VEROLME B
corporati
in the Netherlands,

Plaintiff-Claimant,

vs.

LEE C. MOORE CORPORATION,
a Pennsylvania corporation,

Defendant-Respondent.

Case No. 94-C-1084-BU

ORDER

This matter comes before the Court upon the Application of Verolme Botlek for Summary Confirmation and Enforcement of a Foreign Arbitral Award. Defendant, Lee C. Moore Corporation ("LCM"), has objected to the application and Plaintiff, Verolme Botlek B.V. ("Verolme"), has replied thereto. Based upon the parties' submissions, the Court makes its determination.

Verolme is a Dutch corporation with its principal place of business in the Netherlands. Verolme's principal business is ship drydocking and repair. LCM is a Pennsylvania corporation with its principal place of business in Tulsa, Oklahoma. LCM's principal business is the design, engineering, manufacture and servicing of drilling derricks, masts and related equipment for the petroleum industry.

On June 13, 1990, LCM requested that Verolme provide a quotation for the installation of hydraulic piping for a top drive on the drilling vessel "Benreoch." On June 25, 1990, Verolme transmitted to LCM by telephonic facsimile a quotation for the work

to be performed on "Benreoch" at the Verolme shipyard at Rotterdam Botlek. The quotation contained the following language: "Yard's General Terms and Conditions are fully applicable" and "Orders are only accepted on base of the terms and conditions as mentioned on the reverse side, except when previously agreed otherwise." The quotation, however, did not contain the text of any of the General Terms and Conditions printed on the reverse side of Verolme's stationery. LCM faxed to Verolme a purchase order dated October 1, 1990, which referred to the quotation transmitted by Verolme to LCM. An additional description of work, referring to the purchase order and to Verolme's quotation, was sent by LCM to Verolme on October 12, 1990.

Verolme worked on the "Benreoch" rig from approximately October 24, 1990 to December 1, 1990. On November 6, 1990, Verolme informed LCM that the piping was not in accordance with the drawings and that extra work would be required. On November 19, 1990, Verolme submitted a further quotation to LCM dated November 8, 1990, on the reverse side of which were printed the General Terms and Conditions. Paragraph 20 of the General Terms and Conditions provided that

> [a]ll disputes which might arise from the agreement between the Contractor and the Principal or from any subsequent agreements resulting therefrom shall be exclusively settled at the Contractor's discretion, either by a Netherlands court of law having jurisdiction or by arbitration in accordance with the Rule of the Netherlands Arbitration Institute.

Paragraph 11.4 also provided that

> [t]he Contractor shall be entitled to charge the Principal for all costs and expenses both in and out of

court, incidental to the collection of any sums outstanding and the interest payable thereon. . . .

After the work on the "Benreoch" rig was completed, Verolme submitted to LCM a final invoice, which was dated December 6, 1990. LCM made three payments on the invoice, but as of mid-1991 a balance remained due. On November 28, 1991, Verolme initiated arbitration proceedings in the Netherlands Arbitration Institute on the basis of the arbitration clause in paragraph 20. The Netherlands Arbitration Institute appointed an arbitrator, K.W. Brevet, in February, 1992. The arbitrator determined that the place of the arbitration would be Rotterdam and that the proceedings would be conducted in English language. LCM objected to arbitration jurisdiction on the basis that there was no agreement between the parties to arbitrate their claims. It also asserted various other defenses in regard to the amount claimed by Verolme, including duress, payment and failure to perform in a workmanlike manner.

On October 30, 1992, the arbitrator rendered an interim award in which he concluded that he had jurisdiction to hear the dispute between the parties. Applying Dutch law, the arbitrator specifically concluded that the parties had agreed to the General Terms and Conditions, which expressly included the arbitration clause. Following notice to the parties, the arbitrator conducted a hearing in regard to the parties' dispute on August 3, 1993. The arbitrator rendered a final award on January 19, 1994 wherein he awarded to Verolme: (1) NLG 168,604.59, the principal amount due as of August 22, 1991, and interest at the Dutch statutory rate from

August 22, 1991, until the date of payment; (2) NLG 24.486,10 for Verolme's reasonable attorney fees; and (3) NLG 21.027 for the costs of arbitration.

LCM declined to pay Verolme the amount of the arbitrator's award. As a result, Verolme, filed the instant application, pursuant to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), as incorporated into the Federal Arbitration Act, 9 U.S.C.A. § 201 (West Supp. 1995), seeking to confirm and enforce the arbitrator's award against LCM. Verolme specifically requests that the Court reduce the arbitrator's award to judgment pursuant to Oklahoma law and pursuant to the parties' agreement, award to Verolme the legal and nonlegal costs of this enforcement action.

LCM, in response to the application, argues that the Court lacks jurisdiction over Verolme's application because the arbitration clause does not satisfy the requirement of an "agreement in writing" in article II(1) of the Convention.[1] The Convention defines "agreement in writing" as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Convention, art. II § 2, reprinted in 9 U.S.C.A. § 201 note (West Supp. 1995). LCM argues that Verolme cannot offer proof of an arbitration clause

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[1]A proceeding "falling under the Convention shall be deemed to arise under the laws and treaties of the United States," and original jurisdiction is in the district courts. 9 U.S.C.A. § 203 (West Supp. 1995). The Convention applies if there is "an agreement in writing" in which the parties undertake to submit their differences to arbitration. Convention, art. II(1).

that was signed by the parties or contained in an exchange of letters.

Even if the arbitration clause satisfies the Convention's writing requirement, LCM contends that the Court should nonetheless deny Verolme's application. LCM specifically argues that no valid and binding agreement existed between the parties to arbitrate their claims. According to LCM, the arbitration clause at issue was not a term of the parties' agreement because the text of the General Terms and Conditions was not provided to LCM with Verolme's June 25, 1990 quotation. Moreover, LCM argues that the arbitration clause is not mutually binding on the parties and hence is invalid under the doctrine of mutuality of contractual obligations. In addition, LCM argues that the arbitral award is unenforceable under the Convention because it violates to public policy. LCM specifically contends that a portion of the time and material sheets involved in the work performed by LCM by Verolme were signed by LCM under duress. According to LCM, the arbitral award, which represents an agreement exacted from duress, is contrary to public policy and thus enforceable. Finally, LCM argues that paragraph 11.4 in the General Terms and Conditions, which provides for the recovery of costs and expenses, is unenforceable against LCM as it was not a part of the parties' agreement.

After reviewing the parties' submissions and applicable law, the Court concludes that it has jurisdiction over this matter. The Court finds the arbitration clause at issue satisfies the writing requirement of the Convention even though it was not contained in

a "signed" document and even though the text of it was not contained in Verolme's initial quotation of June 25, 1990. The Convention definition of "agreement in writing" includes "either (1) an arbitral clause in a contract or (2) an arbitration agreement (a) signed by the parties or (b) contained in an exchange of letters or telegrams." Sphere Drake Ins. PLC v. Marine Towing, Inc., 16 F.3d 666, 669 (5th Cir.),(emphasis added), cert. denied, 115 S.Ct. 195 (1994). As the arbitrator found, the arbitration clause was contained in the contract between the parties which consisted of the June 25, 1990 initial quotation and the October 1, 1990 purchase order. Because what is at issue here is an "arbitral clause in a contract," the qualifications of an arbitration agreement are not applicable. A signature or an exchange of letters therefore are not required. Thus, because the arbitration clause was contained an "arbitral clause in a contract," it satisfies the "agreement in writing" requirement under the Convention.

LCM's reliance upon Sen Mar, Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879 (S.D.N.Y. 1991), is misplaced. Although the arbitration clause in Sen Mar, Inc. appeared in a single telex sent to Tiger Petroleum Corporation by Sen Mar, Inc., Tiger Petroleum Corporation, upon receipt of the telex, responded with telexes that rejected the entire contents of the telex which had contained the arbitration clause. Consequently, there was no written agreement between the parties containing an arbitration clause because Tiger Petroleum Corporation refused to agree to the terms of the

agreement which had included the arbitration clause. In the instant case, however, the General Terms and Conditions, which contained the arbitration clause at issue, were incorporated by reference as a proposed term in Verolme's initial quotation. The arbitrator found that LCM, without making any objection to inclusion of the General Terms and Conditions, accepted the quotation. Upon acceptance of the quotation, the arbitration clause became a part of the parties' agreement and satisfied the "agreement in writing" requirement.

As the arbitration clause at issue was an agreement in writing and jurisdiction exists over Verolme's application, the Court must consider LCM's other arguments regarding the enforcement of the arbitration award. In doing so, the Court initially notes that LCM has not challenged Verolme's ability to satisfy the requirements for seeking the enforcement of the arbitral award. The Convention requires that the party seeking enforcement of a foreign arbitral award (1) file an application for recognition and enforcement of the award; (2) supply the "duly authenticated original award or a duly certified copy;" (3) supply the original arbitration agreement or a duly certified copy; and (4) supply, if appropriate, a translation of the award. Convention, art. IV. Since the record shows that Verolme has satisfied these four requirements and LCM has made no challenge in regard to these requirements, the Court finds that Verolme has satisfied the basic requirements for enforcement of the arbitral award under the Convention and has established a prima facie case of enforcement.

Because Verolme has satisfied the requirements of the Convention, LCM has the burden to establish the arbitral award at issue is invalid. As previously stated, LCM, in its response, argues that the arbitral award should not be enforced due to the absence of a valid arbitration clause. LCM specifically argues that the arbitration clause was not a part of the parties' agreement and that it was invalid under the doctrine of mutuality of contractual obligations. LCM also argues that the arbitral award should not be enforced because it violates public policy.

Similar to LCM's no "agreement in writing" argument, the Court rejects LCM's argument that no valid arbitration clause was in effect between the parties. In his award, the arbitrator, applying Dutch law, concluded that the terms of the parties' agreement were contained in Verolme's June 15, 1990 quotation, which stated that the General Terms and Conditions were "fully applicable," and LCM's purchase order, which referenced Verolme's quotation. The arbitrator reasoned that such general conditions frequently are referenced in domestic and international contracts and that if a party does not wish to agree to referenced general conditions, it will object to those general conditions. Like the arbitrator, the Court concludes that by placing a order with Verolme without objection to the General Terms and Conditions, LCM accepted the General Terms and Conditions, which included the arbitration clause. The mere fact that the text of the General Terms and Conditions was not a part of the quotation does not mean LCM did not agree to the arbitration clause. As noted by Verolme, the

requirement of definiteness in a contract may be satisfied by express references to external sources of terms. See, 1 E. Allan Farnsworth, Farnsworth on Contracts, § 3.28, at 356 (1990)(discussing the requirement of definiteness). See generally, Restatement (Second) of Contracts § 33(2)(1981). Therefore, because the General Terms and Conditions were incorporated in Verolme's quotation and LCM accepted those terms without objection, the arbitration clause was a part of the parties' agreement and is therefore binding upon LCM.[2]

The Court also rejects LCM's argument that the arbitration clause is not valid under the doctrine of mutuality of contractual obligations. Even if Dutch law were to apply the mutuality of contractual obligations doctrine, the Court also concludes that the

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[2]The Court notes that the Convention specify the law to be applied to the preliminary question of whether any agreement existed between the parties to foreign arbitration. Generally, questions of validity and enforceability of an agreement are controlled by federal common law, comprised of generally accepted principles of contract law. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987). In the Court's view, LCM's argument may be construed as challenging the validity or enforceability of the arbitration clause for the reason that it was never accepted by LCM.

However, the Court notes that the Convention in Article V does allow a party to assert that an agreement to arbitrate is not valid "under the law which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." Convention, art. V. In the instant case, Dutch law would be the applicable law. Under Dutch law, which was chosen by the arbitrator, a valid arbitration agreement was in effect between the parties. LCM has not challenged the arbitrator's interpretation of Dutch law. However, even if federal common law were to apply, the Court concludes, as stated above, that the parties reached a valid agreement to arbitrate their disputes.

arbitration clause complies with the doctrine.[3] The arbitration clause in paragraph 20 of the General Terms and Conditions does provide that all disputes which might arise from the parties agreement shall be exclusively settled at Verolme's discretion either by a Netherlands court of law having jurisdiction or by arbitration. However, the language in paragraph 20 does not reserve the right of Verolme to take certain disputes to court once it has chosen arbitration. The arbitration clause is thus not one which requires arbitration of LCM's claims while permitting Verolme's claims to be settled in court. Therefore, the Court finds that arbitration clause is mutually binding upon the parties.[4]

As to LCM's public policy defense, the Court finds that LCM has failed to satisfy its heavy burden of establishing duress and coercion. LCM maintains that Verolme employees threatened work stoppages or strikes unless LCM signed the time and material sheets immediately. The arbitral award, however, does not demonstrate that any such threats were unlawful or improper. Nor does it

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[3]The Court notes that the Restatement (Second) of Contracts, which is comprised of generally accepted contract principles, disavows the type of doctrine of mutuality of contractual obligation relied upon by LCM. Restatement (Second) of Contracts, § 79(c) & cmt. f.

[4]In its response, LCM makes a request for discovery on the issue of the validity and enforceability of the arbitration clause. However, under the Convention, proceedings to confirm and enforce foreign arbitral awards are generally summary proceedings. 9 U.S.C.A. § 6. Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334, 335 (5th Cir. 1976). The Court concludes that LCM has not made a sufficient showing of why discovery is necessary. Therefore, the Court declines to allow LCM to pursue discovery.

demonstrate that LCM had no alternative but to succumb to the threat. In order to prevail on a duress defense, LCM would be required to establish such factors. Restatement (Second) of Contracts § 175(1) & cmt. b; § 176 & cmts. Moreover, the Court notes that the alleged threats of Verolme's employees did not occur during the contract formation. Therefore, the Court concludes that public policy defense does not preclude the enforcement of the arbitration award.

Lastly, the Court finds that Verolme is entitled to recover the costs and expenses it incurred in the arbitration and in the enforcement of this action. Similar to the arbitration clause, the clause providing for the recovery of costs and expenses was a part of the General Terms and Conditions, which was incorporated by reference in Verolme's June 25, 1990 quotation and was accepted by LCM in its purchase order dated October 1, 1990.

Because the Court has jurisdiction over this matter, Verolme has satisfied the requirements for applying for the confirmation and enforcement of a foreign arbitral award under the Convention, as incorporated into the Federal Arbitration Act, LCM has failed to satisfy its burden of demonstrating the invalidity of the arbitral award under any defenses listed in the Convention and Verolme is entitled pursuant to the parties' agreement to recover costs and expenses, the Court finds Verolme's application should be granted.

IT IS THEREFORE ORDERED that the Application of Verolme Botlek for Summary Confirmation and Enforcement of a Foreign Arbitral Award (Docket Entry #1) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff, Verolme Botlek B.V., is entitled to judgment in the amount of the arbitrator's award and interest.

IT IS FURTHER ORDERED that Plaintiff, Verolme Botlek B.V., is entitled, as part of its judgment, to recover its reasonable costs and expenses incurred in prosecuting this action.

IT IS FURTHER ORDERED that the parties are to confer with each other in good faith prior to September 13, 1995 and determine the reasonable amount of costs and expenses to be included in the judgment. If the parties have been able to reach an agreement as to the reasonable amount of costs and expenses to be included in the judgment, Plaintiff shall prepare and submit to the Court no later than September 15, 1995, a final judgment pursuant to Oklahoma law, which has been approved as to form by counsel for LCM. However, if the parties, after conferring in good faith, have been unable to reach an agreement in regard to a reasonable amount of costs and expenses, Plaintiff shall submit to the Court no later than September 15, 1995, a motion and supporting documentation regarding the issue of costs and expenses. Defendant shall then respond to the motion no later than September 20, 1995. After the Court makes a determination of the allowable costs and expenses, Plaintiff shall prepare and submit to the Court a final judgment pursuant to Oklahoma law, which has been approved as to form by

counsel for LCM.

ENTERED this 7 day of ~~August~~ Sept, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE