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119. UNITED STATES: DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA - 10 April 1980 - Mitsui & Co. (USA), Inc., v. C&H Refinery, Inc., Pacific Refining Co., Coastal States Trading, Inc., CIC Industries, Inc., Coastal States Gas Corporation *

Effects of an arbitration agreement on judicial proceedings - Waiver of arbitration

(See Part I.B.1)

MEMORANDUM OF DECISION

NGRAM, District Judge.

n its amended complaint, the plaintiff, tsui & Company (USA), Inc. ("Mitsui"), alleged that one of the defendants, H Refinery, Inc. ("C&H"), contracted to crude oil at specified terms for a one- r period commencing July 1977.[1] It con- ds that defendant Coastal States[2] ed to process the oil and, to perform r acts that would have enabled C&H to t obligations under the oil sale con- t. Mitsui also alleges that the de- dants agreed to perform similar obliga- s regarding one shipment in September 7. It claims that the defendants breached h contract by failing to accept the Sep- ber delivery.[3]

he defendants have moved to stay this ion pending arbitration. For the reasons discussed below, the motion is granted, and all further proceedings are stayed pending arbitration.

The Record

The plaintiff filed suit on November 15, 1978. In January 1979, C&H moved for a more definite statement, and Coastal States moved to dismiss its parent corporations on jurisdictional grounds.[4] The parties resolved these matters by stipulation. As a result, Mitsui amended its complaint and dismissed the corporate parents without prejudice. In February 1979, C&H filed an answer and counterclaim, later amended, that made no mention of arbitration. Mitsui answered the amended counterclaim on May 21, 1979.

On that day, Coastal States moved for a stay pending arbitration. It relied on the oil sale contract, which provided that "[a]ny

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Mitsui is a New York corporation; C&H, a yoming corporation. Delivery was to be ade in Indonesia.

The Coastal States defendants are Pacific Re- ing Company and Coastal States Trading, c.

3. In alternate counts, Mitsui bases the same facts on theories of estoppel, interference with contract relations, and fraud.

4. The complaint had named Coastal States Gas Corporation and CIC Industries, Inc., as additional defendants.

controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by arbitration." See F.O.B. Oil Sales Agreement, General Conditions § 11.2.

Mitsui acknowledged the validity of the arbitration clause, but contended that Coastal States could not invoke a provision of a contract to which it was not party. Coastal States contended that it was entitled to the benefit of the arbitration clause because the complaint both incorporated the terms of the oil sale contract into an alleged agreement involving Coastal States and alleged that the defendants were agents of one another.

The parties argued the motion on August 3, 1979. At the hearing, C&H expressed its opposition to a stay, but informally reserved the right to alter this position, subject to giving Mitsui advance notice.

Following the hearing, Mitsui verified C&H's opposition to the stay and moved to "clarify" the allegations of its complaint. Both defendants opposed the motion: Coastal States argued that the plaintiff should be bound by its "admissions in the complaint," while C&H claimed undue burden in having to respond to an amended pleading. The Court granted Mitsui leave to amend on October 10, 1979.

Because the amended complaint[5] purported to separate the terms of the oil sale contract from those of the Coastal States contracts, the Court invited further briefing on the stay motion. Coastal States continued to insist that each of the plaintiff's theories of recovery implicated the arbitration right. In Mitsui's view, the amendments merely confirmed that its separate counts prevented Coastal States from invoking arbitration.

Prior to the hearing on December 21, 1979, C&H informed Mitsui that it would join Coastal States' motion to stay.

It is uncontroverted that C&H had a right to obtain a stay when Mitsui first filed suit. The plaintiff alleges that C&H is a party to the oil sale contract. The arbitration agreement embodied in that contract is governed by the United States Arbitration Act of 1925, 9 U.S.C. §§ 1–14 (1976) (the "Act").[6] Section 3 of the Act permits a defendant to obtain a stay pending arbitration.[7]

Mitsui argues that C&H has waived its right to obtain a stay by its conduct in this litigation. Acknowledging that the case is close, the Court must disagree with Mitsui.

Discussion

[1] The Court begins with the premise that "waiver is not favored and the facts must be viewed in light of the strong federal policy supporting interr tion agreements." *Shinto Ltd. v. Fibrex & Shipping C* 1328, 1330 (9th Cir. 1978). a waiver, the Court "must only that the [party seek acted inconsistently with right, but that [the objec prejudiced by this action."

The *Shinto Shipping* co trial court's refusal to fir examining the fairness of r jecting party to arbitrate. who had sued to compel taken three depositions for tion. This constituted a mis because arbitration rules di compelled testimony. The participated in the depositic it knew they were improper. last session ended, the defer that a waiver had occurr Circuit rejected this arg the defendant failed to show the limited discovery. Four strated the lack of prejudice: ant had not shown that the t materially affect its case in it had been adequately rep sessions; (3) it had incurred expense; and, (4) it could h wrong, but instead schemed tration. *Id.* at 1330–31.

This holding makes clear t ing party bears the burden ing prejudice by a convi based on the entire record.

5. Prior to the filing of the amended complaint, C&H had moved to dismiss the action for Mitsui's alleged failure to join indispensable parties. The parties stipulated to the removal of this motion from calendar pending a ruling on the stay motion.

6. C&H relies on both the Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, *reprinted foll.* 9 U.S.C.A. § 201 (West Supp.1979) (the "Convention"). Congress enacted the Convention as positive law with the addition of Chapter 2 of the Act. See 9 U.S.C.A. §§ 201–208 (West Supp.1979).

The Act governs all contracts "evidencing a transaction involving commerce," 9 U.S.C. § 2, "among the several states or with foreign nations," *id.* § 1. The Convention applies to these § 2 agreements. 9 U.S.C.A. § 202.

The Court will treat the motion as one brought solely under § 3 of the Act. The parties have not briefed the import of the Convention in the waiver context. Because the Act accords to the defendants the relief sought, the Court does not consider whether a different analysis applies to Article II(3) of the Convention, which commands that a court "refer the parties to arbitration, unless it finds that the [arbitration] agreement is null and void, inoperative or incapable of being performed." Convention art. II(3), *reprinted foll.* 9 U.S.C.A. § 201 (West Supp.1979).

7. Section 3 provides in relevant part:

> If any suit . . . be brought in [federal court] upon any issue referrable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with arbitration.

9 U.S.C. § 3 (1976).

8. C&H suggests that the waive submitted to arbitration with never attempts to explain the express statement to the contr *Marietta Alum. Inc. v. Gener* F.2d 143, 146 (9th Cir. 1978) issue to be determined by t upon the facts and circu upon").

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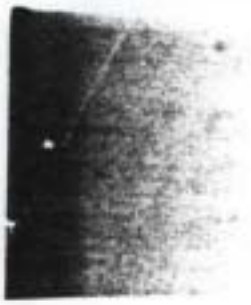

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al policy supporting international arbitration agreements." *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co., Inc.*, 572 F.2d 1328, 1330 (9th Cir. 1978). In order to find a waiver, the Court "must be convinced not only that the [party seeking arbitration] acted inconsistently with that arbitration right, but that [the objecting party] was prejudiced by this action." *Id.*

The *Shinto Shipping* court affirmed a trial court's refusal to find waiver after examining the fairness of requiring the objecting party to arbitrate. The plaintiff, who had sued to compel arbitration, had taken three depositions for use in arbitration. This constituted a misuse of discovery because arbitration rules did not allow for compelled testimony. The defendant had participated in the depositions even though it knew they were improper. Just after the last session ended, the defendant contended that a waiver had occurred. The Ninth Circuit rejected this argument because the defendant failed to show prejudice from the limited discovery. Four factors demonstrated the lack of prejudice: (1) the defendant had not shown that the testimony would materially affect its case in arbitration; (2) it had been adequately represented at the sessions; (3) it had incurred "insignificant" expense; and, (4) it could have avoided the wrong, but instead schemed to avoid arbitration. *Id.* at 1330–31.

This holding makes clear that the objecting party bears the burden of demonstrating prejudice by a convincing showing based on the entire record.

[2] Undoubtedly, C&H acted inconsistently with its arbitration right. In its answer, it contested the plaintiff's claims without alluding to that right. By its counterclaim, it sought judicial relief respecting arbitrable issues. It engaged in merits discovery. It filed motions raising matters unrelated to arbitration. It initially opposed a co-defendant's stay motion. Finally, it waited over one year from the filing of suit before seeking arbitration.

The sole issue[8] is whether the plaintiff has shown that it has been prejudiced by these acts.

Mitsui contends that it would have sought its remedy in arbitration had C&H requested a stay promptly. It argues that its burden is met with the showing that it both incurred avoidable expense and produced discovery materials[9] as a result of C&H's delay.

These factors are relevant in determining whether the litigation has reached a point where "it would be manifestly unfair to permit one side to resort to arbitration over the protest of the other." *Cavac Compania Anonima Venezolana de Administracion y Comercio v. Board*, 189 F.Supp. 205, 209 (S.D.N.Y.1960). However, they do not necessarily preclude a late stay. In terms of fairness to litigants, the question is whether the hardship to the objecting party outweighs the strong policy favoring arbitration.

If a party has not been substantially misled, his claim of prejudice lacks the force it might otherwise carry. When a defendant participates in litigation after communicat-

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§ 3 (1976).

7. C&H suggests that the waiver issue should be submitted to arbitration with all others, but never attempts to explain the Ninth Circuit's express statement to the contrary. *See Martin Marietta Alum. Inc. v. General Elec. Co.*, 586 F.2d 143; 146 (9th Cir. 1978) ("Waiver is an issue to be determined by the court, based upon the facts and circumstances relied upon").

8. The parties conducted limited discovery. No depositions were taken. Coastal States neither conducted nor responded to discovery, taking the view that discovery should await the outcome of the stay motion. Mitsui and C&H each filed two sets of requests seeking documents and interrogatory answers from one another. C&H responded to both Mitsui sets. Prior to the filing of the initial stay motion, Mitsui had produced over 2,500 documents and had furnished a few interrogatory answers in response to C&H's first requests. The parties have stipulated that Mitsui's response to the second C&H set will depend on whether the action is stayed. Neither party sought a protective order prior to furnishing discovery materials.

Mitsui seems to suggest that the defendants schemed to deny it legitimate discovery from Coastal States. The Court finds this to be highly speculative and cannot draw such a conclusion from the present record.

ing an intent to arbitrate in his answer, for example, "the burden is heavy on one who would prove waiver." *Hilti, Inc. v. Oldach*, 392 F.2d 368, 371 (1st Cir. 1968). *Accord, Martin Marietta Alum., Inc. v. General Elec. Co.*, 586 F.2d 143, 146 (9th Cir. 1978) (arbitration as a bar). Courts are more likely to enter a late stay if convinced that the objecting party could not have reasonably relied on his adversary's apparent election to litigate. In *Nuclear Installation Servs. Co. v. Nuclear Servs. Corp.*, 468 F. Supp. 1187 (E.D.Pa.1979), for instance, the defendant participated in litigation for one year after attempting promptly but unsuccessfully to assert its arbitration rights. The plaintiff argued that a waiver had occurred because it incurred expense in opposing a jurisdictional challenge brought by the defendant. The court disagreed, concluding that this expense could not justify a finding of waiver. *Id.* at 1194. Similarly, in *Shinto Shipping, supra*, the objecting party incurred expense by participating in improper discovery. In rejecting the claim of waiver, Judge Beeks emphasized that the "defendant cannot forthrightly claim surprise or unavoidable prejudice" when it recognized and participated in the misuse of discovery. This fact mitigated against the showing of "convincing evidence and clear equity" needed to support a waiver. *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co., Inc.*, 425 F.Supp. 1088, 1092 (N.D. Cal. 1976), *aff'd*, 572 F.2d 1328 (9th Cir. 1978).

Mitsui incurred expense by vigorously opposing Coastal States' stay motion. Aware that C&H had reserved its right to seek a stay, it made a tactical decision to strive to avoid arbitration and thereby assumed the risk that its effort would be rendered futile by C&H's change of mind. The Court agrees with the plaintiff that C&H could not have stood by justly as Mitsui committed itself irretrievably to the litigation. As a lawsuit progresses into later stages, a mere reservation of the right to arbitrate cannot prevent the objecting party from concluding reasonably at some point that the right has been abandoned. This is illustrated vividly in *Demsey & Assocs., Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1018 (2d Cir. 1972), where the court held that it would be a "gross miscarriage of justice" to allow arbitration following a complex trial on the merits even though the arbitration right had been reserved in the pleadings.

The point of no return has not been reached here. Little of substance has occurred in this lawsuit. The pleadings have not been fully joined and little discovery has been conducted. No pretrial conference has been held; nor has the case been set for trial. Indeed, the major activity has centered about the stay question, and before that question was submitted for decision, C&H invoked its arbitration right. Within these limits, the plaintiff will not be prejudiced in having to proceed in arbitration.

The plaintiff argues that a contrary result is compelled by *Gulf Central Pipeline Co. v. Motor Vessel Lake Placid*, 315 F. Supp. 974 (E.D.La.1970), and *Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp.*, 455 F.Supp. 211 (S.D.N.Y.1978). Neither case supports its position.

In *Gulf Central*, the stay applicant had waited almost a year before requesting arbitration. The court admonished that litigants "owe a duty not to delay litigation unduly, nor to stretch out the proceeding to its utmost, as if it were merely a checker game in which each player awaits the maximum time before he next moves." 315 F.Supp. at 977. Yet it did not find prejudice in the delay. The parties had arbitrated a related dispute before the stay was sought. The court found prejudice because a stay "would require a second submission to arbitration of an issue that could have been submitted and decided at the time of the first arbitration proceeding." *Id.* This case would be relevant only if Mitsui could demonstrate that similar waste would result from the entry of a stay order here.

Relying on *Pollux Marine*, Mitsui argues that its stay opposition has been wasted because C&H's delayed joinder "moots" that effort. In that case, a petitioner sought to compel arbitration in accordance with the terms of a charter party. The respondent contested both the charter party

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Relying on *Pollux Marine*, Mitsui argues that its stay opposition has been wasted because C&H's delayed joinder "moots" that effort. In that case, a petitioner sought to compel arbitration in accordance with the terms of a charter party. The respondent contested both the charter party and the arbitration clause. *See* 455 F.Supp. at 214 n.3. For nearly six months the re- spondent "refused to arbitrate and actively opposed the instant petition, through exten- sive discovery, briefings, affidavits and sev- eral court appearances." *Id.* at 214. Four days before the scheduled trial in which the court was to determine whether a charter party had been formed, the respondent "ad- mitted" the existence of an arbitration agreement and filed an amended answer requesting that the charter party question be referred to arbitration. The court struck this pleading. Discussing the propri- ety of leave to amend, it found prejudice because the last minute reversal might have mooted the lively efforts of the parties in seeking a court determination of the char- ter party question. *Id.* at 216. The *Pollux Marine* holding surely mitigates against C&H's argument that the waiver issue should be referred to arbitration. The Court has rejected that argument, however, and is deciding the issue tendered to it by the parties.

As these cases reflect, courts must insure that duplication of effort in separate fo- rums is minimized. If an objecting party can demonstrate concretely that such dupli- cation would result from a belated attempt to obtain a stay, prejudice will likely be found. *E. g., Demsey, supra*, 461 F.2d at 1018 (arbitration sought after case fully tried); *American Locomotive v. Chemical Res. Corp.*, 171 F.2d 115, 118 (6th Cir. 1948) (stay sought after nearly eight years of protracted litigation), *cert. denied*, 336 U.S. 909, 69 S.Ct. 515, 93 L.Ed. 1074 (1949); *Radiator Specialty Co. v. Cannon Mills, Inc.*, 97 F.2d 318, 319 (4th Cir. 1938) (stay sought on day of trial). Mitsui has not made such a showing.

Nor has the plaintiff shown that it will suffer concrete harm in the arbitration fo- rum as a result of the litigation activity. It argues that the defendants have gained an unwarranted advantage through discovery, but does not show how the documents it produced will impair its case in arbitration. *See Shinto Shipping, supra*, 572 F.2d at 1330. It has not shown, moreover, that these materials would have been unavaila- ble to defendants through the arbitration process. If discovery had been substantial, the Court might presume that prejudice exists. *See Liggett & Myers, Inc. v. Bloom- field*, 380 F.Supp. 1044, 1047–48 (S.D.N.Y. 1974) (thousands of pages of deposition tes- timony and hundreds of documents). But the Court cannot base such a presumption on the limited discovery that has occurred to date. If the discovery record is sparse an objecting party must show specifically how its case has been impaired. Absent such a showing, the strong policy favoring arbitration controls.

The law is clear that waiver "is not to lightly inferred." *Carcich v. Rederi A. Nordie*, 389 F.2d 692, 696 (2d Cir. 196 *See Hilti, Inc., supra*, 392 F.2d at 372 ("The cases demonstrate with marked c sistency the reluctance of courts to f default despite substantial delay and int vening proceedings.").

Mitsui has not made the convincing sh ing needed to sustain its burden. At b the record permits an inference of preju to be drawn. Prejudice cannot be show inference alone. Examining the fact light of the strong policy favoring arb tion, the Court must resolve all do against the objecting party. The C concludes, therefore, that Mitsui can ceed in arbitration at this time wi prejudice to its case. C&H has not w its right to obtain a stay.

Accordingly, this action is stayed pe arbitration in accordance with the ot contract.

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121. UNITED STATES: COURT OF APPEALS, FIRST CIRCUIT - 25 February 1981 - Société Générale de Surveillance, S.A. v. Raytheon European Management and Systems Company *

Order restraining arbitration proceedings other than those provided in the arbitration agreement - Scope of the arbitration agreement

(See Part I.B.1,4)

BREYER, Circuit Judge.

This case involves a disagreement between Raytheon Management Systems ("REMSCO") and Societe Generale de Surveillance ("SGS") about whether, or where, they must arbitrate a dispute arising under a contract between them for the testing of Hawk missiles. REMSCO sought to arbitrate the dispute before the American Arbitration Association in Boston. SGS then brought a diversity action in the United States District Court in Massachusetts seeking an order under Massachusetts General Laws, ch. 251, §§ 2, 15,[1] restraining REMSCO from proceeding with that arbitration. The district court granted the temporary restraining order that SGS sought and several months later denied REMSCO's motion to modify or to vacate its order. REMSCO appeals.

This court has jurisdiction under 28 U.S.C. § 1292(a)(1), which provides for appeals of "orders ... granting, continuing, ... or refusing to dissolve or modify injunctions ...."[2] We affirm the decision

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* The text is reproduced from 643 Federal Reporter, 2d Series, p.864 ff.

1. Chapter 251 of the Massachusetts General Laws § 2(b) provides:

"Upon application, the superior court may stay an arbitration proceeding commenced or threatened if it finds that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily determined. And if the court finds for the applicant it shall order a stay of arbitration; otherwise the court shall order the parties to arbitration."

2. Appealability under 28 U.S.C. § 1292(a)(1) depends first on whether the relief granted by the district court was a temporary restraining order (the relief initially requested and the caption of the December 4, 1979 order) or a preliminary injunction. Temporary restraining orders usually do not fall within the interlocutory appeals statute because they are of short duration, often *ex parte*, and terminate with the ruling on preliminary injunction. 11 Wright & Miller, *Federal Practice and Procedure: Civil*, § 2962 at 616–622 (1973). Regardless of name, the two orders here, both entered after notice and hearing, have enjoined REMSCO for more than a year from proceeding with arbitration in

of the district court and remand the case for possible further proceedings consistent with this opinion.

I.

On July 10, 1975, REMSCO, a Massachusetts firm, and SGS, a French company, entered into a sub-contract under which SGS agreed to provide transportation, and other related services, for NATO Hawk missiles. This sub-contract (which we shall call the Basic Contract) was written on a two page Raytheon Purchase Order Form, to which were attached fifteen typewritten pages of provisions and fifty other pages of typed and printed exhibits and addenda. The Purchase Order is numbered 11.1108.-02.0144. The typed statements on the form state the basic subject matter ("transportation and ... other services"), refer the reader to the attached sixty-five pages for the terms of the contract, delete the printed conditions on the back of the form,[3] and state that the number of the Purchase Order (11.1108.02.0144) "shall be used in all references and correspondence regarding to this agreement". The subsequent sixty-five pages set forth a series of Articles spelling out the nature of the work, and provided for price ceilings, credit, security measures, insurance, audits, communication, disputes, and other basic matters. Article 16 provides that the Basic Contract will be "construed and interpreted in accordance with the law of the Republic of France". Article 17.2 provides that "all disputes ... arising in connection with" the Basic Contract "shall be finally settled by arbitration" under the rules of the International Chamber of Commerce in Lausanne, Switzerland. The Basic Contract further provides that any future changes must be in writing.

Over the next few years, the parties entered into a series of "change orders". Typically, the change order would be written on a Raytheon Purchase Order Form. In the upper left of the form, under the *printed* words "purchase order number" the *typed* Basic Contract number (11.1108.02.-0144) would appear. In a box next to it titled "c. o. number" the typed number of the change order would appear. At the bottom of the page, among other printed statements, the *printed* words "ship subject to the terms and conditions on the face and back hereof" appeared. Apparently often, or at least sometimes, this latter printed instruction was expressly countermanded by a typed statement. For example, Change Order No. Six, entered into on December 16, 1976, has the typed statement on its face that "this change ... does not

Boston and have had the effect of a preliminary injunction. SGS has had and continues to have the benefit of all the relief it ultimately sought. Thus, in this instance the temporary restraining order can be considered a preliminary injunction for purposes of appeal. *State of Maine v. Frl*, 483 F.2d 439 (1st Cir. 1973); 9 Moore's *Federal Practice* ¶ 110.26[5] at 253–255 (2d ed. 1970).

Second, some courts have questioned whether an appeal lies from an order enjoining a party from proceeding with arbitration, given the fact that an order sending a case to arbitration has been held not to constitute an injunction for purposes of § 1292(a)(1). *See, e. g., Lummus Company v. Commonwealth Oil Refining Company*, 297 F.2d 80, 86 (2d Cir.), *cert. denied sub nom., Dawson v. Lummus Co.*, 368 U.S. 986, 82 S.Ct. 601, 7 L.Ed.2d 524 (1962); *Greater Continental Corporation v. Schecter*, 422 F.2d 1100, 1102 (2d Cir. 1970). In this circuit, however, there is authority allowing an appeal from an order staying a party from proceeding with arbitration, at least where that order does not constitute a preliminary part of a larger case seeking determination by the court of the underlying dispute, but rather where a request for the stay constitutes the entire relief sought. *Lummus Co. v. Commonwealth Oil Refining Co., Inc.*, 280 F.2d 915, 917 (1st Cir.), *cert. denied*, 364 U.S. 911, 81 S.Ct. 274, 5 L.Ed.2d 225 (1960). There are strong reasons for holding that an order *sending* a case to arbitration is not an injunction in light of the policies underlying § 1292(a)(1) and the Federal Arbitration Act. These are set out by Chief Judge Coffin in *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183, 186–187 (1st Cir. 1972). Those same policies here underlie a holding of appealability, for the district court's decisions effectively deprived at least one of the parties to the dispute of one of the principal objects for which it allegedly bargained, i. e. a relatively speedy and inexpensive preliminary resolution of any controversy.

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cking determination by the erlying dispute, but rather or the stay constitutes the *Lummus Co. v. Commonwealth Co., Inc.*, 280 F.2d 915, 917 ied, 364 U.S. 911, 81 S.Ct. (1960). There are strong that an order sending a s not an injunction in light lying § 1292(a)(1) and the Act. These are set out by *New England Power Co. Corp.*, 456 F.2d 183, 186- Those same policies here appealability, for the dis- effectively deprived at s to the dispute of one of or which it allegedly bar- speedy and inexpensive of any controversy.

tions of purchase on the ge hereto are deleted in

change the Terms and Conditions." Thus, even though Change Order No. Six, and subsequent change orders were written on a new Raytheon form—one with printed terms on the back providing for arbitration in Massachusetts—the terms of the Basic Contract, not the printed terms on the back of the form, appeared to govern.

In December 1976 the parties signed a Memorandum of Understanding which set forth certain changes in the work provided by the Basic Contract, particularly with respect to management services, the rate of exchange, and payment. The Memorandum states that the subject matter "will form the basis of a firm definitive contract" to be executed before January 31, 1977. That memorandum was attached to Change Order No. 7. That change order has the number of the Basic Contract (11.1108.02.0144) typed in the upper left hand corner; it has "7" typed under the printed legend "c. o. number"; it has the same printed terms on the face and back as No. 6; but the typing on the front simply refers to the Memorandum of Understanding and does not say that other terms and conditions remain the same.

On June 12, 1977, the parties agreed to Change Order No. 8. That change order also has the same Basic Contract number in the upper left hand corner; it has the number "8" typed under the printed legend "c. o. number"; it has the same printed terms on the face and back as No. 6. It provides, however, not for the transportation of missiles but for their field testing, inspection and evaluation. And, like order No. 6, but unlike order No. 7, it has the typed statement on its face: "All other terms and conditions set forth in this contract remain unchanged."

Subsequently, a dispute arose in which REMSCO claimed that SGS was negligent in its performance under Change Order No. 8. After informal efforts to resolve the dispute failed, REMSCO sought arbitration in Switzerland under Article 17.2 of the Basic Contract. SGS opposed this arbitration, however, arguing in a letter to REMSCO that the testing and other services called for by Change Order No. 8 were different from the transportation and other services described in the Basic Contract—to the point where the arbitration clause of the Basic Contract did not apply. REMSCO then sought arbitration in Boston, presumably on the theory that if Article 17.2 of the Basic Contract did not apply, then the printed arbitration clause on the back of Change Order No. 8 must apply. SGS responded by bringing this action in the district court under Massachusetts law seeking to enjoin the Boston arbitration. Judge McNaught entered a temporary restraining order enjoining the Boston arbitration on December 4, 1979. He found that SGS would probably succeed on the merits of its action. He wrote that it is "logical ... to claim that, if arbitration is to be held at all, it must be held in these circumstances under Article 17.2 of the original contract. It is not inconsistent to urge further that, by reason of the nature of the services called for by the change order, no arbitration is required should a dispute arise."

On December 17, 1979, REMSCO filed a motion to dissolve the temporary restraining order or in the alternative to "condition any ... injunction ... upon SGS's participation in ... arbitration in Lausanne Switzerland" in accordance with the Basic Contract. Judge McNaught denied this motion in July 1980. In September 1980 REMSCO renewed its motion, specifically requesting the court to "dissolve the temporary restraining order and compel arbitration in either Boston, Massachusetts, or Lausanne, Switzerland." This motion was denied on September 16, 1980. At the same time REMSCO filed with the International Chamber of Commerce a demand for arbitration in Switzerland. SGS filed a response in which it denied that the arbitration clause in the original contract applied to the present controversy but apparently was prepared to allow the arbitration to proceed, reserving the right to argue that Article 17 of the Basic Contract does not apply. Thus, at the present time Judge McNaught's restraining order, preventing arbitration before the American Arbitration Association in Boston [illegible] effect,

while some form of arbitration is proceeding (with reservations) in Switzerland.

II.

In appealing from Judge McNaught's refusal to dissolve or to modify the temporary restraining order, enjoining arbitration before the American Arbitration Association in Boston, REMSCO makes three basic arguments. First, it claims that the district court erred as a matter of law in issuing the temporary restraining order, for the Federal Arbitration Act, not Massachusetts state law, applies to this proceeding, and that Act does not grant the court the power to stay arbitration proceedings. Second, it claims that, beginning with Change Order No. 7, the parties created a new contract; thus the Basic Contract (and in particular Article 17) does not apply to Change Order No. 8; rather, the printed arbitration provision on the back of Change Order No. 8 applies. Third, in any event, if the Basic Contract applies, the district court should have ordered arbitration in Switzerland under Article 17. We shall consider each of these arguments in turn.

A.

[1] We agree with REMSCO that the Federal Arbitration Act applies to this dispute. The Act applies to a

> "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ...." 9 U.S.C. § 2.

There is a strong judicial policy favoring the submission of contractual disputes to arbitration—particularly under the provisions of the Federal Arbitration Act, which embodies the agreements reached in an international convention on arbitration.[4] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–520, 94 S.Ct. 2449, 2452–2457, 41 L.Ed.2d 270 (1974). Thus, the courts have held that the term "commerce" in this provision of the Act refers to interstate or foreign commerce and is to be broadly construed. *See, e. g., Weight Watchers of Quebec Ltd. v. Weight Watchers Int'l Inc.*, 398 F.Supp. 1057 (E.D.N.Y.1975); *Caribbean Steamship Co., S.A. v. La Societe Navale Caennaise*, 140 F.Supp. 16 (E.D.Vir.1956). In this case, both the Basic Contract and Change Order No. 8 "evidenc[e] ... a transaction involving [foreign] commerce." The contract, prepared in New Hampshire, is between an American and a French company, and it concerns the transportation and testing in Europe of missiles made in California and Massachusetts. It clearly covers trade "between citizens of this country and subjects of a foreign country ...." *Caribbean Steamship Co., S.A. v. La Societe Navale Caennaise, supra*, 140 F.Supp. at 21.

[2, 3] We disagree, however, with REMSCO's claim that the Act removes the district court's power to enjoin the Massachusetts arbitration. The Act supplants only that state law inconsistent with its express provisions. *Litton RCS v. Pennsylvania*

4. In 1958, a special conference of the United Nations Economic and Social Council adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1970 the United States acceded to the treaty, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, and Congress passed Chapter 2 of the United States Arbitration Act, 9 U.S.C. § 201 *et seq.*, in order to implement the Convention. 9 U.S.C. § 201 provides unequivocally that the Convention "shall be enforced in United States courts in accordance with this chapter."

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. Doc. E, 90th Cong., 2d Sess. (1968); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049 (1961). Article II(1) of the Convention provides:

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

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', 3] We disagree, however, with REM-)'s claim that the Act removes the dis- t court's power to enjoin the Massachu- s arbitration. The Act supplants only t state law inconsistent with its express visions. *Litton RCS v. Pennsylvania Turnpike Commission*, 376 F.Supp. 579 (E.D.Penn.1974), *aff'd mem. Litton Business Systems, Inc. v. Pennsylvania Turnpike Com.*, 511 F.2d 1394 (3d Cir. 1975); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). There is no such inconsistency here. The Act expresaly provides federal courts with the power to order parties to a dispute to proceed to arbitration where arbitration is called for by the contract. 9 U.S.C. § 3. To allow a federal court to enjoin an arbitration proceeding which is not called for by the contract interferes with neither the letter nor the spirit of this law. Rather, to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present. *A.B.C., Inc. v. American Federation of Television & Radio Artists*, 412 F.Supp. 1077 (S.D.N.Y.1976).[5] In fact, were the law read to prevent a court from enjoining an arbitration proceeding it might actually interfere with arbitration—in the unusual case, arguably present here, where one such arbitration proceeding may interfere with another. Thus, we conclude that the district court had adequate authority under Massachusetts law to stay the Massachusetts arbitration.

B.

[4] We agree with the district court that SGS is likely to prevail in its claim that Change Order No. 8 is part of the Basic Contract and that it does not form part of a new contract instituted by Change Order No. 7. We note that this issue, under the terms of both the Basic Contract (Article 16) and the Memorandum attached to Change Order No. 7, is to be decided as a matter of French law. While the parties have not briefed French law, a cursory review of its basic principles suggests that courts are free to look to objective indications of the parties' intentions. René David, *English Law and French Law, A Comparison*, pp. 100 *et seq.* (1980). *Compare* Restatement of Contracts §§ 235–23 There are numerous indications that th parties intended Change Order No. 8 to b governed by the Basic Contract.

For one thing, there is the obvious fac that both Order No. 7 and Order No. 8 wer referred to as "change" orders. Both r fer, in their upper left hand corners, to-th Basic Contract by its number (11.1108.02 0144). Both have numbers ("7" and " respectively) typed under the headings " o. number". For another thing, sever critical basic matters, such as secrecy, insu ance, credit, and audits were dealt with the Basic Contract but not dealt with in t Memorandum attached to Change Ord No. 7. These omissions are odd, if t parties had intended Change Order No. 7 begin an entirely new contractual relatio ship, but they are not at all odd if t parties intended the Basic Contract to go ern except where modified by the terms the Change Order. Finally, Change Ord No. 8, while it refers by number to t Basic Contract, nowhere refers to Chan Order No. 7.

On the other hand, Change Order No. does not specifically state that other ter and conditions are to remain the same, a the Memorandum attached to it says th the parties will enter a "definitive co tract". Yet, whether Change Order No. was meant itself to constitute that "defi tive contract" is unclear. Even if it was meant, basic terms in the Basic Contra might still be intended to apply. A Change Order No. 8 may in any event pi up terms from the Basic Contract, for No might well have been intended to be "defi itive" only as to matters within its speci subject matter: the costs of transportati and related services in 1977. On the ba of the information before the district co and before us, it appears likely, und French law, that Change Order No. 8 wou be found to be part of the Basic Contra

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"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

[5] *See also Shinto Shipping Co. v. Fibrex Shipping Co.*, 572 F.2d 1328 (9th Cir. 1978); *Griffin v. Semperit of America, Inc.*, 414 F.Supp. 1384 (S.D.Tex.1976), where federal courts have entertained motions to restrain a party from p ceeding to arbitration under the Federal Ar tration Act without rejecting them as illfound as a matter of law.

If so, Article 17, with its provision for ICC arbitration in Switzerland, at least *arguably* governs the parties' dispute.

Once it is determined that Article 17 of the Basic Contract *arguably* governs this dispute, then it is appropriate to remit the dispute for resolution in the Swiss arbitration. If Article 17, *in fact*, governs the underlying dispute of the parties, then the printed clause on the back of Change Order No. 8 is inconsistent with Article 17. It could not therefore comprise a part of the contract between the parties. Arbitration Boston, not having been agreed to by the parties, should be enjoined. However, even if Article 17 later turns out not to govern the underlying dispute, referral to Switzerland now is still proper. Whether SGS is correct in contending that the testing of missiles is so different from their transport that Change Order No. 8 (while within the Basic Contract) was meant to be outside the scope of the arbitrability clause is itself a matter for the International Chamber of Commerce arbitrators. The issue of the scope of an arbitration clause in a contract is an appropriate matter for arbitration. *Butler Products Company v. Unistrut Corporation*, 367 F.2d 733 (7th Cir. 1966). In the present instance, the Rules of Conciliation and Arbitration of the International Chamber of Commerce expressly provide that as long as there is in the opinion of the ICC Court of Arbitration "prima facie" an agreement to arbitrate, "the arbitration shall proceed" and "any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself." Article 8, Section 3. SGS has entered into arbitration proceedings in Switzerland for the purpose of making this determination. Since the arbitrators there are more likely to be familiar with commercial dealings in this area and with French law, and since the proceedings are under way, the order of the district court enjoining arbitration in Boston is well within its discretion.

C.

[5] REMSCO argues, however, that if it is determined in Switzerland that Article 17 was not meant to include the *testing* of missiles within its scope, it will be left without recourse to arbitration for the underlying dispute. It is possible that the parties, in agreeing to Change Order No. 8, meant to delete the printed terms on the back of the change order and to make applicable only Article 17 arbitration limited to whatever matters were previously considered to be within Article 17's scope; if Article 17 did not include "testing" disputes, then there would be no arbitration agreement. Yet, REMSCO responds, such an interpretation is inconsistent with its continued efforts to resolve disputes through arbitration, as reflected in the fact that it prints standard arbitration clauses on the back of its forms and that it has made every effort to provide for arbitration in its dealings with SGS.

In support of the view that the back of Change Order No. 8 is deleted no matter what the scope of Article 17 is, the fact that the typed words at the bottom of Change Order No. 8 read "All other terms and conditions set forth in this contract remain unchanged". On the other hand, one might also read the words of Change Order No. 8 as deleting from the back only provisions *inconsistent* with the Basic Contract. On this view, if Article 17 does not provide for arbitration of Change Order No. 8 disputes, then the printed arbitration clause on the back of the form would be perfectly consistent with Article 17 and thus not necessarily deleted.

It is obviously difficult to determine whether, if Article 17's scope is limited, the contract leaves the parties without recourse to arbitration or makes operative the printed clause on the back of Change Order No. 8 (which would then be *consistent* with Article 17). Presumably evidence relating to the history of the parties' dealings, their use of arbitration, and French law would be relevant. But this issue need not be decided now. The district court remains free to reexamine the issue and the appropriateness of its restraining order should there be an authoritative determination by a competent authority elsewhere that Article 17 is so limited.

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Nor need the district court now order arbitration in Switzerland. The parties are proceeding under the ICC rules with arbitration there, at least to determine the scope of Article 17 and presumably, if Article 17 is found to apply, the arbitrators will arbitrate the underlying dispute. Should it appear that an injunction is needed to obtain arbitration there, the parties remain free to request the district court to issue it.

Affirmed and remanded for possible further proceedings consistent with this opinion.