UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NEWTERRA, INC.,

Plaintiff/Counterclaim-Defendant,

v. 4:20cv77–WS/MAF

FOLEY CELLULOSE LLC,

Defendant/Counterclaim-Plaintiff.

NEWTERRA, INC.,

Third-Party Plaintiff,

v.

UNIVERSAL TANK & FABRICATION, LLC,

Third-Party Defendant.

ORDER DENYING THIRD-PARTY DEFENDANT'S
MOTION TO COMPEL ARBITRATION

Before the court is a motion (ECF No. 38) to compel arbitration filed by Third-Party Defendant Universal Tank & Fabrication, LLC ("Universal"). Third-Party Plaintiff, Newterra, Inc. ("Newterra"), has responded (ECF No. 42) in opposition to the motion.

Universal seeks to compel arbitration pursuant to the terms of a commercial agreement (the "Agreement"), the parties to which are Newterra and Universal. Section 25(a)(i) of that Agreement provides that "all disputes" arising out of the Agreement "shall be finally settled pursuant to the Arbitration Act (Ontario)" at a location within twenty miles of Newterra's place of business in Ontario, Canada. ECF No. 39, Ex. A, ¶ 25(a)(i). Whether this court has the authority to compel such foreign arbitration is governed by treaty, namely, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The Convention requires courts of signatory nations to give effect to private arbitration agreements made in those nations. *Sierra v. Cruise Ships Catering and Servs. Int'l N.V.*, 631 F. App'x 714, 715 (11th Cir. 2015). Both Canada and the United States are signatories to the Convention. The United States enforces its agreement to the Convention's terms through Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201–208 (the "Convention Act"). *Id.*

Tracking the language of § 202 of the Convention Act, the Eleventh Circuit has explained that, unless one of the Convention's affirmative defenses prevents application of the Convention, a district court must compel the parties to arbitrate if the following jurisdictional prerequisites are met:

1. There is an agreement in writing within the meaning of the Convention;

> 2. The agreement provides for arbitration in the territory of a signatory of the Convention;
>
> 3. The agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and
>
> 4. A party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Bautista v. Star Cruises, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005); *see also* 9 U.S.C. § 202.[1] The party seeking to compel arbitration bears the burden of proving the Convention's four jurisdictional prerequisites. *Singh v. Carnival Corp.*, 550 F. Appx. 683, 685 (11th Cir. 2013). If the prerequisites are not met, a district court lacks the authority to compel arbitration in a foreign country.

Here, as the party seeking to compel arbitration, Universal bears the burden of establishing the Convention's four prerequisites. This it has not done. Indeed, in

---

[1] Section 202 of the Convention Act provides as follows: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. *An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."* 9 U.S.C. § 202.

its motion to compel arbitration, Universal altogether fails to address the Convention's four prerequisites. For this reason only, Universal's motion is due to be denied.

Moreover, Newterra asserts—and the record suggests—that the Agreement's arbitration provision is unenforceable because the agreement to arbitrate in Ontario is between citizens of the United States for business having no reasonable relation to Canada. For purposes of the Convention, "a corporation is a citizen of the United States if it is incorporated . . . in the United States." 9 U.S.C. § 202. While Newterra admits that it is incorporated in Ontario, Canada, it also asserts that it is a "domestic corporation" in Nevada and, therefore, a citizen of the United States as well. *See* SilverFlume, Nevada's Business Portal, https://esos.nv.gov/EntitySearch/OnlineBusinessAndMarkSearch (listing Newterra as a "domestic corporation"). Under Nevada law, a "domestic corporation" is defined as a "corporation organized and existing under" Nevada law. N.R.S. 92A.025. Because Newterra is a "corporation organized and existing under" Nevada law,[2] it is considered a "citizen" of the United States for purposes of the Convention. Universal describes itself as a Delaware limited liability company having its principal place of business in Iowa

[2] Newterra is registered in Florida as a "*foreign* profit corporation," which suggests that it is not incorporated under the law of Florida.

and does not dispute that it is a citizen of the United States. Assuming both parties are United States citizens, then the Convention's fourth prerequisite is not met unless it is established that the parties' commercial relationship has some reasonable relation with one or more foreign states. There is nothing in this record to suggest that such a "reasonable relation" exists. 9 U.S.C. § 202 ("An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."). Indeed, according to Newterra, the parties' agreement involved the purchase of pressure vessels that were fabricated in Texas and shipped directly to a construction site in Perry, Florida.

That the parties' Agreement specified a Canadian arbitration site and provided that all disputes arising out of the Agreement shall be settled pursuant to the Arbitration Act (Ontario) does not establish the necessary "reasonable relation" to a foreign country. As the Second Circuit explained in *Jones v. Sea Tow Services Freeport NY Inc* ., 30 F.3d 360 (2d Cir.1994), to make an arbitration provision cognizable under the Convention, there has to be some reasonable connection to a foreign county independent of the terms of the agreement itself. *Id.* at 366; *see also*

Smith-Varga v. Royal Caribbean Cruises, Ltd., No. 8:13cv00198–EAK–TBM, 2013 WL 3119471, at *3 (M.D. Fla. June 18, 2013) (noting that "foreign arbitration sites and choice of law provisions do not themselves establish a foreign connection" (citing cases)); *Reinholtz v. Retriever Marine Towing & Salvage*, No. 92–14141, 1993 WL 414719, at *5 (S.D. Fla. May 21, 1993) (concluding that an arbitration award made in London under English law pursuant to Lloyd's Standard Form of Salvage Agreement did not fall under Convention and was unenforceable because the award was between United States citizens and concerned the salvage of vessel off the Florida coast).

Universal having failed to establish that the Convention applies in this case, it is ORDERED:

1. Universal's motion (ECF No. 38) to compel arbitration and to stay proceeding, or alternatively, to dismiss for lack of subject matter jurisdiction is DENIED.

2. Universal shall have fourteen (14) days from today's date to answer Newterra's third party complaint.

DONE AND ORDERED this 1st day of December, 2020.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE