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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Petition of

HZI RESEARCH CENTER, INC.,

Petitioner,

- against -

SUN INSTRUMENTS JAPAN CO., INC.,

Respondent.

94 Civ. 2146 (CSH)

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

The above-captioned case is presently before the Court on a petition to compel arbitration, under the Federal Arbitration Act, 9 U.S.C. § 4. Respondent has filed a cross-motion to dismiss the petition pursuant to Rule 12(b) of the Federal Rules of Civil Procedure asserting (i) that this Court lacks personal jurisdiction and (ii) on the ground of forum non conveniens. For the reasons set forth below, the petition is granted and the cross-motion denied.

BACKGROUND

This is an action arising out of a dispute between Petitioner, HZI Research Center, Inc. ("HZI"), a developer of medical computer equipment, and Respondent, Sun Instruments Japan Co., Inc. ("Sun"), a medical equipment distribution company. HZI is a New York corporation with its principal place of business located within this District, in Tarrytown, New York. Affidavit of Kurt S. Itil (hereinafter "Itil Affidavit"), ¶ 13. Sun is a Japanese corporation with its principal place of business in Tokyo, Japan.

Affidavit, Exhibit C, at C0004.

HZI claims that in July 1989, as a result of this

Affidavit of Yoh Chie Lu (hereinafter "Lu Affidavit"), ¶ 2. Sun has no New York office or mailing address. Id., ¶ 2.

Yoh Chie Lu was a shareholder of Sun during part of the time period relevant to this dispute and is now the Company's President. According to Lu, Sun's first contact with HZI was in Hong Kong in 1988 through a business acquaintance named Edward Hou. Id., ¶ 3. Hou was not affiliated with either company. Hou allegedly asked Lu "whether Sun would be interested in meeting with representatives of a United States corporation that was developing a brain scanning device." Id., ¶ 3. Lu claims that he expressed his interest to Hou and "(s)hortly thereafter ... received a letter or telephone call from Mr. Kurt Itil (of) HZI." Id., ¶ 3.

HZI offers a somewhat different account of this initial contact. Kurt Itil was the President of HZI during the time these events took place and, since February 1994, has also been HZI's Chief Executive Officer. Itil Affidavit, ¶ 1. Kurt Itil contends that the relationship was initiated when, in March 1989, Lu contacted Kurt Itil's father, Turan Itil, who was and remains Chairman of HZI. Id., ¶ 15. This contact, Kurt Itil maintains, was "unsolicited". Id., ¶ 15.

It is agreed, however, that after this initial contact the Itils agreed to meet Lu in Japan and it is also agreed that such a meeting took place, possibly in May 1989. Id., ¶ 6; Supplemental Affidavit of Yoh Chie Lu (hereinafter "Lu Supplemental Affidavit"), ¶ 4. A Letter of Agreement was then executed between HZI and Chisan United Ltd., a minority shareholder of Sun. Itil

respect to finalizing written agreement." Lu Affidavit, ¶ 7. Over the next eleven months the parties negotiated further by telephone

Affidavit, Exhibit C, at C0004.

HZI claims that in July 1989, as a result of this meeting, Sun began to order HZI products for distribution in Japan. Itil Affidavit, ¶ 17, Exhibit D. HZI further contends that shipment for these orders was "FOB Tarrytown" or "FOB New York", that Sun was to pay for shipping and insurance from New York and that Sun paid HZI by wiring funds into HZI's Chase Manhattan bank account in Tarrytown, New York. Id., ¶ 17.

Both parties agree that the Itils returned to Japan in either September or October 1989. Itil Affidavit, ¶ 18; Lu Affidavit, ¶ 5. Further negotiations took place on this visit, although Sun did not execute the draft agreement that the Itils had brought with them. Nevertheless, HZI has presented to the Court two handwritten agreements, apparently signed at this time, which state HZI and Sun's intent to enter into a more comprehensive agreement. Itil Affidavit, Exhibit C, at C0006-09. Both parties agree that at this stage Sun ordered HZI products for placement in Japan.

Lu claims that, after this visit to Japan, no further negotiations took place until November, 1990. Lu Affidavit ¶ 6. However, HZI has attached to its affidavits correspondence between HZI and Sun suggesting that negotiations took place during this period. Itil Affidavit, Exhibit C, at C0010-0118.

HZI and Sun both acknowledge that Lu visited New York in November 1990 to negotiate with HZI. Nevertheless, while HZI consider these negotiations to have been fruitful, Itil Affidavit, ¶ 23, Sun argues that the negotiations "accomplished nothing with

respect to finalizing a written agreement." Lu Affidavit, ¶ 7. Over the next eleven months the parties negotiated further by telephone and, according to HZI, also by correspondence. Itil Affidavit, Exhibit C, at C0138-0249. In addition, HZI alleges that, in 1990, Sun twice sent employees to HZI's offices in Tarrytown for training. Itil Affidavit, ¶ 25.

Sun and HZI eventually signed the contract now in dispute (the "Agreement") on October 12, 1991, in Los Angeles. Petition, Exhibit A. The Agreement required Sun to purchase a minimum of $300,000 of products from HZI between December 1, 1990, and March 31, 1992, and a minimum of $250,000 of HZI's products during each subsequent year that the Agreement was renewed. Agreement, ¶¶ 2.01, 8.03. Sun was required to pay fifty percent of the purchase price in advance and the remainder after delivery. The Agreement further provided that "[t]he construction, interpretation and performance of this Agreement shall be governed by the laws of the State of New York, United States of America." Agreement, ¶ 9.03. Moreover, it additionally provided that "[i]n the event of a dispute between the parties which cannot be resolved, the parties agree that each party shall select an arbitrator and the two arbitrators shall select a third arbitrator, all of whom shall be Members of the American or Japanese Arbitrator Society, who will resolve the dispute." Agreement, ¶ 9.06. However, as both parties concede, there are no such organizations as the "American Arbitrator Society" or the "Japanese Arbitrator Society", although organizations do exist entitled the "American Arbitration Association" (hereinafter "AAA")

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and the "Japan Commercial Arbitration Association" (hereinafter "JCAA").

Sun allegedly failed to satisfy the Annual Minimum Purchase Requirement and, consequently, on January 10, 1994, HEI made a demand for arbitration, seeking to have the arbitration conducted under the AAA pursuant to the AAA's International Rules. Sun has objected to this demand, arguing that its Agreement with HEI did not state that any arbitration would be conducted by the AAA, nor that the arbitration would take place in New York.

DISCUSSION

The case arises out of a commercial legal relationship, ultimately reduced to a written contract, between a New York corporation and a Japanese corporation. The contract provides that any dispute between the parties will be resolved by arbitration. Those circumstances bring the case within the Convention on the Recognition of Foreign Arbitral Awards, signed by both the United States and Japan, and implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201 et seq. (Cum. Ann. Pocket Part 1995). See Filanto, S.p.A. v. Chilewich International Corp., 789 F.Supp. 1229, 1234 (S.D.N.Y. 1992); Oil Basins Ltd. v. Broken Hill Proprietary Co. Ltd., 613 F.Supp. 483, 485 (S.D.N.Y. 1985). This Court's power to compel arbitration is conferred by 9 U.S.C. § 206. Subject matter jurisdiction is derived from 28 U.S.C. § 1331, since actions or proceedings "falling under the Convention shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203. Thus HEI's invocation of 28

U.S.C. § 1332(a)(2) as a basis for subject matter jurisdiction, while factually justified by the diversity of the parties' citizenship, is unnecessary in view of § 1331's independent jurisdictional grant. Filanto at 1234.

No question of this Court's personal jurisdiction over Sun arises. The contract provides that New York law governs, and that the United States is one of two specified places for arbitration, the other being Japan. Arbitration agreements, favored by public policy, are construed broadly and in accordance with common sense. I construe this contract as an agreement by Sun, if called upon to do so, to arbitrate disputes in New York. "If the parties agreed to arbitrate in New York, then it is as if they were physically present in New York; they have consented in advance to New York jurisdiction." Atlanta Shipping Corp. v. Cheswick-Flanders & Co., 463 F.Supp. 614, 618 (S.D.N.Y. 1978) (citing cases). Atlanta arose under Chapter 1 of the Federal Arbitration Act, but that makes no difference.

The provision in the arbitration agreement for two possible venues, the United States (which I construe to mean New York) or Japan, has the limited effect of giving the party first demanding arbitration its choice. If Sun had first demanded arbitration in Japan, HEI would have been obligated to comply.

The final point at issue arises out of the fact, agreed by both parties, that neither of the organizations referred to in the agreement, "the American or the Japanese Arbitrator Society," exists. That furnishes no impediment to enforcement of the

arbitration agreement. The dominant purpose of the parties, clearly expressed in their contract ... think right.

arbitration agreement. The dominant purpose of the parties, clearly expressed in their contract, was to resolve disputes by arbitration. If the parties imperfectly or incorrectly designate the instrumentality through which arbitration should be effected, the court will enforce the contract by making an appropriate designation. See Astra Footwear Industry v. Harwyn International, Inc., 442 F.Supp. 907 (S.D.N.Y.), an opinion by District Judge Pierce, as he then was, aff'd, 578 F.2d 1366 (2d Cir. 1978); Laboratories Grossman, S.A. v. Forest Laboratories, Inc., 31 A.D.2d 628, 295 N.Y.S.2d 756 (1st Dept. 1968); and Delma Engineering Corp. v. K & L Construction Co., 6 A.D.2d 710, 174 N.Y.S.2d 620 (2d Dept.), aff'd., 5 N.Y.2d 852, 181 N.Y.S.2d 794 (1958). This salutary practice finds global acceptance; see also Lucky-Goldstar International (H.K.) Ltd. v. Ng Moo Kee Engineering Ltd., 1993 No. A94 (Sup.Ct. Hong Kong 1993), where the court, faced with an arbitration agreement designating a non-existent arbitration organization, said:

> I believe that the correct approach in this case is to satisfy myself that the parties have clearly expressed the intention to arbitrate any dispute which may arise under this contract. I am so satisfied. ... As to the reference to the non-existant arbitration institution and rules, I believe that the correct approach is simply to ignore it. I can give no effect to it and I reject all reference to it so as to be able to give effect to the clear intention of the parties.

In the case at bar, the American Arbitration Association is an entirely appropriate designation. I direct that the arbitration of disputes between the parties proceed before that body forthwith, subject to whatever procedural rules the AAA may

think right.

MZI's petition to compel arbitration is granted. Sun's cross-petition is denied. This Court will retain jurisdiction to consider any issues that may arise after the arbitrators have rendered their award.

It is SO ORDERED.

Dated: New York, New York
September 14, 1995.

CHARLES S. HAIGHT JR.
U.S.D.J.

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