YCA IX/NYC/US 45

US no. 45
YB IX

July 6, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------X

Petition by	:	78 Civ. 3263 (VLB)
DIAPULSE CORPORATION OF AMERICA,	:	MEMORANDUM ORDER
Petitioner,	:	
-against-	:	
CARBA, LTD.,	:	
Respondent.	:	

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VINCENT L. BRODERICK, U.S.D.J.

I.

Petitioner Diapulse is a Delaware corporation with its principal place of business in New York. Respondent Carba is a Swiss corporation. In a distributorship agreement dated May 30, 1974, both parties agreed that the contract would be "constructed" [sic] under New York law and that any dispute would be settled by arbitration in New York City. Carba allegedly committed a breach of the contract; arbitration in New York has been completed; and a board of arbitrators ("the board") has awarded Diapulse $35,000 in damages and has enjoined Carba from further competition with Diapulse.[1]

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Diapulse seeks an order, pursuant to "Arbitration - General Provisions" ("the Arbitration Act"), 9 U.S.C. §§2, 6; the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" ("the Convention"), 9 U.S.C. §201-4, 208; and New York Civil Practice Law and Rules, §§7501, 7503(c), 7510, 7514, confirming the arbitration award ("the award") and directing that judgment on the award be entered. Carba cross-moves, pursuant to 9 U.S.C. §11, to modify the award by deleting paragraph 1 thereof.

II.

Jurisdiction of this court exists pursuant to 9 U.S.C. §9: "If no court is specified in the agreement of the parties, then such application [for confirmation of the board's award] may be made to the United States court in and for the district within which such award was made." In the case before me, no court is specified in the agreement of the parties.

The parties have briefed the issues under the Arbitration Act, the Convention, and New York law. By its terms the Convention does not apply because the award herein was not "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" nor is the award before me an "award not considered as domestic ... in the State where ... recognition and enforcement are sought." Convention, Article I.

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Under the Arbitration Act, a determination whether to enforce or modify an arbitration award is governed by federal law. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir.), cert. denied, 406 U.S. 949 (1972); 1A (Part 2) Moore's Federal Practice ¶0.317[7] at 3241-43 (2d ed. 1978).

I have therefore addressed the issues involved herein under the Arbitration Act. I note, however, that the result would be the same under the Convention and New York State law.[2]

III

The court's function upon review of arbitration awards is limited. "Neither the correctness of the arbitrator's conclusion nor the propriety of his reasoning is relevant. ..." Amoco Oil Co. v. Oil, Chemical and Atomic Workers International Union, Local 7-1, Inc., 548 F.2d 1288, 1294 (7th Cir.), cert. denied, 431 U.S. 905 (1977). The weight of decisions falls heavily against upsetting arbitrators' awards. Courts should resolve all doubts in favor of arbitrators' authority. Resilient Floor and Decorative Covering Workers, Local Union 1179 v. Welco Mfg. Co., Inc., 542 F.2d 1029 (8th Cir. 1976). Where the construction of a contract is involved, the court cannot overrule the arbitrators because

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the court's interpretation of the contract is different than the arbitrators' interpretation. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). These restrictive principles further the objective of arbitration, i.e., to avoid prolonged and costly litigation.

The essence of the policies set forth above is that an arbitration award will not be vacated or modified for errors of fact and law, but an arbitration award will be vacated or modified if it compels conduct which is "contrary to accepted public policy." Union Employers Division of Printing Industry of Washington, D.C., Inc. v. Columbia Typographical Union No. 101, 353 F.Supp. 1348, 1349 (D.D.C. 1973) (quoting Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971)), aff'd, 492 F.2d 669 (D.C. Cir. 1974). See also Local 453, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Otis Elevator Co., 314 F.2d 25, 29 (2d Cir.), cert. denied, 373 U.S. 949 (1963):

> It is no less true in suits brought ... to enforce arbitration awards than in other lawsuits that the "power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States ..." Hurd v. Hodge, 334 U.S. 24, 34-35 (1948) ... Thus, when public policy is sought to be interposed as a bar to enforcement of an arbitration award, a court must evaluate its asserted content.

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In the case before me, the board issued an injunction against competition. The injunction is permanent in time and unlimited in geographic scope. In the absence of extraordinary circumstances, such an injunction violates the public policy of the United States against unreasonable restraint of trade.

> It is true that, in general, covenants not to compete which are reasonable with regard to time and space and are reasonably necessary to protect the purchaser's investment are valid, but it is equally true as a general proposition that covenants not to compete which are unlimited as to space or time are invalid and unenforceable. The Oregon Steam Navigation Co. v. Windsor, 87 U.S. (20 Wall) 64, 22 L.Ed. 315 (1873).

Compton v. Metal Products, Inc., 453 F.2d 38, 45 (4th Cir. 1971), cert. denied, 406 U.S. 968 (1972), cited in Brunswick Corp. v. Sheridan, 582 F.2d 175, 181 (2d Cir. 1978).

One might argue that the policy prohibition against unlimited non-competition injunctions is a "general proposition" only and that the court must assume that the board had good and sufficient reason to create an exception to the general proposition. However, the board in this case gave no reason for its extraordinary award. While arbitrators are not required to state reasons for their awards, in the absence of any stated reasons, the court must independently and without guidance from the board "evaluate [the award's] asserted content." Otis Elevator, supra, 314 F.2d at 29.[3]

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The contract between Diapulse and Carba provided that "during the term of his contract and upon termination of the dealership, for any reason whatsoever, for a period of two years thereafter, [Carba] will not engage in competition with Diapulse in the production or sale of the same or similar devices... to or through the purchasers described in paragraph (1) above." Paragraph (1)(C) of the Contract provided that Carba had the right to sell Diapulse products to the medical profession and the veterinary profession "in the territory described below, ... Germany." In proceedings before the board, the parties agreed that the contracts in issue provided for sales by Carba in Switzerland as well as Germany. Therefore, the contractual two year non-competition provision applied to the geographic areas of Germany and Switzerland.

Diapulse did not argue to the board any need for an injunction for a term in excess of two years. At the commencement of the arbitration proceedings, Diapulse stated that it "brings this action for damages and injunction to enforce the provisions that during the term of the contract and for two years thereafter they [defendant] will not engage in the marketing in [sic] any form of competitive devices."[4] The inference from this statement is that imposition of the contractual two year non-competition provision is all

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that Diapulse sought as "reasonably necessary to protect [its] investment." Compton v. Metal Products, Inc., supra, 453 F.2d at 45.

The board did not restrict its non-competition injunction against Carba to the contractual two year period sought to be enforced by Diapulse or to the geographic areas covered by the contracts. The board instead imposed an injunction against competition by the defendant "unlimited as to space or time." Compton v. Metal Products, Inc., supra, 453 F.2d at 45.

Upon review of the proceedings before the board, the award, and the underlying papers submitted by the parties, I find an absence of circumstances which would warrant the extraordinary imposition of an unlimited non-competition injunction.

Pursuant to 9 U.S.C. §11, the court may "make an order modifying ... the award ... (c) [w]here the award is imperfect in matter of form not affecting the merits of the controversy." The court in said order "may modify ... the award, so as to effect the intent thereof and promote justice between the parties."[5]

The form of the board's injunction, i.e., unlimited in time or geographic scope, is imperfect because such an injunction violates public policy. However, the substantive

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quality of the injunctive award is not affected by the imperfect quantitative aspect of the injunction. Thus, I am modifying the temporal and geographic aspect of the injunctive award; the board's conclusion that the merits of the controversy warrant an injunction is preserved.

Modification of the award will effect the intent of the board to impose an injunction upon Carba, because without modification the injunction must fail as violative of public policy. Concomitantly, modification will promote justice between the parties and the public policy requirements will be satisfied.

Paragraph 1 of the award, which enjoins competition, is modified to add the following at the end thereof: "for a period of two years from July 5, 1979, in the area of Germany and Switzerland." As modified, the award is confirmed, and judgment will be entered on July 5, 1979 on the award as modified.

Counsel for Diapulse shall submit a proposed judgment on notice on or before July 2, 1979.

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
June , 1979

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FOOTNOTES

1. The arbitration award, in pertinent part, provides as follows:

> 1. CARBA LIMITED (CARBA AKTIENGESELLSCHAFT), hereinafter referred to as RESPONDENT, is enjoined from engaging in competition with DIAPULSE CORPORATION OF AMERICA, hereinafter referred to as CLAIMANT in the production or sale of its device described as Diapulse or any similar devices.
>
> 2. RESPONDENT shall pay to CLAIMANT the sum of THIRTY FIVE THOUSAND DOLLARS ($35,000.00) for damages. The THIRTY FIVE THOUSAND DOLLARS ($35,000.00) shall not include any monies that may be due from RESPONDENT to CLAIMANT for merchandise sold and delivered by CLAIMANT to RESPONDENT.
>
> 3. The administrative fee of the American Arbitration Association totalling THREE THOUSAND FIVE HUNDRED NINETY DOLLARS AND NINETY FOUR CENTS ($3,590.94) shall be borne by RESPONDENT. Therefore, RESPONDENT shall pay to CLAIMANT the sum of TWO HUNDRED DOLLARS ($200.00) for that portion of said fee previously advanced by CLAIMANT to the Association and RESPONDENT shall pay to the American Arbitration Association the sum of THREE THOUSAND THREE HUNDRED NINETY DOLLARS AND NINETY FOUR CENTS ($3,390.94) for that portion of said fee still due the Association.
>
> 4. This AWARD is in full settlement of all claims submitted to this Arbitration.

2. The injunction violates the public policy of the State of New York. See In the Matter of the Arbitration Between Sprinzen and Nomberg, No. 110 (N.Y. Ct. App. March 27, 1979).

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3. The mandate of the Court of Appeals in _Otis Elevator_, that a court must evaluate the content of the arbitrators' award where a legitimate public policy question is raised, has been quoted in, _inter alia_, _International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 117_ v. _Washington Employers, Inc._, 557 F.2d 1345, 1355 (9th Cir. 1977); _Metal Products Workers Union, Local 1645_ v. _Torrington Co._, 358 F.2d 103, 106 (2d Cir. 1966); _Botany Industries, Inc._ v. _New York Joint Board, Amalgamated Clothing Workers of America_, 375 F.Supp. 485, 491 n.8 (S.D.N.Y.), _vacated on other grounds_, 506 F.2d 1246 (2d Cir. 1974).

I am cognizant of potential abuse of the public policy challenge to arbitrators' award, especially since said challenge requires the court to evaluate the content of the award. However, I am confident that frivolous and purely tactical public policy challenges can and will be thwarted by appropriate imposition of costs and attorneys' fees.

4. Transcript of Proceeding, Diapulse Corporation of America and Carba Limited before the American Arbitration Association on June 3, 1976 at p. 4.

5. One might expect that the term in 9 U.S.C. §11 "imperfect in form" most often applies to a situation where the award is proper in its result, but where the arbitrators do not state their award according to some prescribed layout or "form." However, arbitrators are not required to use any particular terms of art in their award; to the contrary, arbitrators are not required to state the reasons for their award at all. _United Steelworkers of America_ v. _Enterprise Wheel & Car Corp._, 363 U.S. 593, 598 (1960).

Thus, modification where the award is "imperfect in form" applies to situations, like the one before me, other than where the award is imperfect in grammatical or other linguistic form.

626 F.2d 1108

-earlier instance is U.S. 45, YB IX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 695—September Term 1979

(Argued January 24, 1980 Decided July 10, 1980)

Docket No. 79-7535

DIAPULSE CORPORATION OF AMERICA,

Petitioner-Appellant,

v.

CARBA, LTD.,

Respondent-Appellee.

Before:

MULLIGAN, VAN GRAAFEILAND and KEARSE,
Circuit Judges.

Appeal from judgment entered in United States District Court for the Southern District of New York, Broderick, *J.*, modifying an arbitration award on the grounds that the original award contravened the public policy of the United States against restraints of trade.

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Remanded to the district court to permit application to be made for remand to arbitrators.

SOLOMON H. FRIEND, New York, N.Y. (Friend Perles Dorfman & Kleefeld, New York, N.Y., Frank D. Decolvenaere, on the brief), *for Petitioner-Appellant.*

STEPHEN RACHLIS, New York, N.Y. (Wachtell, Manheim & Grouf, New York, N.Y., on the brief), *for Respondent-Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

This is an appeal by Diapulse Corporation of America from that part of a judgment entered in the United States District Court for the Southern District of New York which modified the injunctive provisions of an arbitration award in its favor. Appellee Carba, Ltd. originally cross-appealed but then withdrew its appeal, content to let the award stand as modified. We hold that the district court had no authority to modify the substantive provisions of the award but remand to the district court so that application may be made for remand to the arbitration panel for clarification of ambiguities in the award.

Diapulse, a Delaware corporation, manufactures an electronic device for use by the medical and veterinary professions. The device, known as the "Diapulse machine", is designed to expedite bone and tissue healing through the emission of electromagnetic energy

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and impulse waves. Because of FDA objections, the machine, which is manufactured in New York, is not distributed in the United States. It is marketed in Europe and other parts of the world through a system of exclusive territorial distributorships.

In 1973, Carba, a Swiss corporation, contracted to become the exclusive distributor of Diapulse machines in Switzerland. In 1974, Diapulse granted Carba a second exclusive distributorship covering Germany. These agreements contained a clause providing for resolution of all contractual disputes by arbitration in New York City in accordance with the rules of the American Arbitration Association.

Pursuant to this clause, Diapulse filed a demand for arbitration in 1976, alleging that Carba had violated a provision in the distributorship agreements prohibiting it from competing with Diapulse in the production or sale of Diapulse machines or any similar device during the term of the agreements and for two years thereafter. The arbitration proceedings took place in June 1976. Diapulse presented evidence that Carba had funded the development of a competitive device which it marketed in Europe and elsewhere under the name "Ionar". Diapulse introduced into evidence a copy of a letter from Carba to an Arabian sales agency dated October 27, 1975, in which Carba announced the development of the Ionar machine, described it in some detail, and noted that sales efforts were concentrated in Switzerland, France, and Algeria, where hundreds of Ionar machines were currently in service and hundreds more were expected to be sold. The letter was accompanied by literature purporting to be descriptive of the Ionar machine and Ionar therapy. A representative of Carba admitted at the arbitration proceedings

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that the literature accompanying the letter to the Arabian sales agency was for the most part a direct translation of literature discussing the Diapulse machine which had been provided by Diapulse to Carba and other Diapulse distributors for use in the promotion of the Diapulse machine. This witness also testified that Carba had financed the development of the Ionar machine, had appointed agents or distributors of Ionar in France, Belgium, and Austria, and regularly responded to requests for information about Ionar from other parts of the world.

By way of defense, Carba argued that the Ionar machine was not really similar to the Diapulse machine and that, in any event, the non-competition clause should be construed as barring competition only in Germany and Switzerland, the areas in which Carba served as exclusive distributor. Carba urged that the reference in the letter to the Arabian sales agency concerning sales efforts in Switzerland was a "sales bluff" and that in reality it never sold Ionar machines in Switzerland in violation of the non-competition clause.

In an award dated December 19, 1977, the arbitrators enjoined Carba "from engaging in competition with [appellant] in the production or sale of its device described as Diapulse or any similar devices", awarded appellant $35,000 in damages, and required Carba to pay the costs of the arbitration proceeding. Appellant petitioned for confirmation of the award in the United States District Court for the Southern District of New York in July 1978. Carba cross-moved to modify the award by deleting the provision that enjoined it from competition, arguing that the two-year period provided for in the contracts had expired. The district court

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concluded that because the injunction was permanent in time and unlimited in geographic scope, it violated the public policy of the United States against unreasonable restraints of trade. Purporting to act under the authority of 9 U.S.C. § 11(c), the court modified the award by adding a clause limiting the injunction geographically to the area of Switzerland and Germany and temporally to a period of two years from the date of the judgment. The award, as modified, was confirmed, and judgment thereon was entered July 6, 1979. We turn first to the district court's construction of the authority given him by section 11(c).

The purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings. *Wilko v. Swan*, 346 U.S. 427, 431-32 (1953); *Office of Supply v. New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972). Accordingly, it is a well-settled proposition that judicial review of an arbitration award should be, and is, very narrowly limited. *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 429-32 (2d Cir. 1974); *Office of Supply v. New York Navigation Co., supra*, 469 F.2d at 379-80. A federal court may vacate or modify an arbitration award only if one of the grounds specified in 9 U.S.C. §§ 10 & 11 is found to exist. *I/S Stavborg v. National Metal Converters, Inc., supra*, 500 F.2d at 429-30. *Office of Supply v. New York Navigation Co., supra*, 469 F.2d at 379. Section 11(c) authorizes a district court to modify or correct an arbitration award "[w]here the award is imperfect in matter of form not affecting the merits of the controversy."

The district court, after concluding that the arbitrators' injunction violated public policy, reasoned that

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this rendered the award "imperfect in form" and empowered the court to modify it so as to eliminate the violation. This was error. Section 11(c), which is limited to matters of form not affecting the merits of the controversy, does not license the district court to substitute its judgment for that of the arbitrators. It cannot be argued seriously that the district court's revision of the arbitration award, which transformed a very broad non-competition injunction into a relatively narrow one, did not affect matters of substance that were at the heart of the controversy between Carba and Diapulse. This sort of judicial intervention into the arbitral process is precisely what the narrowly defined provisions of sections 10 and 11 were designed to prevent. Section 11(c) did not empower the district court to modify the arbitration award by substantially altering its geographic and temporal scope. *See Bradigan v. Bishop Homes, Inc.*, 20 A.D. 2d 966, 966-67 (N.Y. App. Div. 1964), decided under a similarly worded New York statute.

The question remains whether the injunctive provisions of the award should have been vacated as against public policy. Although contravention of public policy is not one of the specific grounds for vacation set forth in section 10 of the Federal Arbitration Act, an award may be set aside if it compels the violation of law or is contrary to a well accepted and deep rooted public policy. *Local 435, IUEW v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963); *Metal Product Workers Union v. Torrington Co.*, 35[illegible] F.2d 103, 106 (2d Cir. 1966); *Matter of Sprinzen*, 4[illegible] N.Y. 2d 623, 629-32 (1979). The parties have argued at length on the issue of whether the injunction against competition violates public policy as being of unlimite[d]

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scope and duration. Basic to their differences, however, is an inability to agree upon what sales the award enjoins against. Appellant contends that Carba is not prohibited from selling a device "which can perform the same function as the Diapulse device, so long as it is not a copy of the Diapulse." Carba asserts, on the other hand, that other devices which, like Diapulse, use electromagnetic and impulse waves as their method of treatment, may well be considered "similar devices" within the meaning of the arbitration award. "Similar", Carba points out, may be interpreted to mean "showing some resemblance", "related in appearance or nature", "alike though not identical", "resembling in many respects", "somewhat alike", etc. *See, e.g., Japan Import Co. v. United States*, 86 F.2d 124, 131 (CCPA 1936); *Butterfield v. Oculus Contact Lens Co.*, 332 F. Supp. 750, 757 (N.D. Ill. 1971). Appellant's answer to this is that the issue of similarity will be determined at such time as appellant may decide to pursue its remedies for violation of the injunction. We find this argument most troubling.

A district court judgment entered upon an arbitration award has the same force and effect as if it had been entered in an action in the court itself. 9 U.S.C. § 13. A court is required to frame its orders so that those who must obey them will know what the court intends to forbid. *International Longshoremen's Assn., Local 1291 v. Philadelphia Marine Trade Ass'n.*, 389 U.S. 64, 76 (1967). "[B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). It is for this reason that Fed. R. Civ. P. 65(d), like its predecessor 28 U.S.C. § 383, provides that every order granting an injunction shall be specific in

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its terms and describe in reasonable detail the acts sought to be restrained. An order which does not satisfy the requirement of specificity and definiteness will not withstand appellate scrutiny. *See, e.g., Sanders v. Air Line Pilots Ass'n, Int'l.*, 473 F.2d 244, 247-48 (2d Cir. 1972); *B.H. Bunn Co. v. AAA Replacement Parts Co.*, 451 F.2d 1254, 1268-70 (5th Cir. 1971); *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1113-17 (8th Cir. 1969); *Brumby Metals, Inc., Bargen*, 275 F.2d 46, 49-50 (7th Cir. 1960). Section 10(d) of the Arbitration Act provides that the district court may vacate an award that is not "definite". The injunction in this case falls within that category.

Both parties and the district court have assumed without question that the injunction was intended to be everlasting, despite the fact that the word "permanently" or its equivalent appears nowhere in the award. Both parties and the court also assumed that it was intended to be worldwide in scope. We are not convinced that this was the arbitrators' intent although we make no finding to that effect. A knowledgeable determination as to whether the injunctive provisions of the award contravene public policy cannot be made, however, unless the district court is able to place the term "similar devices", adequately defined, in its proper temporal and geographic setting. The parties may have been willing to live with a lack of explicitness during the two-year term of the agreement not to compete. The district court, which must be concerned with public policy and the problems arising out of the enforcement of an ambiguous decree that may be much broader in scope, is not bound to accept the parties' choice of contractual language.

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The judgment as appealed from is remanded to the district court so that appellant Diapulse may there move that the injunctive provisions of the award be referred back to the arbitrators for (1) a more complete and descriptive definition of the type of device whose sale by Carba is being enjoined, (2) a clarifying statement as to the geographical scope of the injunction and (3) a clarifying statement as to the duration of the injunction. If Diapulse does not so move within a reasonable time as set by the district court, the judgment may stand as entered, Carba having taken no appeal therefrom. We make no present determination as to whether the award, when and if clarified by the arbitrators, will contravene public policy.

So ordered.

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