION

For the foregoing reasons, petitioner's motion to confirm the arbitration award is granted, and respondent's cross-motion to dismiss the petition is denied. Costs and post-award, pre-judgment interest will be awarded. Petitioner shall submit a proposed judgment, on notice, within seven days hereof.

SO ORDERED.

Dated: New York, New York
December 8, 1997

DENNY CHIN
United States District Judge

Mealey Publications, Inc., Wayne, PA. Vol. 12, #12, 12/97

MEALEY'S International Arbitration Report