UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JEAN FRYDMAN, DAVID FRYDMAN, and ANAHOLD B.V.,

94 Civ. 3772 (LAP)

Plaintiffs,

MEMORANDUM AND ORDER

-against-

COSMAIR, INC., L'OREAL, S.A., PARAVISION INTERNATIONAL, S.A., PARBEL OF FLORIDA, INC., ESTATE OF JACQUES CORREZE, by its Personal Representatives GUY DANET and FREDERIC BONNART, LINDSAY OWEN-JONES, PIERRE CASTRES-SAINT-MARTIN and GERARD SANCHEZ,

Defendants.

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LORETTA A. PRESKA, U.S.D.J.

On February 2, 1994, plaintiffs filed this action in the Supreme Court of New York, New York County, alleging fraudulent conversion, conspiracy to defraud and aiding and abetting fraud. Defendants removed the action to this Court pursuant to Sections 203 and 205 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). See 9 U.S.C. §§ 201-208. Plaintiffs now move to remand, arguing that this action does not relate to an arbitration falling under the Convention. Upon reviewing the parties' submissions, I find plaintiffs' arguments persuasive and order this action remanded to the Supreme Court of the State of New York, County of New York.

BACKGROUND

Plaintiffs Jean Frydman and David Frydman are French citizens[1] involved in the communications industry. (Compl. PP 5-6.) Plaintiff Anahold B.V. ("Anahold") is a Dutch corporation solely owned by Jean Frydman. (Compl. P 7.) In 1987, plaintiffs entered into a business venture with defendant L'Oreal, S.A. ("L'Oreal") a French corporation having its principal place of business in Paris, France, to form Paravision International, S.A. ("Paravision") "for the purpose of building an international network for the acquisition, production and distribution of audio-visual products." (Compl. P 30.) Plaintiffs collectively received 25% of Paravision's shares, and L'Oreal received the remaining 75%. (Compl. P 31.)

Plaintiffs allege that by late 1989 circumstances had arisen that forced them to terminate their relationship with L'Oreal. (Compl. P 42.) Accordingly, on December 22, 1989, the parties executed an agreement to submit to arbitration the value of plaintiffs' Paravision shares. (Compl. P 42; Affirmation of Stanley S. Arkin executed on July 21, 1994 ("Arkin Aff."), Exh. B.) On the same date, the parties also agreed to submit for arbitration a dispute over whether certain film rights had been transferred from Paravision to plaintiffs (the "Israeli rights" dispute). (Compl. P 42.) The arbitration proceeded under Mr. Jacques Mayoux ("Mayoux") after the original arbitrator recused himself, citing a potential conflict of interest. (Compl. P 43.)

In June 1990, the parties changed Mayoux's role by entering into a contract whereby plaintiffs agreed to sell, and L'Oreal agreed to buy, plaintiffs' 25% holding in Paravision at a price to be set by Mayoux

[1] Jean Frydman is also an Israeli citizen.

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pursuant to Article 1592 of the French Civil Code rather than pursuant to the original arbitration agreement. (Arkin Aff., Exh. C.) Under the contract, plaintiffs purchased the rights to certain films at an agreed price, to be paid by deducting that amount from the price of the Paravision shares to be fixed by Mayoux. (Pl. Mem. at 7.) On June 11, 1990, the parties sent a letter to Mayoux notifying him of their contract and directing him to set the price for plaintiffs' Paravision shares pursuant to Article 1592 of the French Civil Code. (Arkin Aff., Exh. D.) Mayoux accepted the parties' new specifications and agreed to set the share price accordingly. At the same time, he proceeded to arbitrate the Israeli rights dispute as originally planned.

On June 27, 1990, Mayoux rendered a decision as to the value of the Paravision shares; he also awarded the Israeli rights to L'Oreal. By this point, however, plaintiffs had come to suspect that Mayoux had prior connections with L'Oreal and, therefore, that his decisions could not be impartial. (Compl. P 45.) Plaintiffs commenced judicial proceedings in France seeking to vacate Mayoux's decisions as to the Paravision shares and the Israeli rights. In April 1992, the Paris Court of Appeals cancelled the award as to the Israeli rights; in December 1992, the Paris Tribunal de Grande Instance quashed the price valuation decision on the grounds of fraud. (Arkin Aff., Exh. G.) Mayoux's subsequent appeal is pending in the Paris Court of Appeals.

On February 3, 1994, plaintiffs commenced this action in New York State Supreme Court, New York County, alleging fraudulent conversion, conspiracy to defraud, and aiding and abetting fraud. On May 20, 1994, defendants filed a

Notice of Removal to this Court pursuant to 9 U.S.C. § 205.[1] Later, defendants filed an Amended Notice of Removal pursuant to 9 U.S.C. §§ 203[2] and 205. In response, plaintiffs have moved to remand this action to state court arguing that removal was improper because the action does not relate to an arbitration as required by the Convention.[3] See 9 U.S.C. §§ 201-208.

DISCUSSION

The issue to be determined on this motion to remand is whether the action relates to an arbitration falling under the Convention. Defendants maintain that the valuation proceeding constituted an arbitration within the meaning of the Convention and that removal to this Court therefore was proper. Plaintiffs, on the other hand, argue that it was merely a "price appraisal," that this court has no jurisdiction based on the Convention, and, therefore, that the case must be remanded. Federal removal statutes should be restrictively interpreted so as to limit removal jurisdiction. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 109, 85 L. Ed. 1214, 61 S. Ct. 868 (1941). The removing party

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[1] 9 U.S.C. § 205 provides:
> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or defendants may, at any time before trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

[2] 9 U.S.C. § 203 provides:
> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

[3] Because this issue is dispositive, the rest of plaintiffs' arguments have not been reached.

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bears the burden of establishing federal jurisdiction. See R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F.2d 651, 655 (2d Cir. 1979). Any doubts as to removability should be resolved in favor of remanding the case to state court. See Somlyo v. J. Lu-Rob Enterprises, Inc., 932 F.2d 1043, 1045-46 (2d Cir. 1991).

A. The Original Arbitration was Terminated

Defendants' primary argument – the one relied upon most heavily by their expert, Professor Xavier Linant de Bellefonds – rests on a theory that the original arbitration proceeding as to the value of plaintiffs' shares was never actually terminated. (Affidavit of Xavier Linant de Bellefonds sworn to on August 3, 1994 ("de Bellefonds Aff.") at 5.) They argue that "the fact that Mr. Mayoux's original arbitration mission was technically re-organized on the basis of Article 1592 changed nothing; the arbitration was still in progress." (Def. Mem. at 22; de Bellefonds Aff. at 5.) In support of this argument, defendants point out that Mayoux based his decision on the "numerous proceedings and submissions that had been made to him before his nominal change in title." (Def. Mem. at 22.) Professor de Bellefonds argues that it is "far from being so clear" that the parties terminated the original arbitration and states that an arbitration may only be terminated in one of four specific manners, none of which was performed by these parties. (de Bellefonds Aff. at 5.) Thus, Professor de Bellefonds concludes that "the parties, still involved in an arbitration came together with the intention of reaching a compromise based on a solution inspired by article 1592." (de Bellefonds Aff. at 7 (emphasis in original).)

Plaintiffs argue, on the other hand, that the original arbitration was terminated and that Mayoux merely supplied the price term for their contract pursuant to Article 1592 of the French Civil Code. (Pl. Mem. at 15.) An examination of the documents submitted by plaintiffs demonstrates the merit of this proposition. There is no question that the parties entered into an agreement to arbitrate the value of plaintiffs' Paravision holdings in December 1989. (Arkin Aff., Exh. B.) Subsequently, in June 1990, the parties resolved their dispute and entered into a contract whereby L'Oreal agreed to buy and plaintiffs agreed to sell their Paravision shares. On June 11, 1990, the parties sent a letter to Mayoux stating, "we are terminating the mission of December 22, 1989," and directed him to fix the price of plaintiffs' shares pursuant to Article 1592. (Arkin Aff., Exh. D.) In his June 27, 1990 letter fixing the price of plaintiffs' Paravision shares, Mayoux states that "by virtue of a letter remitted by the parties on June 12, 1990 . . . I was entrusted with the mission of fixing the price of the FRYDMAN group's stake in PARAVISION . . . which I accepted on the same day." (Arkin Aff., Exh. F (emphasis added).) In light of these documents, there is no doubt that in June 1990 the parties terminated the share price arbitration and replaced it with a share valuation pursuant to Article 1592. In contrast, at the same time, the Israeli rights arbitration continued as previously agreed.

The same conclusion was reached by a French court.[1] In its July 2, 1990 opinion denying plaintiffs' "summons to summary proceedings," the Paris Tribunal de Grande Instance ("TGI") stated that, "in an agreement of June 11, 1990, the L'Oreal Company and the FRYDMAN group decided to

[1] It is significant that we have the benefit of knowing how a French court would view these events. There is little doubt, then, that the original arbitration as to the share value was terminated and replaced with an Article 1592 proceeding while the arbitration as to the Israeli rights continued.

terminate the arbitration mission of December 22, 1989 and to replace it . . . by the appointment of Mr. Jacques MAYOUX whose mission was to determine, pursuant to article 1592 of the Code of Civil Law, the price of the sale of said shares." (Reply Affirmation of Stanley S. Arkin executed on October 5, 1994 ("Arkin Reply Aff."), Exh. A at 2 (emphasis added).) Defendants themselves have argued, in a brief submitted to the Paris Court of Appeals, dated June 22, 1994, that:

> The Arbitrator being released from the essential and the delicate and contentious part of his mission (the valuation of the catalogues of the FRYDMAN GROUP), the parties acknowledged that arbitration was becoming pointless and that, in order to determine the value of the PARAVISION shares, it was enough to appoint an expert in the meaning of Article 1592.

That Mayoux, in rendering his price decision, relied upon arbitral submissions and proceedings does not obscure the fact that the parties agreed to, and did, terminate the original arbitration. In the same June 22, 1994 brief, defendant L'Oreal stated that Mayoux was chosen to set the price "for easiness and rapidity's sake." (Arkin Reply Aff., Exh. B.) It made sense for the parties to use him because, having conducted numerous arbitral proceedings, he was already familiar with the parties and the issues. Thus, defendants' argument that the original arbitration continued beyond June 11, 1990 is without merit.[6] Federal jurisdiction will still be proper, however, if a 1592 proceeding is itself an arbitration falling under the Convention.

[6] Equally without merit is defendants' contention that since the complaint makes reference to the original arbitration, prior to its June 1990 termination, this action therefore must relate to an arbitration. In fact, the gravamen of the complaint is fraudulent conversion of the Paravision shares -- a claim relating to the result of the Article 1592 proceeding. The mere fact that an arbitration agreement had existed at some point is not a sufficient basis for federal jurisdiction under Sections 203 and 205 of the Convention.

B. An Article 1592 Price Arbitration is not an Arbitration Falling Under the Convention.

Where, as in this case, there is a dispute as to whether the parties agreed to arbitrate, the court must look to the state law which governed the contract formation. See Progressive Casualty Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 45-46 (2d Cir. 1993) ("We apply state law in determining whether the parties have agreed to arbitrate" (relying on Perry v. Thomas, 482 U.S. 483, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987))).[7] Since the contract in dispute here was formed in France between French citizens, French law applies in the determination of whether it constitutes an agreement to arbitrate.[8] Both parties have submitted translations of various French court decisions and documents, together with sworn affidavits by experts in French law.

The parties agree that plaintiffs and defendant L'Oreal entered into an agreement to arbitrate the value of plaintiffs' Paravision shares in December 1989. They also agree that in June 1990, the parties entered into a contract whereby L'Oreal agreed to buy plaintiffs' Paravision holdings at a price to be determined by the same person who had been appointed for the arbitration. The parties disagree, however, as to

[7] By contrast, where there is no question as to the existence of an arbitration agreement, but there exists a dispute as to whether a particular issue is covered by that arbitral agreement, federal law governs. See Cook Chocolate Co. v. Salomon, Inc., 684 F. Supp. 1177 (S.D. N.Y. 1988) (While state law governs the determination of whether an arbitral agreement exists, "once an agreement is found to exist, federal substantive law . . . governs the scope and interpretation of the agreement").

[8] At oral argument, defendants maintained that federal law applies, citing Filanto, S.p.A. v. Chilewich International Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992), appeal dismissed, 984 F.2d 58 (2d Cir. 1993). However, this Court is bound by the Second Circuit holding in Progressive, 991 F.2d 42.

whether the final decision constituted an arbitral award or merely a price fixation conducted as part of a contract formation.

An examination of the record indicates that, under French law, the differences between general arbitrations and Article 1592 price arbitrations are more than merely "technical." In fact, as both parties' experts have noted, general arbitrations and Article 1592 price arbitrations are "two different institutions." (de Bellefonds Aff. at 2; Affidavit of Sauveur Vaisse and Geraud de Geouffre de la Pradelle sworn to on July 22, 1994 ("Vaisse/Pradelle Aff.") at 3.) It is true, as defendants note, that the plain language of Article 1592 of the French Civil Code refers to an "arbitration by a third party arbitrator." It is equally true, however, that an Article 1592 price appraisal – unlike an arbitral award – does not carry the status of a judgment, nor must an appraisal be conducted in the same manner as an arbitration. (Arkin Aff., Exh. E; Vaisse/Pradelle Aff. PP 6-7.) Furthermore, Article 1592 falls within the section of the French Civil Code relating to sales contracts, not within the section pertaining to arbitrations. (Vaisse/Pradelle Aff. P 3.) Although neither party points to any French ruling that states definitively whether 1592 proceedings generally constitute arbitrations within the meaning of the Convention,[9] plaintiffs have demonstrated that, in this case, the 1592 proceeding was merely a price appraisal and not an arbitration falling under the Convention.

Plaintiffs' experts, Professors Sauveur Vaisse and Geraud de Geouffre de la Pradelle, argue that although the language of Article 1592 refers to a "third party arbitration," such a proceeding does not

[9] Note, however, that the Paris Tribunal de Grande Instance has determined that the June 11, 1990 agreement, accepted by Mayoux on June 12, was "not an arbitration agreement." (Arkin Reply Aff., Exh. A).

constitute "real arbitration" within the meaning of the Convention.[10] (Vaisse/Pradelle Aff. P 4.) In fact, several important distinctions exist between actual arbitrations and price valuations under 1592. Arbitrators, for instance, must hold "full adversarial hearings" and their awards "must be supported by detailed reasoning." (Vaisse/Pradelle Aff. P 7.) Furthermore, since an arbitral award has the status of a judgment, "an action lodged against it . . . comes within the jurisdiction of the Court of Appeal." (Vaisse/Pradelle Aff. P 7.) On the other hand, a third party designated under Article 1592 is required neither to hold hearings nor to support the decision with detailed reasoning. (Vaisse/Pradelle Aff. P 7.) Vitally, because the decision does not have the status of a judgment, an action against it must be instituted in a trial-level court. (Vaisse/Pradelle Aff. P 7.) Plaintiffs note that, in fact, they brought an action against Mayoux's Israeli rights arbitral award in the Paris Court of Appeals, where it was cancelled. They brought an action against the 1592 price valuation, on the other hand, in the Paris TGI, a trial-level court, where the valuation was quashed.[11] (Vaisse/Pradelle Aff. P 8.) Under French law, plaintiffs argue, the TGI would not have had the jurisdiction to quash the price decision if the decision were truly an arbitral award. Moreover, the French court specifically found that the proceeding under

[10] Nomenclature, in this case, cannot be determinative, especially in light of the foreign nature of the statute at hand. The court in McDonnell Douglas Finance Corp. v. Pennsylvania Power and Light Co., 858 F.2d 825, 830, (2d Cir. 1988), held that "it is irrelevant . . . that the contract language in question does not employ the word 'arbitration'." It follows that the mere fact that a foreign statute employs the word "arbitration" does not necessarily result in a true arbitration falling under the Convention.

[11] Again, we have the benefit of knowing how the French courts would view the two separate proceedings; we need not guess.

Article 1592 was not an arbitration. In the July 2, 1990 decision denying plaintiffs' "summons to summary proceedings," the TGI stated that:

> The agreement of June 11, 1990, accepted by Jacques MAYOUX on June 12, in which he is granted the power to fix sales price pursuant to Article 1592 of the Code of Civil Law . . . is not an arbitration agreement but only a mandate granted by the parties the sole object of which was to estimate and evaluate the thing being sold.

(Arkin Reply Aff., Exh. A (emphasis added).) The French court proceedings and the July 1990 holding by the TGI provide significant insight into how an Article 1592 price fixation is perceived by French courts. There is little doubt that, under French law, the price fixation performed by Mayoux was not an arbitration falling under the Convention.

Even if federal law applied to this question, as defendants argue, the agreement in issue would not constitute an arbitration agreement. There are two major distinctions between arbitrations and Article 1592 price appraisals. First, while general arbitrations are conducted as a means of resolving disputes, Article 1592 price arbitrations are conducted as a means of providing the price term for contracting parties. Second, and more importantly, a general arbitral award, under normal circumstances, takes on the status of a judgment; the same is never true for an Article 1592 price appraisal. It is for these two primary reasons that an Article 1592 appraisal cannot be recognized as falling under the Convention.

Defendants argue that to qualify as an arbitration agreement under the Convention, "all that is required is an agreement to submit a question or issue to a third party for binding resolution." (Def. Mem. at 17.) In support of this argument, defendants point to McDonnell Douglas Finance Corp. v. Pennsylvania Power and Light Co., 858 F.2d 825, 830 (2d Cir. 1988) ("What is important is that the parties clearly intended to submit some disputes to their 'chosen instrument for the definitive settlement of [certain] grievances under the Agreement'" (quoting International Longshoremen's Ass'n v. Hellenic Lines, Ltd., 549 F. Supp. 435 (S.D.N.Y. 1982))). By using the phrase "question or issue," defendants mischaracterize the McDonnell Douglas Finance court's holding, which specifically refers to "disputes" and "grievances."[11] In fact, plaintiffs and L'Oreal, by June 1990, had reached an agreement whereby L'Oreal would purchase plaintiffs' Paravision shares at a price to be determined by Mayoux. The Article 1592 proceeding was conducted as part of a contract formation and not for the purpose of resolving a dispute. The court in City of Omaha v. Omaha Water Co., 218 U.S. 180, 54 L. Ed. 991, 30 S. Ct. 615 (1910) held that when the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation by persons agreed upon, it cannot be said that there was any dispute or difference. Such an arrangement precludes or prevents difference, and is not intended to settle any which has arisen. This seems to be the distinction between an arbitration and an appraisement, though the first term is often used when the other is more appropriate."[12] Id. at 194. In their June 11, 1990 letter to Mayoux, plaintiffs and defendant L'Oreal informed Mayoux that his "decision [would] form the

[11] The other cases relied upon by defendants in support of their argument also refer to "disputes," and not to mere price fixations. CAE Indus. Ltd. v. Aerospace Holdings Co., 741 F. Supp. 388 (S.D. N.Y. 1989); Campeau Corp. v. May Dep't Stores Co., 723 F. Supp. 224 (S.D. N.Y. 1989).

[12] The City of Omaha holding is reflected in the words of Professor Corbin: "Where two parties make an agreement of purchase and sale, providing that the price shall be determined by a named third party, we have an appraisal but not an arbitration." 6A Corbin on Contracts § 1442 at 430-31 (1962).

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parties' will concerning the price of the FRYDMAN Group's stake." (Arkin Aff., Exh. D (emphasis added).) That is hardly the language of dispute. It is precisely because plaintiffs and defendant L'Oreal had come to an agreement and no longer had a dispute making an arbitration necessary that they terminated the arbitration as to the Paravision shares and replaced it with the Article 1592 price appraisal.

Finally, and most importantly, even under federal law, because a 1592 price appraisal could never attain the status of a judgment, it cannot be considered an arbitration falling under the Convention. Parties are encouraged to arbitrate their disputes in order to avoid lengthy trial proceedings. In Brener v. Becker Paribas, Inc., 628 F. Supp. 442, 448 (S.D.N.Y. 1985), for example, the court noted that "arbitration provides a prompt and efficient method of resolving disputes, without the expense, delays or complications that are inherent in litigation." The result of an arbitration is a binding, enforceable judgment. See Whirlpool Corp. v. Philips Electronics, N.V., 848 F.Supp. 474 (S.D.N.Y. 1994)("The confirmation of an arbitration award is generally a summary proceeding that converts a final arbitration award into a judgment of the Court.") Similarly, in France, arbitral awards generally obtain "exequatur," making them enforceable as judgments of the court. (Vaisse/Pradelle Aff. P 10.) The enforceability of arbitral awards as judgments of the court provides a powerful incentive for parties to arbitrate their disputes. A price fixation pursuant to Article 1592, however, never obtains the status of a judgment and therefore lacks an important and necessary arbitral function. It is not clear why the parties terminated the original arbitration, but the fact that the parties chose to fix the price pursuant to Article 1592 rather than by an arbitration is dispositive.

As plaintiffs note, a price appraisal pursuant to Article 1592 merely supplies the price term for a contract of sale; one party's refusal to comply with that term would constitute nothing more than a breach of contract. (Vaisse/Pradelle Aff. P 10.) Such breach would not constitute a failure to comply with a court judgment. For example, if, after Mayoux set the share price, L'Oreal had simply refused to pay that amount, plaintiffs could not have come to this Court to seek enforcement. This Court would lack jurisdiction because, since the price decision is simply a contract term, it is not an arbitral "award" capable of being enforced under the Convention.

CONCLUSION

Because this action does not relate to an arbitration falling under the Convention, and because no other basis for federal subject matter jurisdiction has been alleged, this Court lacks subject matter jurisdiction. Accordingly, plaintiffs' motion to remand this case to the Supreme Court of the State of New York, County of New York, is granted. The Clerk of the Court shall mark this matter closed.

SO ORDERED:

Dated: New York, New York
June 30, 1995

Loretta A. Preska, U.S.D.J.