

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 97-3833-CIV-MOORE

CAVALIER CONSTRUCTION
COMPANY, LTD. (Bahamas), et al.,

Plaintiffs,

vs.

THE BAY HOTEL AND RESORT, LTD.,
et al.,

Defendants.

ORDER

FILED BY	D.C.
JUL 13 1998	
CARLOS JUENKE CLERK U.S. DIST. CT. S.D. OF FLA. - MIAMI	

**CLOSED
CIVIL
CASE**

THIS CAUSE initially came before the Court upon Plaintiffs' Motion for Emergency Consideration of Motion for Injunctive Relief (DE # 18). At the hearing on the above-referenced Motion, the Court questioned whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified at 9 U.S.C. § 201 et seq., grants the Court jurisdiction over this action.

UPON CONSIDERATION of the motions and memoranda addressing the threshold jurisdictional issue, including Plaintiffs' Emergency Motion for Injunctive Relief (DE # 16), the supplemental memoranda thereto and Defendant The Bay Hotel and Resort, Ltd.'s Motion To Dismiss Amended Complaint (DE # 33), having heard the argument of counsel and being otherwise fully advised in the premises, the Court enters the following Order.

BACKGROUND

Plaintiff Cavalier Construction Company, Ltd. (Bahamas) ("Cavalier Bahamas") is a Bahamian corporation. Cavalier Construction Company, Ltd. (Turk and Caicos Islands) ("Cavalier T & C") is a Turks and Caicos corporation. Defendant The Bay Hotel and Resort, Ltd. ("The Bay") is also a Turks and Caicos Corporation.¹

On or about August 18, 1993, Cavalier Bahamas and The Bay entered into a written contract for the construction of a hotel in the Turks and Caicos Islands. The construction contract contains an arbitration provision which states as follows:

Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.

Disputes arose during construction, and Cavalier Bahamas made a demand for an arbitration hearing in Miami, Florida. Beginning on or about July 14, 1997 and concluding on or about October 7, 1997, Cavalier Bahamas and The Bay participated in arbitration hearings before a panel of the American Arbitration Association in Miami, Florida. The panel applied the substantive law of the Turks and Caicos Islands during the proceedings. On November 7, 1997, the panel issued an award in favor of Cavalier Bahamas and Cavalier T & C.² On or about December 2, 1997, the panel issued

¹ The Zurich Indemnity Company of Canada and Zurich Insurance Company ("Zurich Defendants") are also named as Defendants. The Zurich Defendants do not play a role in the jurisdictional question before the Court because they are not parties to the arbitration that is at the heart of this action. See Amended Complaint at ¶ 18.

² In the award, the panel granted a request by Cavalier Bahamas to add Cavalier T & C as a party to the arbitration proceedings. As a result, the panel's award applies to both

a supplemental award in favor of Cavalier Bahamas.³ In their Amended Complaint, Cavalier Bahamas and Cavalier T & C ask the Court to confirm the panel's original and supplemental awards and enter judgment accordingly.

DISCUSSION

Before turning to the relief requested, the Court must make a threshold inquiry and determine whether it has subject matter jurisdiction to entertain this action. In light of the foreign citizenship of all the parties to this case, the only possible basis for the Court's jurisdiction is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 201 et seq. Cf. Lander Company, Inc. v. MMP Investments, Inc., 107 F.3d 476, 479, cert. denied, 118 S. Ct. 55 (1997) (noting that the court therein had jurisdiction under the Federal Arbitration Act because of the diverse citizenship of the parties as well as under the Convention).

The Convention gives individuals and companies involved in international trade a dispute resolution mechanism by providing for the recognition and enforcement of foreign arbitration awards in signatory countries. Article I(3) of the Convention, however, gives a signatory country the option of declaring that it will only apply the Convention to awards made in the territory of another signatory to the Convention — that is, on the basis of reciprocity. The United States, in its 1970 declaration of accession to the Convention, opted to apply the Convention on the basis of reciprocity. See Historical and Statutory Notes to 9 U.S.C. § 201.

Cavalier Bahamas and Cavalier T & C.

³ Cavalier T & C is not named in the panel's supplemental award.

The principle of reciprocity is critical to the Court's resolution of the jurisdictional inquiry because the substantive law of a non-signatory nation was applied by the Florida panel in arbitrating the dispute between citizens of non-signatory nations.⁴ In other words, the Court must decide whether the Convention applies to an award rendered in the United States under these circumstances. If the Court determines that the Convention does not apply under the factors set forth above, it lacks subject matter jurisdiction over this action and must dismiss the case.

Other courts have addressed similar jurisdictional issues arising under the Convention. Most recently, in Lander, the Seventh Circuit held that the Convention applies to arbitration awards rendered in the United States and resolving a dispute between two United States nationals arising out of contract performance in a foreign country. Id. at 482. In Bergesen v. Joseph Muller Corporation, 710 F.2d 928, 933-34 (2d Cir. 1983), the Second Circuit held that the Convention applies to non-domestic awards rendered in the United States and arising from a dispute between foreign citizens of signatory nations. Neither case, however, squarely addresses the jurisdictional issue presented to the Court. In fact, the parties have not cited and the Court's independent research has not located a case discussing the precise issue raised herein.

⁴ A review of the list of signatory nations reveals that neither the Bahamas nor the Turks and Caicos are parties to the Convention. See Historical and Statutory Notes to 9 U.S.C. § 201.

The Court's analysis begins with the following operative language from Article I(1) of the Convention:

This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

The Court finds, and the parties agree, that the arbitration award in question does not meet the territorial criterion found in the first sentence of Article I(1) because the award was made in Florida and enforcement is sought in the United States. *See id.* at 932. Therefore, the Convention can only apply if, pursuant to the second sentence of Article I(1), the arbitration award in question is not considered domestic. On this point, the Court turns to the Second Circuit's decision in Bergesen, the case most analogous to the present action.

In Bergesen, the Second Circuit held that "awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." *Id.* Under the Bergesen court's definition of awards "not considered as domestic," the award before the Court, which was rendered pursuant to the substantive law of the Turks and Caicos Islands, falls within the purview of the second sentence of Article I(1).

The Court's inquiry is not complete, however, until it considers the effect of the Article I(3) reciprocity requirement under which the United States acceded to the Convention.⁵ As noted above, the United States declared that it would only apply the Convention on the basis of reciprocity — that is, to awards made in the territory of another signatory nation. See Historical and Statutory Notes to 9 U.S.C. § 201. The Court has already concluded that the award at issue in this action must be considered a non-domestic Turks and Caicos award in order to fall within the scope of the Convention. The Court has also noted that the Turks and Caicos Islands are not signatories to the Convention. The United States' decision to invoke the Convention's reciprocity option would be rendered meaningless if the Court were to find that the Convention, as adopted by the United States, applies to a non-domestic Turks and Caicos award. Accordingly, the Court concludes that the award in question does not fall within the Convention but, instead, is ultimately excluded by the reciprocity requirement.⁶

In arriving at its decision, the Court did not fail to note that the United States has little or no interest in enforcing arbitration awards which solely concern citizens of non-signatory nations and the law of a non-signatory state, particularly when the non-signatory state would not reciprocate the United States' efforts.

On this point, Bergesen does not provide the Court with assistance because the Second Circuit, in arriving at its decision, did not specifically address the question of reciprocity.

⁶ Cavalier Bahamas and Cavalier T & C attempt to avoid the Court's ruling by arguing that the award, although non-domestic under the second sentence of Article I(1), should be considered "made" in the United States for purposes of any reciprocity analysis. This argument amounts to circular reasoning. If the award is "made" in the United States, it is specifically excluded from the Convention by the first sentence of Article I(1). If the award is excluded by the first sentence, the Convention can only apply if the award is considered non-domestic within the meaning of the second sentence of Article I(1).