IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EURO-MEC IMPORT, INC., : CIVIL ACTION
:
v. :
:
PANTREM & C., S.p.A., :
: NO. 92-2624

MEMORANDUM

Newcomer, J. November 16, 1992.

Presently before the court is defendant's Motion To Stay case Pending Arbitration. For the reasons set forth below, I will grant defendant's motion.

I. Factual Background.

Plaintiff Euro-Mec Import, Inc. is a Pennsylvania Corporation with business operations in Pennsylvania and New York. Defendant Pantrem & C., S.p.A. is an Italian corporation with offices in Isernia, Italy and no business operations in the United States. On or about January 7, 1991, plaintiff and defendant entered into a written distribution agreement.

Pursuant to the agreement, plaintiff became the exclusive importer and distributor of defendant's goods for a territory including at least the United States, Puerto Rico, and Jamaica for a period of five (5) years beginning on January 7, 1991. Defendant's goods consist of mens and womens clothing and accessories. Under the agreement, plaintiff agreed to market defendant's goods using its best efforts, to pay defendant's invoices within 110 days from the shipment date of the goods, and to post an irrevocable or similarly guaranteed letter of credit.

ENTERED: 11-20-92

CLERK OF COURT

In return, defendant agreed to provide plaintiff with all advertising materials and information required by plaintiff to facilitate sales. In addition, paragraph ten (10) of the distribution agreement stated:

> Unless amicably settled, any dispute of difference which may arise between the parties hereto out of or in connection with this agreement shall be finally settled by arbitration held and contucted [sic] in Geneva.

Alleging that plaintiff did not fulfill its obligation under the distribution agreement by failing to post the required letter of credit and failing to pay defendant for delivered goods, defendant terminated its relationship with plaintiff in February 1992. Plaintiff filed a lawsuit in this court on May 15, 1992 alleging that defendant: failed to make timely shipments to plaintiff; failed to properly support plaintiff's marketing activity; dealt directly with plaintiff's customers and sales representatives; and wrongfully terminated the distribution agreement. Count I of plaintiff's complaint is for breach of contract, Count II is for intentional interference with contract, and Count III is for intentional interference with prospective business relations.

In a letter dated June 4, 1992, defendant invoked the arbitration clause of the distribution agreement and requested that plaintiff dismiss the suit and proceed with arbitration. Plaintiff claims that the arbitration clause in the agreement is unenforceable because it lacks specificity regarding the method

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of choosing arbitrators, the governing arbitration association, and the governing laws for the arbitration.

II. Standard - Motion to Stay Pending Arbitration.

In a motion to stay proceedings and compel arbitration, the appropriate standard of review is the same standard used in resolving summary judgment motions pursuant to Federal Rules of Civil Procedure 56(c). Trott v. Paciolla, 748 F. Supp. 305, 308 (E.D.Pa. 1990) (citing Par-Knit Mills v. Stockbridge Fabrics, 636 F.2d 51, 54 & n.9 (3d Cir. 1980)). Accordingly, the court considers the evidence in the light most favorable to the party opposing the motion to stay pending arbitration, namely plaintiff Euro-Mec, Inc. Par-Knit Mills, 636 F.2d at 54.

III. Discussion.

As an initial matter, the Court notes that defendant's motion seeks a stay of proceedings and an order directing the parties to arbitration. Defendant cites only 9 U.S.C. § 3, however, which provides for a stay of proceedings. In order to compel arbitration, a motion must be brought under 9 U.S.C. § 4. Moreover, arbitration for international commercial transactions is governed by 9 U.S.C. §§ 201-08. Despite both the defendant's and plaintiff's failure to rely on the appropriate law, the Court will treat defendant's motion as two motions - a motion to stay proceedings pending arbitration and a motion to compel arbitration. See Toloran Fibers, Inc. v. Deutsche Engineering Der Voest-Alpine Industrieanlagenbau GmbH, No. 2:91CV00025, 1991

WL 41772, at *1 (W.D.N.C. Feb. 26, 1991). A review of the relevant law is necessary to resolve defendant's motions.

The appropriate starting point for ruling on defendant's motion is the Federal Arbitration Act ("Arbitration Act"), 9 U.S.C. § 1 et. seq. The Arbitration Act is Chapter 1 of Title 9. Congress enacted the Arbitration Act "to ensure judicial enforcement of privately made agreements to arbitrate." Tennessee Imports, Inc. v. Filippi, 745 F. Supp 1314, 1320 (M.D. Tenn. 1990) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985)). The Arbitration Act provides that an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988). "'The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp., 473 U.S. 614, 626 (1985) (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). The Arbitration Act establishes "a presumption in favor of arbitration," and requires that courts "rigorously enforce agreements to arbitrate." Moses H. Cone, 460 U.S. at 24-25; Byrd, 470 U.S. at 221.

Under the Arbitration Act, a court may stay proceedings "upon any issue referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3. Further, upon finding an enforceable arbitration agreement, a court "shall make

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an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," provided the arbitration take place within the jurisdiction of the court. 9 U.S.C. § 4. Moreover, if the arbitration agreement fails to adequately provide a method for appointing an arbitrator, the court may "designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein." 9 U.S.C. § 5.

The strong federal policy in favor of arbitration also applies to international transactions. See Schark v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972); Becker Autoradio U.S.A., Inc. v. Becq Autoradiowerk GmbH, 585 F.2d 39, 44 (3d Cir. 1978). The federal policy in favor of arbitration for international commerce is reflected in the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. §§ 201-08 (1988). Both the United States and Italy are parties to the Convention. The Convention is Chapter 2 of Title 9.

Article II of the Convention states that signatory countries "shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences." Convention, Article II(1). The Convention defines an agreement in writing to include "an arbitral clause in a contract or an arbitration agreement." Convention, Article II(2). Further, the Convention states that the court of a

signatory country "shall . . . refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Convention, Article II(3). Under 9 U.S.C. § 202, the Convention applies to any transaction involving at least one non-United States party and which satisfies 9 U.S.C § 2. 9 U.S.C. § 202; see also 9 U.S.C. § 2 (requiring written arbitration provision associated with a transaction involving commerce). Unlike the geographical limitation on the court under the Arbitration Act, a court acting under authority of the Convention "may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206; cf. 9 U.S.C. § 4 (court may only order arbitration within the court's district). Chapter 1 of Title 9 applies to international agreements to the extent that it does not conflict with Chapter 2. 9 U.S.C. § 208.

The Court must address four questions in determining the enforceability of arbitration clauses found in international commercial agreements:

> 1) Is there an agreement in writing to arbitrate the subject of the dispute? Convention, Articles II(1), II(2);
> 2) Does the agreement provide for arbitration in the territory of a signatory country? Convention, Articles I(1), I(3); 9 U.S.C. § 206;
> 3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? Convention, Article I(3); 9 U.S.C. § 202; and
> 4) Is a party to the contract not an American citizen, or does the commercial relationship have some reasonable relation

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with one or more foreign states? 9 U.S.C. § 202.

Tennessee Imports, 745 F. Supp. at 1321-22 (citing Ledee v. Ceramiche Ragno, 684 F.2d 184, 186 (1st Cir. 1982)). If the court answers these four questions affirmatively, it must enforce the arbitral agreement unless the court finds the agreement "null and void, inoperative or incapable of being performed." Tennessee Imports, 745 F. Supp. at 1322 (citing Convention, Article II(3); Ledee, 684 F.2d at 187).

Applying the four part test to the instant case, the Court finds that there is an agreement in writing to arbitrate the dispute. Paragraph ten (10) of the distribution agreement refers to "any dispute or difference which may arise between the parties." Defendant's Motion, Exhibit A. This language is broad and includes the claims of plaintiff's complaint, such as failure to make timely shipments, improper support for marketing activities, and direct dealing with customers and sales representatives.[1] Moreover, in the Third Circuit, an arbitration clause is interpreted to cover a dispute "unless a court can state with 'positive assurance' that (the) dispute was not meant to be arbitrated." Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 44 (3d Cir. 1978). Even

1. The fact that Count II and Count III of plaintiff's complaint sound in tort does not exempt plaintiff from the arbitration clause because each Count involves the performance and/or termination of the distribution agreement. See UMC Petroleum Corp. v. J & J Enterprises, Inc., 758 F. Supp. 1069, 1073 (W.D. Pa. 1991) (giving broad scope to arbitration clause in agreement notwithstanding framing of actions in contract or tort; court focused on obligations and duties under agreement).

viewing the evidence in the light most favorable to plaintiff, the Court cannot find "with positive assurance" that plaintiff's claims were not meant to be arbitrated. Thus, question one is answered affirmatively.

Question two is also answered affirmatively. Not only are the parties' respective countries, the United States and Italy, signatories to the Convention, but the designated forum for the arbitration, Geneva, Switzerland, is also a party to the Convention.[2] Thus, the agreement provides for arbitration in the territory of a signatory to the Convention. Because the contract between the parties is a distribution agreement, the agreement necessarily arises out of a legal relationship which is commercial, thus satisfying question three. Finally, the fourth question is satisfied because the defendant is a party to the agreement and is not an American citizen, the defendant being an Italian corporation with no business operations in the United States. Therefore, the arbitration clause in the distribution agreement is enforceable unless the court finds the agreement null and void, inoperative or incapable of being performed. Tennessee Imports, 745 F. Supp. at 1322.

A court should limit application of the 'null and void' clause to cases in which the arbitration agreement itself is

2. The Court interprets the location of the arbitration to be Geneva Switzerland, despite the fact that the agreement only states "Geneva." Although neither party addressed this issue, the Court takes note of the plaintiff's reference to Switzerland in its opposition to defendant's motion. Plaintiff's Opposition at 5.

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"subject to an internationally recognized defense such as duress, mistake, fraud or waiver, or . . . when [the agreement] contravenes fundamental policies of the forum state." Tennessee Imports, 745 F. Supp. at 1322 (citing Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazoni v. Lauro, 712 F.2d 50, 53 (3d Cir. 1983) (citations omitted)). Viewing the evidence in the light most favorable to plaintiff, there does not appear to be any fraud, duress or the like in the formation of the distribution agreement. Therefore, the Court does not find the arbitration clause of the distribution agreement to be null and void, nor inoperable or incapable of performance.

Plaintiff argues, however, that the arbitration clause is so lacking in specificity that it is indefinite and vague and therefore unenforceable because it does not specify the method for choosing arbitrators, the governing arbitration association, or the governing laws for the arbitration. Plaintiff's Opposition at 3, 6. As indicated supra however, failure to provide for arbitrators is not fatal to enforcement of the arbitration provision. 9 U.S.C. § 5. Moreover, if there is an agreement to arbitrate, but also ambiguity regarding the forum for arbitration, courts will still compel arbitration. See Bauhinia Corp. v. China Nat'l Mach. & Equip., 819 F.2d 247 (9th Cir. 1987).

For example, in Bauhinia, the contract between the parties expressly called for arbitration, but two contract clauses referred to arbitration in Peking in one clause and left

the location blank in the second clause. Id. at 249. The Ninth Circuit agreed with the district court's decision that the contract was ambiguous regarding forum.[3] Id. Moreover, the Ninth Circuit noted that there was no evidence of any agreement to select a particular forum. Id. The Bauhinia court nonetheless affirmed the decision to compel arbitration under the requirements set forth by the district court after the parties failed to resolve the problem without court intervention. Id. at 250. Thus, ambiguity regarding key aspects of the arbitration proceedings, contrary to plaintiff's arguments, does not necessarily render an arbitration clause unenforceable. See also Miller and Co. v. China Nat'l Minerals Import & Export Corp., No. 91-C-2460, 1991 WL 171268, at *7 (N.D. Ill. Aug. 27, 1991) (court ordered arbitration in China where arbitration clause stated that "dispute shall be submitted for arbitration in the country of defendant in accordance with arbitration regulations of arbitration organization of the defendant country"); Tolgras Fibers, Inc. v. Deutsche Engineering Der Voest-Alpine Industrieanlagenbau GmbH, No. 2:91CV00025, 1991 WL 41772, at *3,*4 (M.D.N.C. Feb. 26, 1991) (despite international parties, court resorted to Chapter 1 of title 9 and ordered arbitration in court's district where arbitration clause of contract failed to state specific place for arbitration); Capitol Converting Co. v. Curioni, No. 87-C-10439, 1989 WL 152832 (N.D. Ill. Nov. 9, 1989)

3. In fact, the Ninth Circuit stated that the two clauses were mutually exclusive. Bauhinia, 819 F.2d at 249.

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(court ordered arbitration in court's district where parties explicitly agreed to arbitrate but did not specify location of arbitration; court noted Congress more concerned with promoting arbitration than particular location of arbitration).

In light of the strong federal policy favoring arbitration clauses, the similarity of the instant case to the situation in Bauhinia, and because paragraph ten (10) of the distribution agreement specifically states Geneva as the location for arbitration, the Court finds the arbitration clause to be enforceable. Accordingly, "at the request of one of the parties, [the court] must refer the parties to arbitration. Tennessee Imports, 745 F. Supp. at 1322 (citing Convention, Article II(3)). "There is nothing discretionary about article II(3) of the Convention." McCreary Tire & Rubber Co. v. CEAT S.P.A., 501 F.2d 1032, 1037 (3d Cir. 1974). Thus, upon the request of defendant, this Court must refer the parties to arbitration in Geneva. Id. at 1037; 9 U.S.C. § 206. The Court finds plaintiff's claim of unreasonable delay and substantial hardship as a result of the Court's decision to order arbitration to be without merit; plaintiff and defendant appear to be sophisticated business people who knowingly entered into a distribution agreement at arms length. Moreover, the Court will monitor any delay and potential hardship in the resolution of the terms for arbitration.

The parties must reach agreement within forty-five (45) days on how the arbitration will proceed in Geneva and inform the

court of their agreement as well as provide the Court with an update of the parties's progress within thirty (30) days. If the parties are unable to reach a mutual agreement, the Court will order the location and terms of the arbitration. In accordance with the decision to order the parties to arbitration and consistent with 9 U.S.C. § 3, the Court will stay all proceedings pending arbitration.

An appropriate order follows.

Clarence C. Newcomer, J.

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PANTREM & C., S.p.A.,	:	
	:	NO. 92-2624

O R D E R

AND NOW, this 16th day of November, 1992, upon consideration of defendant Pantrem & C. S.p.A.'s Motion To Stay Pending Arbitration and Motion to Compel Arbitration, and plaintiff's response thereto, it is hereby ORDERED that the Motion to Stay Pending Arbitration is GRANTED. It is FURTHER ORDERED that the Motion To Compel Arbitration is GRANTED. It is FURTHER ORDERED that within forty-five (45) days from this ORDER defendant Pantrem & C. S.p.A. and plaintiff Euro-Mec Import, Inc. shall reach an agreement on the terms for arbitration in Geneva, Switzerland and provide the court with an update on the progress of discussions within thirty (30) days from this ORDER.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

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