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WILLIAM T. WALSH
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KWONG KAM TAT TRADING COMPANY, LTD., Plaintiff, v. COMSUP COMMODITIES, INC., Defendant.	CIVIL ACTION NO: 92-3299(JCL) MEMORANDUM

LIFLAND, District Judge

This matter comes before the Court on motion by plaintiff Kwong Kam Tat Trading Co., Ltd. ("KKT") for an Order confirming a foreign arbitration award entered in its favor by a Chinese arbitral tribunal with regard to a breach of contract action asserted by plaintiff pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 207. Defendant Comsup Commodities, Inc. has asserted a counterclaim based upon several separate transactions involving sales of goods between the parties. Plaintiff has further moved to dismiss defendant's counterclaim, or, in the alternative, to remit defendant to arbitration in Beijing, China.

BACKGROUND

This matter concerns at least one, if not several, commercial contracts entered into between plaintiff KKT and Bomar Resources, Inc.. Defendant asserts that, "[f]or purposes of this dispute, [defendant] Comsup is the successor to Bomar Resources, Inc. and Bomar Commodities, Inc. ("Bomar")." Defendant's Brief at 2. While plaintiff has challenged this assertion during the course of the proceedings, the Court will accept it as true for purposes of deciding the instant motions. Plaintiff is a corporation organized and existing under the laws of Hong Kong with its principal place of business in Hong Kong. Defendant is a Delaware corporation with its principal place of business in Fort Lee, New Jersey.

Plaintiff requests an order confirming an arbitral award entered by the China International Economic and Trade Arbitration Commission under the Convention on the Recognition of Foreign Arbitral Awards of June 10, 1958, 9 U.S.C. § 201 *et seq.*. The award, dated August 28, 1991, relates to the sale of a quantity of tin ingots under a single contract entered into between plaintiff and Bomar; under this contract, Bomar apparently took delivery of a quantity of tin ingots and failed to make payment to plaintiff. The award was entered by a Chinese arbitral tribunal in favor of plaintiff KKT and against Bomar in the amount of $144,710.58, plus interest at the rate of eight (8%) percent from December 19, 1989.

Defendant does not oppose confirmation of the arbitration award; however, defendant asserts that "any judgment entered on the arbitration award must be stayed pending the adjudication or resolution of Comsup's counterclaim." Defendant's Brief at 2. This counterclaim is predicated on four contracts for the sale of tin concentrate that Bomar allegedly entered into with plaintiff KKT during the same year as the aforementioned contract for the

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sale of tin ingots. Defendant alleges that KKT was obliged to deliver tin concentrate of a specified minimum tin content, but that the lots actually delivered contained less than the contractually-required minimum tin content. See Defendant's Counterclaim at ¶¶ 5-8.

Bomar apparently attempted to assert these counterclaims before the Chinese arbitral tribunal. The tribunal, however, expressly declined to consider the counterclaims, noting that "[t]he contract in question [relating to the tin ingots] is an independent one and has nothing to do with other contracts [relating to tin concentrate], and accordingly the Defendant's allegation as to its failure to pay the money for the contractual goods is totally without support." Arbitration Award Translation, Exhibit C to Petition.

Defendant objects to enforcement of the arbitral award pending "adjudication or resolution" of its counterclaim. Defendant argues that the amount awarded to plaintiff in the foreign arbitration, while indisputably valid, must be set-off by certain amounts allegedly owed by KKT to defendant for breach of the four tin concentrate contracts. See Defendant's Brief at 4. In fact, the amount asserted by defendant in its counterclaim, $196,979.15, exceeds the $144,710.78 claimed by plaintiff KKT.

Plaintiff argues that this Court lacks jurisdiction in these enforcement proceedings to entertain defendant's counterclaim, and has moved to dismiss the counterclaim, or, in the

alternative, to stay the counterclaim and remit defendant to arbitration in Beijing, China. See Petitioner's Brief at 1.

DISCUSSION

Defendant contends that it is entitled to bring a counterclaim in an action seeking confirmation of a foreign arbitral award under the Convention on the Recognition of Foreign Arbitral Awards of June 10, 1958, 9 U.S.C. § 201 et seq.. In support of this contention, defendant relies primarily upon the decision in Jugometal v. Samincorp., Inc., 78 F.R.D. 504, 507 (S.D.N.Y. 1978). In Jugometal, plaintiff brought an action seeking confirmation of a foreign arbitration award. The defendant counterclaimed, alleging that it was the assignee of two arbitral awards against plaintiff and the holder of another arbitral award against plaintiff. The district court permitted defendant to set off the amounts due under the arbitral awards, stating in relevant part that

> no internal infirmity has been shown with respect to any of the awards. The interests of justice require that the Court exercise its powers over the counterclaims, and strike a net balance, notwithstanding the fact that the arbitral tribunal, because of its own procedures, was unable to do so. It would be inequitable to permit this plaintiff to recover a judgment here against the defendant on the concededly valid arbitral award in its favor, and at the same time to withhold enforcement of the three counterclaims here, requiring [defendant] to seek their enforcement separately in a foreign tribunal or wherever Jugometal can be found. The Convention does not prevent this Court from entertaining set-offs or counterclaims in a proper case where authorized by Rule 13.

Jugometal v. Samincorp. Inc., 78 F.R.D. 504, 506-507 (S.D.N.Y. 1978).

<u>Jugometal</u> is distinguishable from the instant case in several respects. Initially, the Court notes that the "counterclaims" asserted in <u>Jugometal</u> related to previously-issued arbitral awards against the plaintiff, and were themselves in the nature of motions to enforce foreign arbitral awards; additionally, the arbitral awards at issue in both the enforcement action and the counterclaim in that case were issued by the same French tribunal. The counterclaim in the instant case has not been the subject of a previous arbitral decision, and the parties vigorously dispute whether it is for a liquidated amount.

Moreover, the district court in <u>Jugometal</u>, perhaps envisioning exactly the sort of counterclaim asserted by defendant in the instant case, noted that

> [t]his is not a situation in which a lengthy hearing on an unliquidated claim would defer the trial of the main case, or frustrate the fair and speedy administration of justice as required by the Convention. No purpose would be served to require defendants to bring or file separate proceedings here to enforce their awards, and then to move to consolidate their lawsuits.

<u>Jugometal v. Samincorp., Inc.</u>, 78 F.R.D. 504, 507 (S.D.N.Y. 1978). As such, <u>Jugometal</u> does not support the position that defendant is unequivocally entitled to assert a counterclaim in the context of an enforcement proceeding under 9 U.S.C. § 207.

A more recent case involving the assertion of a counterclaim under the Convention reached the conclusion that counterclaims are not appropriate in proceedings of this sort. <u>See Fertilizer Corp. of India v. IDI Management, Inc.</u>, 517 F.Supp. 948, 963

(S.D.Ohio 1981), <u>reconsideration denied</u> 530 F.Supp. 542 (S.D.Ohio 1981). In <u>Fertilizer Corp.</u>, the district court declined to consider a counterclaim asserted by defendant, noting,

> we find that a counterclaim is inappropriate in a confirmation proceeding. In Chapter One of the Arbitration Act, 9 U.S.C. § 6, it is provided that a confirmation proceeding is to follow the rules for motion practice....This matter is in fact before us on plaintiff's motion for confirmation, and a counterclaim may not be interposed in response to a motion. Furthermore, a confirmation proceeding is not an original action; it is, rather, in the nature of a post-judgment enforcement proceeding. In such a proceeding a counterclaim is clearly inappropriate.

<u>Fertilizer Corp. of India v. IDI Management, Inc.</u>, 517 F.Supp. at 963, <u>citing</u> <u>I/M/O Arbitration Between Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc.</u>, No. 6-71054 (E.D.Mich., March 15, 1977), <u>aff'd</u>, 595 F.2d 1222 (6th Cir. 1979) (dismissing counterclaim as inappropriate in an enforcement proceeding). The Court therefore concludes that defendant's counterclaim may not properly be asserted in an enforcement proceeding commenced under 9 U.S.C. § 207.

In further support of its argument that this Court has jurisdiction to entertain the counterclaim, however, defendant asserts that it "has the right to assert a counterclaim pursuant to <u>Fed. R. Civ. P.</u> 13 in response to KKT's claim." Respondent's Brief at 2. Defendant notes in this regard that plaintiff has filed a four-count complaint in this matter. Count I of the Complaint seeks enforcement of the foreign arbitration award in the amount of $144,710.78, pursuant to 9 U.S.C. § 207; Count II repeats the allegations included in paragraphs 1 to 16, but alleges further that respondent owes the identical sum, $144,710.78, under an "account;" Count III repeats the allegations included in paragraphs 1 to 18, and alleges that respondent owes the same sum under "a certain book account;" Count IV repeats the allegations included in paragraphs 1 to 20, and alleges that respondent owes the same amount "for goods sold and delivered." See Complaint at ¶¶ 1-22.

Defendant argues that "[t]he mere fact that KKT elected to file a complaint that advanced different legal grounds for relief thoroughly undermines its argument that Comsup is not entitled to file an Answer and Counterclaim." Defendant's Brief at 5. Defendant concludes that plaintiff "has voluntarily invoked this Court's jurisdiction and all claims arise from a continuing course of business between the two parties," and that defendant is entitled to file a counterclaim under Fed. R. Civ. P. 13. See Defendant's Brief at 4.

In relevant part, Fed. R. Civ. P. 13 provides:

> Counterclaim and Cross-Claim:
>
> (b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.
>
> (c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

Fed. R. Civ. P. 13(b) and (c); see also Defendant's Answer, Affirmative Defenses and Counterclaim at 5.

The Court notes that the complaint in this matter is not, in fact, designated a "complaint;" instead, it was designated by "petitioner" KKT as "Civil Action Docket No. 92-3299(JCL), PETITION UNDER 9 U.S.C. § 207." See Petition at 1. Moreover, the Court notes that the contract relating to the sale of tin ingots which formed the basis for the underlying claim in this matter contained a broad arbitration clause which provided as follows:

> (7) ARBITRATION: All disputes arising in connection with this Sales Contract or the execution thereof shall be settled amicably by negotiation. In case no settlement can be reached, the case under dispute shall then be submitted to arbitration to the Foreign Trade Arbitration Commission of the China Council for the promotion of International trade in accordance with the Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. The decision of the Commission shall be final and binding upon both parties.

See Exhibit A to Petition. Thus, the claims asserted in Counts II, III and IV of plaintiff's complaint are themselves barred by the express terms of the contract, which refer those claims exclusively to arbitration. They will therefore be dismissed without prejudice for failure to state a claim upon which relief can be granted.

The only remaining count of plaintiff's complaint, Count I, seeks confirmation of the arbitral award dated August 28, 1991. As discussed in detail, supra, assertion of a counterclaim is inappropriate in the context of a proceeding to confirm a foreign arbitral award under 9 U.S.C. § 207. The parties are to submit an order consented to as to form.

JOHN C. LIFLAND
United States District Judge