

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

COMPANIA CHILENA DE FOSFOROS)
S.A.,)
)
Plaintiff)
)
v.) Civil No. 96-0014-B
)
FORSTER, INC.,)
)
Defendant)

RECOMMENDED DECISION

This action involves a contract for the purchase and sale of wooden matches. Plaintiff is a Chilean corporation that manufactures such matches for sale in the United States and other countries. Defendant is a Maine corporation that distributes matches and other products in the United States. Plaintiff's Complaint seeks damages for Defendant's alleged unilateral termination of the contract. In addition, Plaintiff has filed a Motion to Stay these proceedings pending arbitration as required by the parties' contract, as well as Motions for Prejudgment Attachment and Attachment on Trustee Process, and to Appoint a Third Arbitrator.

Defendant moves to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction. Specifically, Defendant asserts that the contractual relationship between the parties is governed by the Inter-American Convention on International Commercial Arbitration ["THE CONVENTION"]. The Convention, according to Defendant, vests this Court with jurisdiction only to assist in the appointment of an arbitrator, compel arbitration under the contract, and enforce the resulting award. Defendant seeks dismissal, rather than a stay, pending completion of the arbitration.

Plaintiff does not concede that the contract is subject to the Convention. However, it argues that the Convention is irrelevant in this case because Plaintiff chose not to bring the action under the Federal Question jurisdiction provided by the statute implementing the Convention, but instead invoked the Court's diversity jurisdiction. Indeed, Plaintiff's Complaint does not seek confirmation of an arbitral award, but rather compensatory and punitive damages for common law breach of contract.

The Court is satisfied that it lacks subject matter jurisdiction over the claims raised in Plaintiff's original Complaint. First, it is clear that the Convention applies to the relationship between these parties. The implementing statute provides, in pertinent part:

An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement . . . falls under the Convention.

9 U.S.C. § 202 (incorporated by 9 U.S.C. § 302). These parties are both signatories to the Convention, as required by 9 U.S.C. § 304, and their relationship is clearly commercial within the meaning of the Convention. There is no dispute that the arbitration clause in the agreement covers the issue in dispute in this matter. This action is thus "deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203 (incorporated by 9 U.S.C. § 302).

Plaintiff's argument that it may elect to invoke the Court's diversity jurisdiction, thereby avoiding the terms of the Convention, is without merit. The U.S. Supreme Court has stated:

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.

Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982) (quoting *Scherk v. Alberto-Culver*, 417 U.S. 506, 517 n.10 (1974)).¹ Permitting Plaintiff to elect to enforce its contract as if it did not fall under the Convention would frustrate the very purpose of the Convention.

Other courts have agreed that plaintiffs may not elect to avoid the provisions of the Convention and its implementing legislation. In one case, the U.S. District Court for the Southern District of New York concluded that “although defendant has moved for a stay under Chapter 1 of the Arbitration Act [and plaintiff based subject matter jurisdiction on diversity of citizenship] . . . this case actually falls under Chapter 2 of that title -- the Convention and its implementing legislation.” *Filanto S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 1229, 1234 (S.D.N.Y. 1992). The Court noted that “this independent jurisdictional basis is of some importance to [the] litigation,” in that the Federal Arbitration Act (which incorporates the Convention) ““creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”” *Id.* (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Pursuant to the Convention, the Court has very limited jurisdiction in this case. The implementing provisions permit us to compel arbitration, appoint arbitrators and set a place for arbitration to the extent the contract between the parties does not do so. 9 U.S.C. § 303. The eventual award may of course be enforced in this Court. 9 U.S.C. § 304. We therefore conclude that we have the authority to act on Plaintiff’s Motion to Compel Arbitration, which Motion seeks our

¹ The quoted passage refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [“THE NEW YORK CONVENTION”]. It is nevertheless instructive in the context of our analysis. See *Productos Mercantiles E Industriales, S.A. v. Faberge USA*, 23 F.3d 41, 45 (2d Cir. 1994) (“The legislative history of the Inter-American Convention’s implementing statute, however, clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention”).

assistance in appointing a third arbitrator. Defendant has also sought our assistance with respect to the appointment of a third arbitrator. Accordingly, in lieu of dismissal, the Court hereby RECOMMENDS Plaintiff be permitted to amend its Complaint to seek confirmation of the eventual arbitral award.

Defendant nevertheless argues that it is appropriate to dismiss this action, after compelling arbitration and appointing an arbitrator, pending completion of the arbitration. The Court disagrees. In light of our authority to address pre-arbitration issues, the Court finds that matter need not be dismissed for lack of subject matter jurisdiction. To hold otherwise would be, in the words of one court, “facially absurd because the enabling legislation gives the district court the power at least to compel arbitration. How could even this limited power be exercised without subject matter jurisdiction?” *Filanto*, 789 F. Supp. at 1241-42.

Conclusion

For the foregoing reasons, I hereby recommend Plaintiff be given 20 days in which to Amend its Complaint as described herein, failing which I recommend Defendant’s Motion to Dismiss be GRANTED.²

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

² In light of this recommendation, the Court will address Plaintiff’s Motion for Attachment following amendment of the Complaint, if appropriate.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on April 25, 1996.