IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1290-WD

MANGISTAUMUNAIGAZ OIL PRODUCTION ASSOCIATION (KAZAKSTAN),

Plaintiff,

vs.

UNITED WORLD TRADE, INC., (USA),

Defendant.

ORDER ON PENDING MOTIONS

The above-captioned matter comes before the Court on Plaintiff's Motion for Confirmation of Arbitral Award pursuant to 9 U.S.C. § 207. The Court, having carefully reviewed the file, the parties' memoranda, and being fully advised in the premises, FINDS and ORDERS as follows:

Plaintiff (hereinafter "MOP"), pursuant to 9 U.S.C. § 207 has filed a motion seeking confirmation of an arbitral award (in the amount of $7,333,195.68 plus 83,860 pounds plus interest pursuant to 28 U.S.C. § 1961) against Defendant, United World Trade (hereinafter "UWT"). Defendant has objected to the confirmation of the arbitral award, which was entered by the International Court of Arbitration of the International Chamber of Commerce, Case No. 7822/BGD. In opposition to Plaintiff's Motion Defendant has asserted three defenses: (1) absence of the original agreement to arbitrate; (2) the award is contrary to public policy of the United States; and (3) UWT was not permitted to participate fully in the arbitration proceedings. In support of its asserted defenses to the arbitral award Defendant sought and this Court granted an evidentiary hearing. Defendant has also asserted four "counterclaims" to Plaintiff's motion for confirmation, which Plaintiff has moved to strike.

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BACKGROUND

The factual underpinning of this dispute deserve a limited review. MOP is a state organization of industrial enterprises that is wholly owned by the Republic of Kazakhstan. *See United World Trade, Inc. v. Mangyshlakneft Oil Production Association*, 821 F.Supp. 1405 (D.Colo.) *affirmed* 33 F.3d 1232 (10th Cir. 1994) *cert denied* 115 S.Ct. 904 (1995). MOP is engaged in the exploitation of the oil and gas reserves of that country and trades in oil. UWT is a company incorporated under the laws of the state of Colorado. *See Mangistaumunaigaz Oil Production Association v. United World Trade, Inc.*, Case No. 7822/BGD (International Court of Arbitration "ICC" April 4, 1996), attached as Exhibit No. 1 to Plaintiff's Motion for Confirmation. The source of this dispute is a contract for sale of crude oil entered into by MOP as the seller and UWT as the buyer. (See Exhibit No. 2 to Plaintiff's Motion for Confirmation). Pursuant to this contract MOP delivered oil in four shipments to UWT in Novorossiysk. The oil was then sent to an Italian company, ISAB, in Sicily for refining. Payment from ISAB, for the oil, was then sent to UWT's account at the London branch of the San Paolo Bank. *Mangistaumunaigaz, supra* at 1407. UWT then paid MOP for the oil by posting an irrevocable letter of credit in favor of MOP with the London branch of the San Paolo Bank. Pursuant to the Letter of Credit, upon presentation of a bill of lading, the San Paolo Bank would then transfer payment to an account belonging to an agent of MOP in Paris, France. *Id.* at 1407. The bill of lading for the third and fourth oil shipments was allegedly stolen from a KCFEA (Kazakhstan Commerce Foreign Economic Association) representative. This missing bill of lading created potential liability for ISAB. As a result ISAB allegedly required UWT to issue a contractual guarantee to indemnify ISAB for six years for six million dollars. MOP has claimed that it never received payment for the third shipment and only received partial payment for

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the fourth. (See Plaintiff's Exhibit No. 1 at 5.)

On September 28, 1992, UWT filed suit against MOP in the United States District Court for the District of Colorado asserting various claims arising out of the alleged violation a December 17, 1991 Preliminary Agreement between UWT and MOP. *Mangistaumunaigaz, supra.* On February 16, 1993, pursuant to Clause 15 of the January 23, 1992 Contract,[1] MOP filed a request for arbitration with the ICC. (See Plaintiff's Exhibit No. 2 at 2.) UWT declined to appoint a co-arbitrator or to pay its share of the ICC's advance on costs. *Id.* UWT, through correspondence with the ICC Secretariat, claimed that the January 23, 1992 contract did not contain a binding agreement to arbitrate. Furthermore, UWT asserted the arbitration proceeding should be stayed pending a resolution of its suit in the District of Colorado. On May 21, 1993, United States District Court Judge Spurr, granted MOP's motion to dismiss for lack of subject matter jurisdiction. An appeal was taken by UWT to the Tenth Circuit Court of Appeals. On August 29, 1994, the Tenth Circuit Court of Appeals affirmed the District Court's decision. *See United World Trade, Inc. v. Mangyshlakneft Oil Production Association*, 33 F.3d 1232 (10th Cir. 1994). The United States Supreme Court refused certiorari on January 17, 1995.

In the meantime, on February 25, 1994, MOP filed an action in the Commercial Court of the High Court in London, England seeking a determination of whether or not the January 23, 1992 contract contained a valid and binding contract to arbitrate. (Decision reported at 1995 1 Lloyds 617). Despite UWT's assertions to the contrary, Justice Potter, by decision issued February 21,

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[1] This provision provides: "15) Other terms:
- FOB incoterms latest issue.
-Arbitration, if any, by ICC rules in London.
-English law to apply.

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1995, found:

> the contract between inter alia Mangistaumunaigaz Oil Production Association and United World Trade Incorporated dated the 23rd of January 1992, incorporates a valid, effective and binding agreement to arbitrate, in the following terms: "Arbitration, if any, by ICC Rules in London.

(See Pltf.'s Exhibit No. 1 at 5.) Justice Potter further ordered UWT to pay MOP's costs of the proceedings in the Commercial Court on an indemnity basis and noted:

> that the motivation for [UWT's] resistance to arbitration was ... simply an effort to ward off the evil day rather than to pursue a sincere defence and counterclaim or seek any genuine or bona fide advantage in having the matter tried before the US or Kazakhstan court.

Id. at 6.

Having received the Commercial Court's ruling the ICC went forward with the arbitration despite UWT's resistance. UWT refused to sign the August 21, 1995 Terms of Reference and declined to attend the hearing held in London, England on January 15, 1996. *Id.* at 6. Nonetheless, UWT, through its counsel, Dufford & Brown, submitted its objections by written correspondence to the Arbitral Tribunal. *Id.* The decision of the Arbitral Tribunal notes that UWT never argued or submitted any evidence that the amounts "claimed by MOP had been paid or that UWT had a defence [sic], counterclaim or set-off against MOP sufficient to extinguish the amount due." *Id.* After a detailed analysis of the issues, the Arbitral Tribunal issued its award setting forth the amounts it found due from UWT to MOP. *Id.* at 15-17. This decision was issued on April 4, 1996.[2]

DISCUSSION

I. UWT's Counterclaims

In its answer to Plaintiff's Motion to Confirm, Defendant has asserted four counterclaims:

[2] The Republic of Kazakhstan acceded to the New York Convention on November 20, 1995.

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(1) breach of contract (the December 17, 1991 Preliminary Agreement); (2) anticipatory repudiation of the contract; (3) fraud and misrepresentation; and (4) consequential damages. In response to Defendant's Counterclaims Plaintiff moved to strike asserting that the New York Convention does not provide for the assertion or determination of counterclaims in a confirmation proceeding. This Court agrees.

Pursuant to 9 U.S.C. § 207:

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

Id. (emphasis added). The plain language of § 207 requires that this court may only refuse to confirm the award on one of those bases, set forth in the Convention, for refusal, deferral or enforcement exists. The Convention does not provide any basis for the assertion of counterclaims. *See Evergreen Systems, Inc. v. Geotech Lizenz AG*, 697 F.Supp. 1254, 1257 (E.D.N.Y. 1988) (the right to assert counterclaims in the context of enforcement proceeding appears nowhere in the Convention); *Hewlett-Packard, Inc. v. Berg*, 867 F.Supp. 1126, 1132 (D.Mass. 1994) (Convention only allows for specific and limited attacks on validity of the claim in confirmation proceedings and may not adjudicate a counterclaim); *Fertilizer Corporation of India v. IDI Management, Inc.*, 517 F.Supp. 948, 963 (S.D.Ohio 1981) (holding that counterclaim in confirmation proceeding is inappropriate). Given the narrow nature of the proceedings before the Court, Defendant's assertion of counterclaims are clearly inappropriate under the case law and Convention. Accordingly, Plaintiff's Motion to Strike must be granted.

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II. UWT's Defenses

[2] UWT requested and this Court, by minute order dated May 15, 1997, summarily granted it an evidentiary hearing on its defenses to the confirmation of the arbitral award. Plaintiff objected to this hearing, asserting it was unnecessary. This hearing was set for June 10, 1997. On June 4, 1997, counsel for UWT filed a motion to continue the June 10, 1997 evidentiary hearing on the basis that "counsel for UWT has been unable to reach their clients, despite repeated attempts to do so." Plaintiff opposed the continuance asserting that no good cause has been shown for continuance and no evidentiary hearing was necessary. This Court denied UWT's motion for a continuance and issued a scheduling order for the June 10, 1997 hearing wherein this Court stated that it expected Defendants to be present for the June 10, 1997 hearing.

[3] At 7:56 a.m. on June 9, 1997, this Court received a facsimile from counsel for UWT in response to the Court's scheduling order. Counsel for UWT stated that on June 2, 1997, it had attempted to contact its client by phone, at which time it learned that UWT's telephone had been disconnected. However, UWT's counsel noted that all of its correspondence sent to UWT had never been returned. Counsel for UWT further stated that he "attempted to hand-deliver letters to the client's last known addresses, one of which had been bulldozed and the other which has no office building-it is a vacant lot." (Def.'s Response at ¶ 3.) Despite this and other efforts counsel was apparently unable to locate its client, UWT.

[4] Upon receipt of Defense Counsel's facsimile this Court held a telephonic status conference with counsel for both the Plaintiff and Defendant at 5:00 p.m. on June 9, 1997. At this time counsel for Defendant informed the Court that he had been contacted by his client, but that the individual he intended to testify at the hearing was in Salt Lake City, Utah and the other principal for UWT was

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in Las Vegas, Nevada. Neither could appear in person for the June 10, 1997 hearing, although they could appear by phone. This Court declined to accept unsworn testimony by phone and vacated the evidentiary hearing. Based upon the case law and Defendant's indifference to its opportunity for "its day in court" this Court finds that an evidentiary hearing is not required to resolve the defenses asserted by Defendant. *See Legion Ins. Co. V. Insurance General Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987) (affirming district court's disposition of motion to confirm an arbitration award on the pleadings); *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990) (under Federal Arbitration Act district court need not conduct a full hearing on motion to vacate or confirm--such motions may be decided on the papers without oral testimony); *Allen Group, Inc. v. Allen Deutschland GMBH*, 877 F.Supp. 395, 398 (W.D. Mich. 1994) (same). As set forth below, the legal nature of the defenses raised do not require this Court to hold an evidentiary hearing. Moreover, Defendant's conduct and failure to make itself available for the hearing further reveals the hollow nature of Defendant's claim for the need of an evidentiary hearing.

As a preliminary matter this Court notes that public policy favors recognizing and enforcing international arbitration agreements. *See Indocomex Fibres PTE., Ltd. v. Cotton Company International, Inc.*, 916 F.Supp. 721, 726 (W.D. Tenn. 1996). Under 9 U.S.C. § 207, the burden of proof as to every element of a defense is on the party resisting confirmation of the award. *Id.* citing with approval *Imperial Ethiopian Government v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976).

1. UWT was unable to present its case

Defendant's first defense to the confirmation of the award is that it in accordance with Article V, ¶ 1(b) UWT "was unable to present its case at the arbitration." Defense counsel details this

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defense with more specificity in its June 9, 1997 response in which he asserts that one of the principals for UWT would testify that the cost of filing UWT's counterclaims in the International Chamber of Commerce ("ICC") arbitration would have exceeded several hundred thousand dollars and was prohibitively expensive." This Court finds Defendant's assertion incredulous, especially given the extensive litigation expenses that UWT has clearly expended in attempting to keep this litigation in its home court. Moreover, if this Court was to accept the argument, that where litigation is expensive a party has established that it was "unable to present his case," it would be difficult to imagine when this defense would not exist. Finally, given the "stakes of the game," UWT's assertion that the cost was prohibitively expensive is a empty argument -- as empty as the vacant lot it used for its address. As set forth in ¶ 11 of the Arbitral Award, UWT refused to participate in the proceedings, but instead chose to plead its case through letters and correspondence to the Arbitral Tribunal. UWT does not and cannot argue it failed to receive notice of the proceedings or appointment of the arbitrator. Accordingly, this Court finds that UWT was able to present its case, but chose not to.

2. Failure to provide original agreement or a duly certified copy in accordance with Article IV (b)(1).

This argument is at best disingenuous. While UWT coyly asserts that MOP failed to provide the original agreement or a duly certified copy thereof, nowhere does UWT suggest that the January 23, 1992 contract which was the subject of the arbitration, is not or was not the agreement entered into by the parties. Absent some proof or claim that the copy of the contract the arbitral tribunal based its decision upon was not the contract entered into between the parties, this Court does not believe this failure to adhere to a technical requirement is a defense to this enforcement action.

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Accordingly, this Court finds Defendant's argument wholly without merit.

3. Enforcement is Contrary to Public Policy

Defendant further asserts that it would be against public policy to enforce this award based upon the fact that KCFEA was not made a party to the arbitration process. Defendant contends that because KCFEA was not made a party to the process complete relief would not have been afforded by the arbitration process. This argument was addressed by the Arbitral Tribunal in ¶12 of its Award wherein it noted that no claims were made against KCFEA and the arbitrators found they lacked the discretion to add parties which were not identified as the claimants or respondents in the request for arbitration. It should also be noted that while in one breath UWT asserts that it was precluded from asserting counterclaims against KCFEA, in the other breath it asserts "that the cost of filing UWT's counterclaim in the ... ICC would have exceeded several hundred thousand dollars and was prohibitively expensive." (Def.'s Response at 4.) More importantly, UWT does not contend that as a result of the arbitration it is precluded or estopped from pursuing in some forum its alleged claims against KCFEA.

This Court must narrowly construe the public policy limitation and as stated in *Indocomex*

> [t]he public policy limitation on the Convention is to be construed narrowly, and should be applied only where enforcement would violate the forum state's most basic notions of morality and justice.

supra, at 727 (citations omitted). UWT has failed to present any cogent argument that would support this Court in finding that enforcement of this award would violate the basic notions of morality and justice. To the contrary, based upon the facts and circumstances to refuse to enforce this award would violate the basic principles of fairness and finality. This Court will not serve as a conduit for UWT's continued effort to "ward off the evil day." Accordingly, this Court finds

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UWT's defenses wholly without legal or factual merit.

This Court finds Defendant's Defenses are wholly without legal or factual merit. Moreover, based upon the conduct of Defendant and the merit less defenses asserted in response to Plaintiff's motion for confirmation of the Arbitral Award, this Court believes that Defendant's counterclaims and request for evidentiary hearing may have been done solely for the purpose of causing unnecessary delay in violation of Rule 11(b)(1) and (2), Fed.R.Civ.P. Accordingly, a separate Order to Show Cause will be issued by this Court upon Defendant UWT and Defendant's counsel to show cause why its conduct should not be sanctioned.

THEREFORE, it is

ORDERED, that Plaintiff's Motion for Confirmation of Arbitral Award is hereby GRANTED. It is further

ORDERED, that Plaintiff's Motion to Strike Defendant's Counterclaims is hereby GRANTED. It is further

ORDERED, that the Clerk of Court shall enter a judgment on the Award in favor of MOP and against UWT in the total amount of US $8,712,934.17 calculated from the following amounts:

US $ 5,313,369.84 for the Third Shipment;

US $ 694,190.84 for the Fourth Shipment;

US $ 1,417,257.00 in accrued interest as of June 13, 1997 on the Third and Fourth Shipments;

US $ 154,712.00 for the costs of the arbitration; and

US $ 133,404.49 (legal fees in the amount of £83,860 at the conversion rate quoted by the Colorado National Bank on June 13, 1997).

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DATED this 4 Day of June, 1997.

United States District Judge

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