





Cite as 585 F.Supp. 57 (1983)

L.Ed. 834 (1907). Such consent must be obtained from Congress, for the doctrine of sovereign immunity "has become too firmly entrenched" in the American common law to be abrogated by the judiciary. *Armstrong & Cockrill, The Federal Tort Claims Bill*, 9 *Law & Contemp.Prob.* 327, 331 (1942); accord, *United States v. Kubrick*, 444 U.S. 111, 117-18, 100 S.Ct. 352, 356-57, 62 L.Ed.2d 259 (1979); *Honda v. Clark*, 386 U.S. 498, 501, 87 S.Ct. 1188, 1195, 1197, 18 L.Ed.2d 244 (1967) (dictum); *Gardner v. United States*, 446 F.2d 1195, 1197 (2d Cir.1971), cert. denied, 405 U.S. 1018, 92 S.Ct. 1300, 31 L.Ed.2d 481 (1972). When Congress allows suit against the government by waiving immunity, it may, within constitutional bounds, attach whatever conditions it wishes to that waiver. *Honda v. Clark*, 386 U.S. at 501, 87 S.Ct. at 1197; see, e.g., *Lehman v. Nakshian*, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Congress has set forth filing requirements which are somewhat mechanical and ordinarily unrelated to the merits of the litigation, *Steele v. United States*, 599 F.2d 823, 829 (7th Cir.1979), but such conditions must be strictly construed. *Deakynne v. Dep't of Army Corps of Engineers*, 701 F.2d 271, 274 n. 4 (3d Cir.1983). The statute of limitations in issue in this case is one of the conditions attached to the waiver of immunity set forth in the Federal Tort Claims Act. If an action is not filed as the statute requires, the six-month time period may not be extended by this court. See *United States v. Kubrick*, 444 U.S. at 117-18, 100 S.Ct. at 356-57.

The defendants' motion to dismiss will be granted. An appropriate Order will enter.



LA SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LE TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION DES HYDROCARBURES, Plaintiff,

v.

SHAHEEN NATURAL RESOURCES COMPANY, INC., Defendant.

No. 83 Civ. 0676 (KTD).

United States District Court,  
S.D. New York.

Nov. 16, 1983.

Confirmation was sought of an arbitration award rendered by a three-member International Chamber of Commerce, panel, and defendant moved to dismiss the complaint on ground that award was not entitled to recognition and enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards as implemented by the Federal Arbitration Act, or for stay of enforcement pending filing of answer. The District Court, Kevin Thomas Duffy, J., held that: (1) defendant's objection to confirmation on ground that it was acting only as agent of its subsidiary was waived by failure to present it to the arbitration panel; (2) enforcement of award was not precluded on theory that it would violate United States public policy on ground that underlying contract for the purchase of crude oil provided that the oil would be consigned exclusively to buyer's installations, allegedly in violation of the antitrust laws; (3) plaintiff, though owned by an arm of the Algerian government which is not a party to the Convention, properly invoked the Convention and was entitled to recognition and enforcement of the award, where hearing took place in Switzerland, a signatory country; and (4) enforcement was not precluded on theory that award in defendant's favor would not have been enforced against plaintiff in Algerian courts.

Defendant's motion denied and judgment entered on award.



**1. Arbitration** ¶82.5

Under the Convention on Recognition and Enforcement of Foreign Arbitral Awards, burden of proving that award should be overturned is on the party challenging enforcement and recognition of the award. Convention on the Recognition and Enforcement of the Foreign Arbitral Awards, Arts. IV, V, 9 U.S.C.A. § 201 note; 9 U.S.C.A. § 207.

**2. Arbitration** ¶82.5

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards permits recognition of award to be refused if the subject matter of the difference is not capable of settlement by arbitration or if the recognition of the award would be contrary to the public policy of the country where recognition is sought. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, subd. 2, 9 U.S.C.A. § 201 note.

**3. Arbitration** ¶44

Party to international arbitration proceeding had affirmative obligation to present to the arbitration panel any arguments why arbitration should not proceed, including that it was not a party to the agreement and was not bound by arbitration provision.

**4. Arbitration** ¶82.5

Objection to confirmation of arbitration award rendered by International Chamber of Commerce panel, on ground that party against which enforcement was sought was acting only as an agent, was waived and thus not properly raised in the confirmation proceeding where it was not presented to the arbitration panel.

**5. Arbitration** ¶7.3

Unambiguous language of contract for sale of crude oil refuted contention that party opposing confirmation of an arbitration award thereunder was not bound by the agreement to arbitrate since it was acting as agent for disclosed principal, though allegedly other party knew that the first party was a holding company without any refining facilities and contract provided that the crude oil was to be consigned exclu-

sively to buyer's installations, where the contract identified the objecting party as the buyer and it was signed by its senior vice-president, and nowhere in the contract was it stated that such party was acting on behalf of its subsidiary as presently claimed.

**6. Principal and Agent** ¶19, 20(1)

Party claiming that it is an agent has the burden of proving it and, generally, self-serving statements of the purported agent are insufficient.

**7. Principal and Agent** ¶136(2), 146(2)

Agent who either purports to be the principal or acts for an undisclosed principal is liable under contract, while agent acting on behalf of disclosed principal will not be liable on the contract.

**8. Arbitration** ¶56

Public policy defense under the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards is generally construed narrowly in order to promote the Convention's goal of encouraging the prompt enforcement of awards, and defense based on public policy must touch the forum state's most basic notions of morality and justice. Convention on the Recognition and Enforcement of the Foreign Arbitral Awards, Art. V, subd. 2, 9 U.S.C.A. § 201 note.

**9. Arbitration** ¶56

Enforcement of arbitration award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was not precluded on theory that enforcement would violate United States public policy in that underlying contract for purchase of crude oil provided that the oil should be consigned exclusively to buyer's installations, despite contention that this was a per se violation of the antitrust laws as an illegal location restriction on the resale of goods. Convention on the Recognition and Enforcement of the Foreign Arbitral Awards, Art. V, subd. 2, 9 U.S.C.A. § 201 note; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.



tions, where the objecting party assigned by its senior were in the contract party was acting on ary as presently

19, 23: 1) it is an agent has it and, generally, of the purported

136(2), 146(2) urpose to be the indidused princirac while agent used principal will ract.

e under the Con- on and Enforce- rbitral Awards is rowly in order to goal of encourag- nt of awards, and policy must touch basic notions of onvention on the ment of the For- rt. V, subd. 2, 9

trati. award un- e R gnition and rbitral Awards ory that enforce- ted States public contract for pur- ided that the oil usively to buyer's tentation that this the antitrust laws riction on the re- n on the Recogni- the Foreign Arbi- bd. 2, 9 U.S.C.A. i-Trust Act, § 1 et eq.

10. Arbitration ⇨82.5

Though party to arbitration agreement was in arm of Algerian government, which is not a party to the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards, it properly invoked the Convention and was entitled to recognition and enforcement of award rendered by International Chamber of Commerce panel, where arbitration hearing took place in Switzerland, a signatory country. Convention on the Recognition and Enforcement of the Foreign Arbitral Awards, Art. V, subd. 2, 9 U.S.C.A. § 201 note; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

11. Arbitration ⇨82.5

Alleged lack of reciprocity based on claim that an arbitration award in American company's favor would not be enforced against other party, an arm of the Algerian government, in Algerian courts was not a ground on which enforcement of award in favor of the other party could be denied under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, 9 U.S.C.A. § 201 note.

12. Arbitration ⇨83.1

Failure to raise before International Chamber of Commerce panel contention that arbitration award would not be enforced in the other party's courts waived such ground for denying enforcement of the award.

13. Constitutional Law ⇨306(3)

Enforcement of arbitration award rendered in favor of a company owned by an arm of the Algerian government would not violate due process on the theory, which in any event appeared to be inaccurate and was waived by failure to raise it before arbitration panel, that if award had been in favor of the other party, an American company, it would not be enforced against the Algerian company in Algerian courts. U.S. C.A. Const.Amend. 5, 14.

14. Arbitration ⇨3.1

Buyer's failure to honor its debt constituted dispute subject to resolution through arbitration, for purposes of enforcing the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, despite contention the amount due was never contested. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, subd. 2, 9 U.S.C.A. § 201 note.

15. Arbitration ⇨72.1

Contention that three arbitrators sat on panel in contravention of agreement to arbitrate and International Chamber of Commerce rules was an objection more appropriately asserted in arbitration panel itself, rather than in proceeding seeking confirmation of award.

16. Arbitration ⇨7.8

Decision to have arbitration panel consisting of three members was made properly and in accordance with contract and rules of the International Chamber of Commerce, which provide generally for sole arbitrator save where it appears to the ICC Court of Arbitration that the dispute is such as to warrant appointment of three arbitrators.

17. Arbitration ⇨68

Party waived its objection to alleged untimeliness of arbitration award under rules of the International Chamber of Commerce by failing to object to delay at expiration of initial six-month period following date that terms of reference were signed.

18. Arbitration ⇨50

Rules of the International Chamber of Commerce providing that arbitration award should be made within six months of date that terms of reference are signed were complied with, though more than six months had elapsed, where it appeared that the time limits were extended by the ICC Court of Arbitration as provided by the rules.

19. Arbitration ⇨3

Dispute arising out of an international contract was arbitrable and would be gov-



erned by Internal Chamber of Commerce Rules and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, though one of the parties was a company owned by an arm of the Algerian government, and it appeared that under Algerian law the company would not be entitled to enter into an agreement to arbitrate with respect to domestic disputes. 9 U.S.C.A. §§ 201-208; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. IV, 9 U.S.C.A. § 201 note.

Shearman & Sterling, New York City, for plaintiff; Alfred Ferrer III, New York City, of counsel.

Richard deY. Manning, New York City, for defendant.

#### MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, District Judge:

Plaintiff, La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation Des Hydrocarbures ("Sonatrach") seeks an order confirming an arbitration award rendered by a three-member International Chamber of Commerce ("ICC") panel on November 27, 1981 in Geneva, Switzerland. Defendant Shaheen Natural Resources Company, Inc. ("Shaheen") moves pursuant to 9 U.S.C. § 207 to dismiss the plaintiff's complaint on the ground that the arbitral award on which the complaint is based is not entitled to recognition and enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 U.S.T. 2517, T.I.A.S. No. 6997, as implemented by sections 201 to 208 of the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (1976 Supp.) [hereinafter the "Convention"]. Defendant has moved alternatively, should plaintiff's complaint not be dismissed, for a stay of the arbitration award's enforcement pending the filing of an answer by the defendant. I deny defendant's motions and the arbitration

award is confirmed pursuant to Article IV of the Convention.

#### I.

#### FACTS

Plaintiff, Sonatrach, is a company owned by an arm of the Algerian Government. The defendant is an Illinois corporation with its principal place of business in New York. On June 1, 1974, a written contract was entered into between Shaheen and Sonatrach providing for the sale to Shaheen of 273,000 metric tons of crude oil to be shipped over a seven month period. The contract between the parties contained an arbitration clause that provided:

Any dispute arising out of this Contract shall be permanently settled according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbiters named in accordance with these Rules.

The arbitration shall take place in Geneva.

The law in force in Algeria is applicable for the settlement of any dispute.

Contract, Article 19 (June 1, 1974) (translation), Affidavit of Mohammed Bayou, Exh. A [hereinafter the "Contract"].

A dispute under the contract arose when the full payment for the second cargo shipped to a refinery operated by a subsidiary of Shaheen in Come-By-Chance, Newfoundland was not remitted to Sonatrach. After demanding that Shaheen effect a cure, Sonatrach notified Shaheen on September 25, 1974 that the contract was considered repudiated.

On July 16, 1976 Sonatrach instituted a breach of contract action against Shaheen in the Supreme Court, New York County. Shaheen was notified on April 7, 1978 that Sonatrach also had commenced an arbitration proceeding before the ICC in accordance with the arbitration clause in the contract. Shaheen moved for summary judgment in the state court action arguing that by commencing an action in state court before proceeding to arbitration, Sonatrach had waived its right to have the dispute



Cite as 85 F.Supp. 57 (1983)

arbitrated. On July 28, 1978 the New York Supreme Court denied summary judgment. The court held that Algerian law, not New York law, applied to the waiver issue and that under Algerian law, the commencement of a court action does not waive the right to arbitrate if the other party has not yet served its answer in the court suit. Defendant appealed to the Appellate Division, First Department but on October 23, 1978 the lower court's judgment was affirmed.

In accordance with the rules of the ICC, the terms of reference to the arbitration panel were drafted at a meeting held in Paris on February 28, 1980 and signed on March 7, 1980. Shaheen did not appear at this meeting to sign the document or submit any papers or pleadings to the panel other than an affidavit for the purpose of contesting the jurisdiction of the panel. Shaheen again argued that the ICC panel lacked jurisdiction because Sonatrach had waived its right to arbitrate by instituting the state court action on the same claim in New York.

In the arbitration award rendered on November 27, 1981, the panel found that it had jurisdiction to hear the dispute and therefore rejected the defendant's defense. The panel ultimately found in favor of the plaintiff. Specifically, the arbitration panel found that a valid and binding contract was entered into between Shaheen and Sonatrach on June 1, 1974 and that pursuant to the contract's arbitration clause, Algerian law applied to the dispute. The panel found that Shaheen accepted only a portion of the oil delivered to its refinery and that full payment including late payment penalties was not made to the plaintiff.<sup>1</sup> The

panel held therefore that the plaintiff had a right to cancel the contract based on the defendant's breaches. Damages were calculated by the panel to exceed four million dollars with interest accruing on part of the award.

DISCUSSION

1. The Convention provides that "within three years after an arbitral award falling under the convention is made, any party to the arbitration may apply ... for an order confirming the award as against any other party to the arbitration." 9 U.S.C. § 207. Article IV of the Convention requires only that an "authenticated original award or a duly certified copy thereof" and the original agreement to arbitrate be supplied to the court in order to obtain recognition of the award. Convention, Article IV, 9 U.S.C. § 201. Plaintiff has submitted the documents necessary to obtain confirmation.

2. ~~The~~ The power to review an arbitration award is limited under the Convention, *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 492 F.Supp. 32, 37 (S.D.N.Y. 1979),<sup>\*</sup> and the burden of proving that an award should be overturned is on the party challenging the enforcement and recognition of the award,<sup>(1)</sup> see *Imperial Ethiopian Government v. Baruch-Foster Corp.*, 625 F.2d 321, 326 (5th Cir. 1979). Section 207 provides that "[t]he 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." 9 U.S.C. § 207. Article V provides that recognition and enforcement may be refused only in certain narrowly prescribed situations.<sup>2</sup>

1. The panel found the following breaches by the defendant:

- (a) The defendant did not proceed with the removal of the crude oil which had been agreed upon;
- (b) The defendant did not notify the plaintiff of the removal schedule for September and October 1974;
- (c) The defendant was in arrear in the payment of the balance due on the cargo removed in July; and

(d) The plaintiff had notified the defendant that it considered the failure of the latter to comply with its contractual obligations to constitute a unilateral repudiation of the contract.

Arbitration Award (translation), Affidavit of Alfred Ferrer III, Exh. A, at 29.

2. The Convention provides that recognition may be denied upon the following grounds:

- (a) The parties to the arbitration agreement ... were, under the law applicable to them, under some

\* reported in Yearbook Vol VII (1972) 637 (U.S. 35)  
Vol. II (1977) 1272 (U.S. 10)



[3] In addition, the Convention permits recognition to be refused on two additional bases; if the subject matter of the difference is not capable of settlement by arbitration or if the recognition of the award would be contrary to the public policy of the country where recognition is sought, then recognition and enforcement may be refused. Convention, Article V, subsection 2, 9 U.S.C. § 201. <sup>(2)</sup> ~~Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Pâier (RAKTA), 506 F.2d 1191 (9th Cir.1974), cert. denied, 419 U.S. 1021, 102 S.Ct. 1718, 72 L.Ed.2d 139 (1982), including that it is not a party to the agreement and is not bound by the arbitration provision. Shaheen chose not to do so. See also (6) American Broadcasting Co. v. Ali, 489 F.Supp. 123, 127 (S.D.N.Y.1980) (decision of arbitrators is final and binding upon the parties when proceeding was adequate under the agreement). Thus, I find that Shaheen's objection to confirmation on the ground that it was acting only as an agent to NRC is not properly raised at this time and therefore has been waived. Assuming *arguendo* that Shaheen has not waived this objection to the enforcement of the arbitration award, I find the objection unpersuasive. That Shaheen was merely acting as an agent for NRC and as such is not bound by the agreement to arbitrate is contradicted by the unambiguous language contained in the agreement.~~

#### A. Shaheen's Liability

Shaheen asserts that it is not liable under the contract and is therefore not bound by the arbitration award because it acted merely as an agent for its subsidiary, Newfoundland Refining Company, Ltd. ("NRC"). Shaheen argues that the agency was disclosed because Sonatrach knew that it is a holding company without any refining facilities and that the crude oil was to be refined at a facility operated by NRC. Shaheen points to clause (2) of the contract which provides: "The crude oil covered by this Contract shall be consigned exclusively to Buyer's installations." Contract at 11. [There are two reasons why I find Shaheen's argument unpersuasive. First, Shaheen should have presented its objection to the arbitration panel and failing to do so, has waived it. Second, even if Shaheen's objection is now properly interposed, there is no merit to it.]

[3-5] Shaheen was properly notified of the arbitration proceeding yet contested the jurisdiction of the panel only on the basis that the plaintiff waived the right to arbitrate by commencing an action in state court. Defendant had an affirmative obligation

to raise "any arguments why the arbitration should not proceed" to the panel, *United Steelworkers of America, AFL-CIO CLC v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir.1981), cert. denied, 455 U.S. 1021, 102 S.Ct. 1718, 72 L.Ed.2d 139 (1982), including that it is not a party to the agreement and is not bound by the arbitration provision. Shaheen chose not to do so. See also (6) *American Broadcasting Co. v. Ali*, 489 F.Supp. 123, 127 (S.D.N.Y.1980) (decision of arbitrators is final and binding upon the parties when proceeding was adequate under the agreement). Thus, I find that Shaheen's objection to confirmation on the ground that it was acting only as an agent to NRC is not properly raised at this time and therefore has been waived. Assuming *arguendo* that Shaheen has not waived this objection to the enforcement of the arbitration award, I find the objection unpersuasive. That Shaheen was merely acting as an agent for NRC and as such is not bound by the agreement to arbitrate is contradicted by the unambiguous language contained in the agreement.

incapacity, or the said agreement is not valid under the law to which the parties have subjected ... or  
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or  
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it

contains decisions on matters beyond the scope of the submission to arbitration ... or  
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties ... or  
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

[6,7] The party claiming that it is an agent has the burden of proving it and generally, the self-serving statements of the purported agent are insufficient. <sup>(6)</sup> *Son Tarstar Shipping Co. v. Century Ship-line, Ltd.*, 451 F.Supp. 317, 323 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 837 (2d Cir.1979); *see generally* 2 S. Williston, *A Treatise on the Law of Contracts* § 295, at 374 (3d ed. 1969). Here, Shaheen's argument is contradicted by the unambiguous terms of the contract. The first paragraph of the contract identifies the parties as Sonatrach (the "seller") and Shaheen (the "buyer"). Contract, at 1. Moreover, the last page of the contract is signed by Albin W. Smith,

contains decisions on matters beyond the scope of the submission to arbitration ... or  
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties ... or  
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention, Article V, 9 U.S.C. § 201.



Cite as 585 F.Supp. 57 (1983)

the Senior Vice President of Shaheen. Contract, at 16. Nowhere in the contract is it stated that Shaheen was acting on behalf of NRC. Clause 12.1 is susceptible to interpretations other than that suggested by the defendant; it alone is not sufficient to sustain Shaheen's burden of showing that it was acting for a disclosed principal. Moreover, it was assumed throughout the pleadings and affidavits submitted to the New York Supreme Court as well as the decision rendered by that court that Shaheen was a party to the contract.<sup>3</sup>

#### B. Public Policy

Shaheen asserts that confirmation of the foreign arbitration award would violate United States public policy. See Article V, subsection 2, 9 U.S.C. § 201. Shaheen argues that Article 12 of the contract, which provides that the "crude oil covered by this Contract shall be consigned exclusively to Buyer's installations," is a *per se* violation of the antitrust laws as an illegal location restriction on the resale of goods.

[15, 9] The public policy defense under the Convention is generally construed narrowly in order to promote the Convention's goal of encouraging the prompt enforcement of awards.<sup>4</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 596, 520 n.15, 24 S.Ct. 2449, 2457 n.7, 15, 41 L.Ed.2d 270, reh'g denied, 419 U.S. 885, 45 S.Ct. 157, 42 L.Ed.2d 429 (1974); *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, 504 F.2d 1080, 974 (2d Cir. 1974). A defense based on public policy must touch "the forum state's most basic notions of morality and justice." 508 F.2d at 974. Here, the defendant's antitrust argument fails to reach the standard contemplated by the Convention.

3. Shaheen argues that as an agent for a disclosed principal, it is not liable under the contract that was signed by the vice president of Shaheen. The general rule is that an agent who either purports to be the principal or who acts for an undisclosed principal is liable under the contract. See *Powers v. Coffeyville Livestock Sales Co., Inc.*, 665 F.2d 311, 312-13 (10th Cir. 1981); *Tarolli Lumber Co., Inc. v. Andreassi*, 59

Antitrust arguments interposed as a defense to a contract action, especially an action for an unpaid purchase price, traditionally have been viewed with disfavor.<sup>5</sup> See *Kelly v. Kosuga*, 358 U.S. 516, 518, 79 S.Ct. 429, 430, 3 L.Ed.2d 475 (1959); *Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F.2d 593, 597 (2d Cir. 1975). The Supreme Court in *Kelly v. Kosuga* reasoned that where "a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement." 358 U.S. at 521. Thus, the "successful interposition of antitrust defenses is too likely to enrich [Shaheen] who reap(ed) the benefits of a contract and [now] seeks to avoid the corresponding burdens." 526 F.2d at 599.

Further, assuming that the antitrust argument would be deemed sufficient to constitute a violation of our public policy, defendant has misstated the applicable law. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 408 U.S. 36, 59, 97 S.Ct. 2549, 2562, 53 L.Ed.2d 568 (1977), the Supreme Court overruled *United States v. Arnold, Schweinn & Co.*, 388 U.S. 365, 375-76, 87 S.Ct. 1856, 1863-64, 18 L.Ed.2d 1249 (1967), the authority cited by Shaheen in support of its public policy argument. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, the Supreme Court held that a rule of reason approach should be applied to vertical resale restrictions. 433 U.S. at 59, 97 S.Ct. at 2562. It is unnecessary, at this point, to apply the rule of reason analysis to the given facts in order to determine whether clause 12.1 of the contract violated the Sherman Antitrust Act. The defendant's public policy defense to the enforcement of the award is rejected.

A.D.2d 1011, 399 N.Y.S.2d 739, 740 (4th Dep't 1977). On the other hand, an agent acting on behalf of a disclosed principal will not be liable on the contract. *Id.* Here, even if Shaheen has sustained its burden of establishing the existence of an agency, it has not shown that the principal was disclosed at the time of the making of the contract.



### C. Sonatrach's Standing

[10] Shaheen argues that Sonatrach may not invoke the Convention against Shaheen because as an arm of the Algerian government, Sonatrach is not a party to the Convention.<sup>4</sup> Shaheen's reasoning is inconsistent with the unambiguous language of the Convention which provides that the Convention applies to arbitral awards made in the "territory of a State other than the State where the recognition and enforcement of such awards are sought." Convention, Article 1, 9 U.S.C. § 201. The focus of this article to the Convention is not on the nationality of the party seeking to enforce an award but on the situs of the arbitration. Indeed, arbitration awards rendered by panels sitting in contracting countries have been confirmed consistently when the plaintiff is a national of a country which has not acceded to the Convention. See *Imperial Ethiopian Government v. Baruch-Foster Corp.*, 535 F.2d 284, 285 (5th Cir. 1976) (arbitration award obtained by Ethiopian government, not a signatory to Convention, confirmed); *Jugometal v. Samincorp, Inc.*, 201 F.2d 305, 310 (2d Cir. 1953) (arbitration award obtained by Yugoslavian Corporation and rendered in France confirmed; Yugoslavia is not a signatory to the Convention but France is). Here, the arbitration hearing took place in Switzerland, a signatory country. Thus, Sonatrach has properly invoked the Convention and is entitled to recognition and enforcement of the award rendered by the ICC panel.

### D. Enforcement Against Shaheen

[11-13] Shaheen also argues that the due process clauses of the Fifth and Fourteenth Amendments would be violated by the enforcement of the award because an award, if it were in Shaheen's favor, would not be enforced against Sonatrach in Algerian courts. This reciprocity argument is wholly without merit and is not a ground stated in the Convention upon which enforcement can be denied. In addition, it

4. Shaheen's objection to enforcement based on the fact that Algeria is not a signatory to the

appears that Algerian courts would in fact enforce an ICC arbitral award rendered in a signatory country regardless of the nationality of the parties. See Affidavit of ~~Mohamed T. Had~~ (transliteration), at 4-5. In addition, Shaheen signed the contract containing the arbitration clause and cannot now seek to avoid the consequences of its acquiescence to the arbitration provision in the contract. Last, Shaheen had an opportunity to contest the invocation of the arbitration provision clause at the time that the panel held its hearing. Its failure to do so before the ICC panel waives this ground. Thus, the enforcement of this arbitration award rendered in Sonatrach's favor against Shaheen does not violate the Fifth and Fourteenth Amendments to the Constitution.

### E. Miscellaneous Procedural Objections to Enforcement

[14] Shaheen argues that there was no "dispute" to be arbitrated because the amount due on the contract was never contested and that arbitration was therefore improperly invoked. I find, however, that the arbitration clause was properly invoked by Sonatrach. Shaheen's circular argument is frivolous and without support. First, Shaheen concedes a liability in the approximate amount of 1.8 million dollars. Yet, the arbitration panel computed Shaheen's liability to exceed 4 million dollars. Second, Shaheen's failure to honor its debt constitutes a dispute subject to resolution through arbitration.

[15,16] A number of other procedural deficiencies are cited by Shaheen as defenses to the enforcement of the arbitration award. Shaheen argues that the award is fatally defective because three arbitrators sat on the panel in contravention of the agreement to arbitrate and the ICC Rules. Although this is an objection properly raised under Article V of the Convention, it is an objection more appropriately asserted to the arbitration panel itself. In addition, it appears that there is no merit to this

Convention is not a ground to deny recognition under the Convention. See *supra* note 2.

objection. The contract dispute arising between be permanently settled Rules of Conciliation and International Chamber one or more arbitrators with those Rules." hammed Bayou, Exh. A of Conciliation and Arbitration national Chamber of that "[w]here the parties upon the number of arbitrators shall appoint a sole arbitrator it appears to the Court such as to warrant three arbitrators." A deY. Manning, Exh. F dated June 12, 1978, the of the ICC Court of the parties that the dismissed to an arbitration three members. See Ferrer III, Exh. O. the decision to have consisting of three properly and in accordance with the Rules of

[17] Finally, Shaheen's award was procedural; the award was not rendered within the time limits of the Rules. The rules provide that the award should be made within the time signed. Affidavit concerning, Exh. H, at 19. Shaheen's objection to the award by failing to object at the expiration of the period. See *Laminier de Lena, S.A.*, F.Supp. 1063, 1066 *Lodge No. 725, Int'l of Machinists v. U.S.* 410 F.2d 681, 683 (9th Cir. 1969) has not raised this objection to the panel or prior to the award; therefore estopped.

[18] Even assuming the award is properly proffered, it appears that the IC

\* Selected in Yearbook Vol. II (1972), p. 272 (U.S. no. 10)  
\* Selected in Yearbook Vol. IV (1974), p. 276 (U.S. no. 12)



Cite as 585 F.Supp. 57 (1983)

objection. The contract provides that any dispute arising between the parties "shall be permanently settled according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbiters named in accordance with those Rules." ~~Affidavit of Mohamed Bayou, Exh. A, at 16.~~ The Rules of Conciliation and Arbitration of the International Chamber of Commerce provide that "[w]here the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators." ~~Affidavit of Richard deY. Manning, Exh. H, at 11.~~ By letter dated June 12, 1978, the Secretary General of the ICC Court of Arbitration informed the parties that the dispute would be submitted to an arbitration panel comprised of three members. ~~See Affidavit of Alfred Ferrer III, Exh. G.~~ Thus, it appears that the decision to have an arbitration panel consisting of three members was made properly and in accordance with the contract and the Rules of the ICC.

[17] Finally, Shaheen asserts that the award was procedurally defective because the award was not rendered by the panel within the time limits set forth in the ICC Rules. The rules provide that the award should be made within six months of the date that the terms of reference was signed. ~~Affidavit of Richard deY. Manning, Exh. H, at 19.~~ Shaheen has waived its objection to the alleged untimeliness of the award by failing to object to the delay at the expiration of the initial six-month period. ~~Laminoirs-Trafileries-Cableries de Lens, S.A. v. Southwire Co., 474 F.Supp. 1000, 1008 (N.D.C. 1980) (citing Lodge No. 725, International Association of Machinists v. Mooney Aircraft, Inc., 410 F.2d 681, 683 (5th Cir.1969)).~~ Shaheen has not raised this objection before the panel or prior to the instant motion and is therefore estopped from raising it now.

[18] Even assuming that this objection is properly proffered at this time, it appears that the ICC Rules were complied

with. The terms of reference were agreed to on May 7, 1980 and the award was signed on November 15, 20, and 27, 1981. The ICC Rules provide, however, that the ICC Court of Arbitration may extend this time period within which the award shall be rendered. *Id.* It would appear that the time limits prescribed by the rules within which an award should be rendered were extended in accordance with those rules on four occasions. ~~See Affidavit of Alfred Ferrer III, Exh. G.~~ Shaheen may not now assert its defense to the enforcement of the award based on the delay of the panel in rendering the award.

F. Enforcement Under Algerian Law

[19] Shaheen, in its final argument against the enforcement of the award, is grasping for straws. Shaheen contends that under the applicable Algerian law, Sonatrach, as a state-owned company, is not entitled to enter into an agreement to arbitrate disputes. Shaheen has misinterpreted the documents submitted on Algerian law to serve its own purpose. It is apparent from the affidavits submitted by Ali Bencheneb and Mohand Issad, professors of Algerian law, that the restriction on agreements to arbitrate applies only to domestic disputes. This dispute arises out of an international contract and as such, is clearly arbitrable and would be governed by the ICC Rules and the Convention. ~~See Affidavit of Ali Bencheneb, at 3-4, Affidavit of Mohand Issad, at 2-3.~~

CONCLUSION

To deny recognition and enforcement to the arbitration award rendered on November 27, 1981 at this stage would be to violate the goal and the purpose of the Convention, that is, the summary procedure to expedite the recognition and enforcement of arbitration awards. ~~Imperial Ethiopian Government v. Baruch Foster Corp., 335 F.2d at 306.~~ Shaheen had an opportunity to raise its objections to the arbitration proceedings to the panel and did not do so. Moreover, its objections are not interposable under

\* noted in feedback Vol. VI (1981), p. 347 (1981) Vol. I (1977), p. 352 (1977)



Article V of the Convention. There is no basis, in fact or law, to support its motion to dismiss the plaintiff's petition to confirm the award rendered in its favor by the ICC panel. Thus, the defendant's motion to dismiss is denied, and the arbitration award is hereby confirmed. Defendant's application for a stay of the enforcement of the award pending the service of an answer by Shaheen in the state court action is also denied. Judgment is directed to be entered on the arbitration award forthwith.

SO ORDERED.



Louis H. SHIPKOWSKI

v.

UNITED STATES STEEL  
CORPORATION.

Civ. A. No. 83-2409.

United States District Court,  
E.D. Pennsylvania.

Nov. 29, 1983.

Employee who was discharged after being caught stealing four paint brushes brought action against employer alleging violations of Employee Retirement Income Security Act, Age Discrimination in Employment Act, and pendent state law claims couched in wrongful discharge, prima facie tort, breach of implied covenant of good faith and fair dealing and infliction of emotional distress. On employer's motion to dismiss, the District Court, Kelly, J., held that: (1) employee stated cause of action under Pennsylvania law for wrongful discharge; (2) employee's complaint alleging prima facie tort failed to state a cause of action under Pennsylvania law; (3) questions of fact precluded summary dismissal of employee's cause of action for breach of covenant of good faith; and (4) employee

stated cause of action sounding in infliction for emotional distress.

Motion granted in part and denied in part.

1. Master and Servant ⇨34

Pennsylvania law permits a cause of action for wrongful discharge.

2. Master and Servant ⇨39(1)

Employee, who asserted that his discharge, after he was caught stealing four paint brushes, was made to substantially reduce his pension benefits that would have substantially increased in about a month; and that younger employees with more severe violations of company policy had not been fired, stated cause of action under Pennsylvania law for wrongful discharge.

3. Torts ⇨1

By alleging prima facie tort arising out of his discharge, employee failed to state a cause of action under Pennsylvania law.

4. Federal Civil Procedure ⇨1793

Questions of fact as to whether or not relationship between employee and employer constituted a contract precluded summary dismissal of employee's cause of action for breach of covenant of good faith arising out of his discharge.

5. Damages ⇨50.10

There are four elements in a cause of action sounding in infliction of emotional distress: the conduct must be extreme and outrageous; the conduct must be intentional or reckless; it must cause emotional distress; and the distress must be severe.

6. Federal Civil Procedure ⇨1811

Where complaint advances colorable claims, or claims where likelihood of recovery is remote, motion to dismiss should be denied.

7. Damages ⇨50.10

Employee who was discharged after being caught stealing four paint brushes stated cause of action against employer