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INTERNATIONAL ARBITRATION REPORT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HYTRAN CORPORATION, an Illinois corporation,	)	
Plaintiff,	)	No. 95 C 2254
v.	)	
MAN NUTZFAHRZEUGE AKTIENGESELLSCHAFT, a corporation formed under the laws of the Federal Republic of Germany,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Hytran Corporation ("Hytran") is an Illinois corporation engaged in the selling of multiple-use truck and tractor equipment with its principal place of business in Waukegan, Illinois. Defendant MAN Nutzfahrzeuge Aktiengesellschaft ("MAN") is a corporation formed under the laws of the Federal Republic of Germany, with its principal place of business in Munich, Germany. MAN manufactures truck and bus vehicles, chassis and constituent truck and bus parts and engineering systems. Plaintiff originally filed this action for breach of contract, promissory estoppel, intentional misrepresentation, and unjust enrichment in the Circuit Court of Cook County, Illinois. Defendant removed the case to federal court pursuant to 18 U.S.C. §§ 1441 and 1446 based on diversity of citizenship between a citizen of Illinois and a citizen of Germany. 28 U.S.C. § 1332(a)(2). Defendant alleges, and plaintiff does not dispute, that the amount in controversy exceeds $ 50,000.

Defendant has moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) on the grounds that the allegations made by plaintiff are subject to arbitration, pursuant to written agreement between the parties. MAN argues that under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. § 201, the complaint must be dismissed in favor of arbitration. In the alternative, defendant argues that plaintiff fails to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6).

A motion to dismiss for lack of subject matter jurisdiction may be supported by any documents necessary to resolve the jurisdictional problem raised. Barnhart v. United States of America, 884 F.2d 295, 296 (7th Cir. 1989), cert. denied, 495 U.S. 957, 109 L. Ed. 2d 743, 110 S. Ct. 2561 (1990). In this case, defendant argues that the issues raised by plaintiff are subject to arbitration under the terms of a written agreement entered into by the parties on October 16, 1991. Plaintiff responds that the October 1991 agreement terminated November 21, 1991 and that the issues raised by its complaint relate solely to a Memorandum of Understanding signed in December 1992. Both parties have submitted additional documents in support of their positions; these will be examined to determine whether this

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dispute is properly before the court.[1]

"It is beyond peradventure that the Federal Arbitration Act [which encompasses the Foreign Convention] embodies a strong federal policy in favor of arbitration." Sweet Dreams Unlimited v. Dial-A-Mattress Int'l, 1 F.3d 639, 641 (7th Cir. 1993). Nonetheless, the duty to arbitrate remains one assumed by contract, and a party cannot be forced to arbitrate a dispute unless it has agreed to do so. Id. When it is alleged that a duty to arbitrate exists, the court is limited to resolving that allegation before proceeding further. Nat'l Passenger Corp. v. Chesapeake & Ohio Ry. Co., 551 F.2d 136, 139 (7th Cir. 1977).

To determine whether or not the Foreign Convention applies, a United States court must resolve four questions: (1) whether there is an agreement in writing to arbitrate the subject of the dispute; (2) whether the agreement provides for arbitration in the territory of a signatory of the Convention; (3) whether the agreement arises out of a legal relationship, contractual or not, which is considered commercial; and (4) whether a party to the agreement is a foreign citizen or the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation to one or more foreign states. Jones v. Sea Tow Services Freeport New York, Inc., 828 F. Supp. 1002, 1015 (E.D.N.Y. 1993), rev'd on other grounds, 30 F.3d 360, 361 (2d Cir. 1994). As the following discussion demonstrates, the only issue in dispute relates to the first question.[2]

[1] Defendant has inappropriately criticized plaintiff for providing the court with information regarding the termination of the 1991 agreement. The fact that the agreement was terminated is highly relevant to a determination of the applicability of arbitration in this case. Defendant should have provided this information in its initial memorandum of law in support of the motion to dismiss and should have addressed its arguments more pointedly to the question of arbitration of disputes following termination of a contract.

BACKGROUND

To the extent that additional background is necessary to explain the documents submitted by the parties, plaintiff's well-pleaded allegations of fact will be taken as true. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 122 L. Ed. 2d 517, 113 S. Ct. 1160, 1161 (1993); Swofford v. Mandrell, 969 F.2d 547, 549 (7th Cir. 1992). Plaintiff's complaint, supplemented by the documents submitted by the parties, provides the following relevant information.

In 1985, John L. Greene, founder and chief executive officer of Hytran, began to pursue a business relationship with MAN on behalf of United State Motorized Equipment Corporation ("USMEC"), the predecessor to Hytran. USMEC hoped to develop the "Variman," a multi-use truck utilizing a truck chassis manufactured by MAN. Through the use of hydraulic systems attached to the chassis, the user of a Variman would be able to attach and remove devices such

[2] The issues involved are clearly of a commercial nature, MAN is a citizen of a foreign country, and France, the location of any proposed arbitration, is a signatory to the Convention.

as a dump bed, a recycling bin body, a street-cleaning device or a back hoe and bulldozer blade. USMEC predicted a strong market in the United States for the Variman among municipalities and other governmental entities. At the time that Greene and USMEC developed a marketing strategy for the Variman, MAN had no market presence for truck vehicles in the United States or Canada, but enjoyed a strong market position in Germany and elsewhere in Europe.

The Variman project continued to advance, and by 1989 USMEC and MAN entered into a Memorandum of Understanding in which MAN granted USMEC exclusive license to use its patents, trademarks and other technical knowledge, agreed to contribute towards the production of the first Variman vehicles, and agreed to various financial arrangements regarding the sale and marketing of the Variman. This was followed by a more specific agreement signed on October 11, 1989 relating to the sale and delivery of component parts. Production did not commence, however, because USMEC was unable to secure the necessary facilities. MAN then cancelled the October 1989 agreement.

On October 16, 1991, Hytran, as USMEC'S successor, executed a new agreement which was substantially similar to the October 1989 agreement. The first page of the agreement stated the following purpose:

> 1.1 HYTRAN intends to manufacture and assemble [] its own liability multi-purpose trucks of cla [sic] (9 metric tons) range (the "Products") for sale to third parties.
>
> 1.2 MAN will deliver to HYTRAN certain component parts for the series production and assembly o [sic] Products and will provide HYTRAN with ce[sic] technical assistance as set forth in [] Agreement.

Subsequent clauses addressed topics such as scope of delivery, terms of delivery, preliminary and firm orders, prices, terms of payment, packing, transport insurance, technical assistance, trademarks and trade names, warranties, default, options, and liability indemnification. The agreement also specifically acknowledged that HYTRAN was the legal successor of USMEC:

> 16.1 This Agreement between HYTRAN and MAN replaces [] almost identical agreement between USMEC and [MAN] dated Oct. 11, 1989. As far as this Agreement [is] concerned, HYTRAN acts as legal successor of USMEC.

The agreement would terminate "if Hytran fails to place an initial firm order of not less than 50 sets of components and parts by Nov. 11, 1991 at the latest . . ." Agreement at 20.2. Disputes arising in connection with or relating to the agreement were to be resolved through arbitration:

> 19. Arbitration
>
> All disputes arising in connection with or relating to the present Agreement and the performance thereof shall be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said rules.
>
> The language of Arbitration shall be the English language. Place of Arbitration shall be Paris, France. Each party shall pay its own costs, attorneys fees and expenses in connection with arbitration.
>
> The award of the arbitral tribunal shall be final and binding on both parties, and may be enforced in any court in any jurisdiction in the United

States or Federal Republic of Germany.

On May 2, 1992, Wilhelm Schilling notified Greene by facsimile transmission that the October 16, 1991 agreement had expired. Schilling wrote:

> The above mentioned agreement expired on November 21, 1991 according to Section 20.2 of the agreement, amended by our fax letter of November 11, 1991. Therefore all mutual rights and obligations in connection with this agreement are terminated.
>
> Despite of this regrettable development we would like to mention, that MAN is still interested in supplies of truck parts and components to the US-market, always provided, however, that we are able to meet the technical standards in the US, that volumes and dates of deliveries correspond to our production potentialities, and, last but not least, that the prices are economically reasonable and payments are secured.
>
> Under these provisions we are prepared to discuss your intentions and ideas of a future business relationship during your visit to Germany, that you envisaged within the next three or four weeks.

Despite the expiration of the agreement, Hytran continued to pursue financing for the Variman project and to develop a business plan. On October 6, 1992, however, MAN indicated it was no longer interested in pursuing the project. On October 27, 1992, MAN indicated that the company remained interested in the project, but only if Hytran was able to provide sufficient product liability insurance, sufficient service facilities, place a specific volume of orders during the first year, make a substantial first firm order, and effect payment through an irrevocable letter of credit. After additional negotiations the parties entered into a two-page Memorandum of Understanding on

December 9, 1992 in which they agreed on the following items "concerning their continued business relationship": cost of vehicles, quantities, discounts, prototypes, engineering support, warranties, Hytran's request for a permanent liaison from MAN, and Man's agreement to host a meeting for the attachment manufacturers. The final clause of the agreement contained their consent to work together in good faith to execute such other agreements as are necessary and commercially reasonable to effectuate the understanding of the parties as set forth herein. This Memorandum of Understanding does not in and of itself create legally binding obligations upon the parties, but the parties promise to make reasonable efforts to effectuate the terms of this Memorandum.

Hytran claims that it had fully met all of the conditions of the agreement when MAN announced on February 1, 1993 that it had determined that the Variman was no longer feasible and that it would not proceed with the project. Despite additional discussions and a presentation by Hytran at the corporate offices in Munich, Hytran was unable to persuade MAN to reconsider its decision.

Hytran brought suit, alleging that MAN breached the terms of the 1992 agreement by failing to negotiate in good faith, that Hytran relied on MAN's promises and thus failed to pursue business opportunities with other companies, that MAN since 1989 had intentionally misrepresented its interest in the Variman, and that MAN was unjustly enriched because it received numerous

benefits from Hytran's market research and other efforts to produce the Variman.

DISCUSSION

Plaintiff argues that its complaint is not subject to arbitration because the allegations arise solely from MAN's activities following the signing of the December 1992 agreement. Defendant argues that the October 1991 arbitration clause remains in force, despite termination of the agreement, because it covers "all disputes arising in connection with or relating to the present Agreement." Defendant contends that the claims raised by Hytran have their origin in the 1991 agreement and therefore must be dismissed.

It is imperative to decide at the outset the scope of the arbitration clause in question. See Collins & Aikman Products Co. v. Bldg. Sys., Inc., 1995 U.S. App. LEXIS 15053, ___ F.3d ___, 1995 WL 361721 #3 (2d Cir. June 15, 1995); Sweet Dreams, 1 F.3d at 641-42. The obligation to arbitrate a "particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Sweet Dreams, 1 F.3d at 641 (quoting United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960)). Any doubt "concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id. (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927)(1983)).

The breadth of the clause may obligate a party to arbitrate even after the expiration of the contract or agreement. Consequently, the Seventh Circuit held in Sweet Dreams, supra, that an arbitration clause providing that "any disputes arising out of the agreement shall be settled by the American Arbitration Association of the City of New York" was sufficiently broad to cover post-expiration disputes. Id. at 642. The court noted:

> Any dispute between contracting parties that is in any way connected with their contract could be said to "arise out of" their agreement and thus be subject to arbitration under a provision employing such language. At the very least, an "arising out of" arbitration clause would "arguably cover[]" such disputes, and, under our cases, this is all that is needed to trigger arbitration. . .

If the parties had wished to limit the duty to arbitrate to the term of the Agreement itself they could have said so explicitly. Instead, they used language that evinces an intent to commit to arbitration any dispute connected with the contract irrespective of when it occurs.[1] Id. at 642, 643.

The arbitration language contained in the 1991 agreement, requiring arbitration of "all disputes arising in connection with or relating to the present Agreement and the performance thereof" is even broader than that found in Sweet Dreams. This clause is,

[1] The Court noted, however, that it would be presented with a "different and more difficult question if the disputes had arisen a significant time after the expiration of the Agreement." Sweet Dreams, 1 F.3d at 643.

in fact, paradigmatic of a broad arbitration clause. Collins & Aikman, 1995 U.S. App. LEXIS 15053, 1995 WL 361721 @4 ("The clause in this case, submitting to arbitration 'any claim or controversy arising out of or relating to the agreement' is the paradigm of a broad clause."). Given the strong presumption in favor of arbitration, plaintiff's claims must be dismissed if it can be shown that they arise in connection with or relate to the 1991 Agreement.

This analysis is not controlled by the characterization of the claims as set forth in the pleadings.

Instead, we look to the conduct alleged and determine whether or not that conduct is within the reach of the . . . arbitration clause: In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims 'touch matters' covered by the parties' . . . agreements, then those claims must be arbitrated, whatever the legal labels attached to them. (citations omitted). Collins & Aikman, 1995 U.S. App. LEXIS 15053, 1995 WL 361721 @4.

Under this framework, the allegations contained in plaintiff's complaint require a determination that Counts III and IV, intentional misrepresentation and unjust enrichment, are subject to arbitration. Plaintiff alleges in both counts that MAN represented to Hytran at "various times from and after October, 1989" that it wanted to participate in development of

the Variman. Plaintiff alleges in Count III and realleges by incorporation in Count IV that MAN's representations to Hytran and to its predecessor-in-interest were false when made and were known by MAN to be false when made. On information and belief, since the summer of 1989, when MAN was first threatened with litigation as a result of its failure to fulfill the obligations it willingly undertook with Hytran's predecessor-in-interest in connection with the "Variman" project, MAN developed a strategy to offer agreement and support of Hytran's business pursuit of the "Variman" venture without every really intending to develop the project for commercial exploitation. Rather, in response to a threat of litigation, MAN developed a corporate strategy to express support without ever intending to deliver said support until such time as MAN could offer a pretextual rejection of the "Variman" project and, thereby, extricate itself from threat of litigation for breach of its earlier commitments to pursue the "Variman" project. Complaint at P 60. Plaintiff further alleges in Count IV, that as a result of defendant's fraud, it was induced to undertake market research and product development which unjustly enriched MAN.

The sweep of these allegations unquestionably relate to conduct preceding the execution of the 1992 agreement, implicating every interaction between Hytran and MAN since 1989. Consequently, they relate to the 1991 agreement and are subject to arbitration.

Such a determination is more difficult regarding plaintiff's

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claims for breach of contract and promissory estoppel. In these counts, plaintiff links its injury to defendant's failure to negotiate in good faith as required by the 1992 Memorandum of Understanding. Plaintiff asserts that defendant's termination of their relationship prevented Hytran from recovering its significant start-up costs. Moreover, Hytran argues that MAN's reasons for terminating were pretextual because they addressed issues known to MAN prior to entering into the 1992 agreement. Plaintiff also insists that reliance upon defendant's conduct kept it from pursuing development of the Variman with other truck manufacturers.

The 1992 Memorandum of Understanding memorializes a "continuing business relationship," a relationship which was clearly contemplated even as the 1991 agreement expired under its own terms. Unlike the 1992 Memorandum, however, the 1991 agreement provided a detailed plan for the ongoing relationship between Hytran and MAN. The agreement envisioned a long-term relationship in which both parties profited from the development of the Variman. The ongoing validity of the agreement was subject to the placement of regular orders by Hytran and could terminate of its own accord if those orders were not placed. Thus, while the arbitration clause clearly would have covered disputes arising from the practical execution of the contract – such as delivery schedules, methods of payment, or packaging disputes – it also covered disputes over the development of the Variman and the relationship envisioned by the parties. The 1992

Memorandum of Understanding flows from that agreement, as evidenced by the continued close working relationship the parties enjoyed following termination of the 1991 agreement.

Nonetheless, as plaintiffs argue, the 1992 Memorandum is distinct from the 1991 Agreement. Allegations that MAN did not negotiate in good faith after October 1992, or that MAN's conduct precluded the development of other lucrative business relationships after that time, go to issues not contemplated by the 1991 Agreement. To the extent that plaintiff can point to specific grievances arising solely out of the 1992 agreement, those grievances are not arbitrable. See Collins & Aikman, 1995 U.S. App. LEXIS 15053, 1995 WL 361721 @5.

Given plaintiff's underlying claim that MAN deliberately misled Hytran from 1989 on, however, it may be difficult to separate out specific non-arbitrable issues stemming from the 1992 agreement. Ultimately, plaintiff's grievances stem from the allegation of long term fraud, an allegation which is arbitrable under the terms of the 1991 contract.

Because it is necessary for the parties to resolve their differences through arbitration, defendant's motion to dismiss will be treated as a motion to compel arbitration. The parties will be ordered to proceed with arbitration. The claims not subject to arbitration will be dismissed without prejudice, but jurisdiction will be retained in order to enforce arbitration or to resolve matters not addressed in arbitration. The parties will have sixty days following the final arbitration order to

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move for leave to reinstate or for enforcement.

IT IS THEREFORE ORDERED that defendant's motion to dismiss, treated as a motion to compel arbitration, is granted. The Clerk of the Court is directed to enter judgment as follows: (1) The parties shall proceed to arbitration. (2) The claims not subject to arbitration (Counts I and II), are dismissed without prejudice. (3) The parties have sixty days from the date of the final arbitration determination to move to reinstate either for further proceedings to enforce the arbitration award or to resolve claims dismissed without prejudice.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: July 21, 1995

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