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VENCONSUL N.V., Plaintiff(s), -against- TIM INTERNATIONAL N.V., Defendant(s).

No. 03 Civ. 5387 (LTS) (MMD)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2003 U.S. Dist. LEXIS 13594

Amended: 2003-05-21

DISPOSITION: [*1] Plaintiff's motion for preliminary injunction denied.

KEY TERMS: arbitration, reintegration, shareholder, preliminary injunction, arbitral, counterclaim, dollars, entertain, capital contribution, irreparable harm, subject matter jurisdiction, personal jurisdiction, compel arbitration, monetary award, currency, provisional remedies, interim relief, vessel, speedy, temporary restraining order, arbitration proceeding, pending arbitration, damages awarded, liquidation, undisputed, arbitrate, bolivares, oppose

COUNSEL: For Venconsul NV, PLAINTIFF: Shari H Markowitz, Thelen, Reid & Priest, LLP, New York, NY USA.

JUDGE: LAURA TAYLOR SWAIN, UNITED STATES DISTRICT JUDGE.

OPINION BY: LAURA TAYLOR SWAIN

OPINION:

MEMORANDUM ORDER

Plaintiff Venconsul N.V. ("Venconsul") moves for a preliminary injunction restraining defendant TIM International N.V. ("TIM"), from taking certain steps to consummate a "capital reintegration" of Corporacion Digital, C.A. ("Digital"), a Venezuelan telecommunications service provider. Venconsul argues that it would suffer irreparable harm by reason of loss of shareholder rights if it were forced to forfeit its Digital shares by reason of what it argues amounts to an illegal capital call, and that it would also suffer irreparable harm by reason of currency export restrictions were it to make a protective capital contribution in order to preserve its shareholder rights pending arbitration of the underlying dispute.

The Court has considered thoroughly all submissions and argument related to this motion. For the reasons that follow, the motion is denied. This Memorandum Order constitutes the Court's findings [*2] of fact and conclusions of law to the extent required by Federal Rules of Civil Procedure 52 and 65.

BACKGROUND

The parties to this action are both Dutch corporations that are principal shareholders of Digital. TIM is the controlling shareholder, and Venconsul is the largest minority shareholder. The relationship between TIM and Venconsul with respect to the

management of Digital is governed by a Stockholders Agreement dated November 17, 2000 (the "Agreement," Ex. A to Kimmelman Decl.).

Digital is currently embroiled in lawsuits before multiple Venezuelan courts arising out of Digital's attempt to proceed with the aforementioned capital reintegration (the "Reintegration"), which would require shareholders to make certain pro rata contributions to Digital to maintain their shareholder status. In the Venezuelan litigation and before this Court, TIM has asserted that the purpose of the Reintegration is to preclude liquidation of Digital as a statutory consequence, under Venezuelan law, of its negative shareholder equity as reflected in Digital's most recently approved balance sheet. In certain Venezuelan court proceedings and in a counterclaim asserted in an arbitration proceeding [*3] before an International Chamber of Commerce ("ICC") tribunal in New York, Venconsul opposes the Reintegration plan, which calls for an additional capital contribution by Venconsul in the amount of \$ 10,697,111.64. ("Shareholder Notice," Ex. B to Compl.) The plan called for payment of that sum by 5:00 p.m. on June 23, 2003. (Id.) Failure to make the contribution could lead to Venconsul forfeiting its shares. (Compl. P 33 and evidence cited therein.)

Venconsul has not made its contribution. To make the contribution, Venconsul alleges, it would have to acquire dollars from its own shareholders and convert them to Venezuelan bolivares in order to be able to transfer the payment to Digital. Venconsul is concerned that, should it make the contribution but ultimately prevail on its efforts to oppose the Reintegration, Venezuelan currency controls will prevent it from converting the contribution, which would then be refunded by Digital in bolivares, back into dollars. Venconsul characterizes the Reintegration as an attempt by TIM to "squeeze out" Digital's minority shareholders, and as violative of its veto rights under the Agreement.

The Agreement provides that any dispute arising thereunder [*4] shall be arbitrated in New York, New York, by an arbitration panel of the ICC. (Agreement at 35.) On May 21, 2003, TIM filed a Request for Arbitration with the ICC concerning alleged breaches of the Agreement by Venconsul. Venconsul answered the Request on June 10, 2003, and asserted a counterclaim against TIM, alleging that TIM has violated the Agreement in connection with the Reintegration.

The Agreement further provides that any monetary award won in arbitration "shall be made and payable in U.S. dollars." (Id. at 36.)

Venconsul commenced the instant action on July 22, 2003. The Court signed an Order to Show Cause with Temporary Restraining Order on July 23, 2003, which prohibited Digital from taking further action to implement the Reintegration.

The Court heard arguments from counsel on the instant motion on July 31, 2003. Neither party presented live testimony. Prior to that date, the parties served and filed briefs and evidentiary material in connection with Plaintiff's application. At the hearing, counsel for defendant acknowledged that Digital is no longer facing imminent liquidation proceedings because it has

credited substantial capital contributions made by TIM and [*5] other shareholders. It also became clear that it is undisputed that TIM has the ability to pay any damages awarded to Venconsul in the pending arbitration in dollars. Defense counsel further represented that TIM would not challenge Venconsul's right under the Agreement to arbitrate its counterclaim before the ICC panel even if Venconsul failed to make its capital contribution and lost its Digital shareholder status for that reason.

Venconsul seeks a preliminary injunction precluding consummation of the Reintegration during the pendency of the ICC arbitration, in order to protect its ability to obtain meaningful relief on its counterclaim in that proceeding.

DISCUSSION

The Court's Jurisdiction

The Court has jurisdiction of this matter pursuant to Chapter 2 of Title 9 of the United States Code. The parties do not dispute that the Agreement falls within the scope of the Convention on the Recognition and Enforcement of § § 201-208 (West 1999) (the "Convention"), nor do they dispute that district courts have the power to entertain requests for injunctive relief in aid of arbitration. TIM contends, however, that district [*6] courts can entertain such requests only in connection with an action to compel arbitration or to enforce an arbitral award and that this proceeding should therefore be dismissed for lack of subject matter jurisdiction.

TIM draws its subject matter jurisdiction argument from *International Shipping Co., Ltd. v. Hydra Offshore, Inc.*, 875 F.2d 388 (2d Cir. 1989), in which the Second Circuit, in the context of approving a district court's imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure, noted with approval the court's refusal to find jurisdiction under the Convention to grant a preliminary injunction "because the party invoking [the Convention] did not seek either to compel arbitration or to enforce an arbitral award." *Id.* at 391 n.5. The party had sought to enjoin the sale of a vessel pending the outcome of a London arbitration concerning an alleged breach of an agreement to buy the vessel. *Id.* at 389. Other Circuit precedent, however, indicates that a district court's power under the Convention is broader.

In *Borden v. Meiji Milk Products Co., Ltd.*, 919 F.2d 822 (2d Cir. 1990), the Second [*7] Circuit rejected the argument that a court's jurisdiction under the Convention is limited to compelling arbitration or confirming an arbitration award. The court held that "entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to [9 U.S.C.] § 206." *Id.* at 826. Seeking equitable remedies in connection with arbitration is consistent with the Convention's "provisions and ... spirit," the court reasoned, because "the desire for speedy decisions in arbitration is entirely consistent with a desire to make as effective as possible recovery upon awards, after they have been made, which is what provisional remedies do." *Id.* *Borden* has been interpreted as recognizing a court's power to entertain requests for provisional remedies in aid of arbitration even where

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the request for remedies does not accompany a motion to compel arbitration or to confirm an award. See *Alvenus Shipping Co., Ltd. v. Delta Petroleum (U.S.A.) Ltd.*, 876 F. Supp. 482, 487 (S.D.N.Y. 1994).

Under Defendant's theory, a party could deprive federal courts of the power to entertain requests for interim relief in aid [*8] of arbitration under the Convention, and thus insulate itself from such relief, by simply appearing in an arbitration proceeding, thereby obviating the need to compel arbitration. Such a result is inconsistent both with a desire for speedy arbitral decisions and a desire to preserve the possibility of recoveries upon awards. Furthermore, unlike in *International Shipping Company*, the situs of the arbitration at issue is New York City, which reduces the risk of a decision on the merits here encouraging improper forum shopping. Accordingly, the Court finds that it does have subject matter jurisdiction of the instant proceeding.

TIM further argues that the Court lacks personal jurisdiction over it, contending that the provision of the Agreement consenting to ICC arbitration in New York is insufficient to provide a basis for the exercise of jurisdiction by this Court. It is well settled, however, that "when a party agrees to arbitrate a dispute in New York, such agreement is deemed consent to the jurisdiction of the courts for purposes relating to enforcing the arbitration agreement." *Kahn Lucas Lancaster, Inc. v. Lark Intern. Ltd.*, 956 F. Supp. 1131, 1139 (S.D.N.Y. 1997) [*9] (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Leopoulos*, 553 F.2d 842, 844 (2d Cir.1977)). See also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shaddock*, 822 F. Supp. 125 (S.D.N.Y. 1993) (holding that court had personal jurisdiction over respondent who had agreed to arbitrate disputes before the NYSE or the NASD, in an action by petitioner to stay arbitration). Certainly, an action for interim relief in aid of an arbitration pursuant to the Agreement relates to the Agreement. Consequently, the Court finds that it has personal jurisdiction of TIM for the purposes of the instant motion.

The Motion for a Preliminary Injunction

"The general standard for issuing a preliminary injunction requires that the movant show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Maryland Casualty Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 984 (2d Cir. 1997) (internal quotation marks omitted). [*10] "Irreparable injury is one that cannot be redressed through a monetary award. Where money damages are adequate compensation a preliminary injunction should not issue." *JSG Trading Corp. v. Tray-Wrap. Inc.*, 917 F.2d 75, 79 (2d Cir. 1990).

Plaintiff's motion must be denied, because Plaintiff has failed to show that it will suffer irreparable harm in the absence of the relief sought. TIM has represented that it will not challenge Venconsul's right to arbitrate its counterclaim even if Venconsul's

shares are cancelled, thus minimizing if not eliminating any risk Venconsul faced of losing its ability to pursue its claim in the arbitral forum pursuant to the Agreement if it found itself unable, or were unwilling, to make its capital contribution. Furthermore, the Agreement provides that Venconsul has the right to recover dollar-denominated damages from TIM if it proves that TIM breached the Agreement in imposing the Reintegration. Venconsul has not shown that such a damage award would not suffice to cover any damages incurred by reason of repatriation restrictions imposed by Venezuelan currency controls. Moreover, it is undisputed that TIM has sufficient assets in dollars [*11] with which it could pay any damages awarded in the ICC arbitration. The potential injury at stake therefore relates principally to the time value of money, an injury compensable through a monetary award. Accordingly, Plaintiff's motion is denied.

CONCLUSION

For the foregoing reasons, Plaintiff's motion is denied. The temporary restraining order and bond requirement issued in this matter are hereby dissolved, and this action is hereby put on suspense pending the appointment of the arbitral panel. Venconsul shall show cause in writing on or before November 4, 2003, why this matter should not be dismissed.

SO ORDERED.

Dated: August 5, 2003

LAURA TAYLOR SWAIN

United States District Judge