UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JMA INVESTMENTS, INC., a Washington corporation, and JOSEPH RIZZUTO, Plaintiffs, -vs- C. RIJKAART bv, a foreign corporation, and RYKAART, INC., a foreign corporation, Defendants.	No. C-83-617 RJM MEMORANDUM AND ORDER

Before the court is the defendants' Motion to Stay Proceedings and Compel Arbitration pursuant to Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 et. seq.[1] The matter was initially presented to the court on the defendants' summary judgment motion. This court denied that motion and ordered an evidentiary hearing to determine whether a contract containing

1 Arbitration clauses arising out of international agreements were formerly governed by Chapter 1 of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. To facilitate recognition and uniform enforcement of international arbitration agreements, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was drafted in 1958. The United States ratified the treaty effective December 29, 1970 and Congress enacted implementing legislation in that same year. 9 U.S.C. §§ 201-208.

the arbitration clause at issue existed and if so, whether the arbitration clause contained in the contract was valid.

This controversy arose out of a contract to purchase a pizza line entered into between the parties.[2] The contract was the result of negotiations between the parties which took place in the latter part of 1981 and the early part of 1982. In the late summer or early fall of 1981 a representative of the plaintiff contacted a representative of defendant Rijkaart Machine to inquire about the defendant's pizza line. Rijkaart Machine sent certain literature to the plaintiff and in December of 1981 sent a document which was labeled as an "Offer." On the first page of the correspondence directly below the word offer was the phrase "based on our FME delivery conditions."[3] The transmittal set out various pieces of equipment which defendant Rijkaart Machine believed would be necessary to construct plaintiff's planned production facility. The document also

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2 This action was originally commenced by Joe's Pizza Supply Company, Inc. the predecessor corporation to JMA Investments, Inc. Joe's Pizza was engaged in the business of producing pizza crusts. Since the commencement of this action JMA Investments, Inc has been dissolved and all claims asserted in this action have been assigned to Joseph Rizzuto. Defendant, C. Rijkaart, Inc. bv (hereinafter Rijkaart Machine) is a Netherlands corporation which manufactures and distributes food processing equipment including pizza lines. Defendant, Rykaart, Inc. (hereinafter Rykaart U.S.) is an Ohio corporation which acts as the United States sales representative for Rijkaart Machine.

3 "FME" stands for Federation of Metal and Electrical Industries. FME conditions are general terms and conditions for contracts developed by and for the Mechanical and Electrical Industries in the Netherlands.

included the price of the listed equipment and a description of the equipment's manner of operation and production capacities. A section entitled "CONDITIONS" appeared at the end of the document. This section contained the phrase "Our quotations and deliveries are based on the enclosed FME-conditions." The attached FME-conditions contained the arbitration clause at issue herein.[4]

Following receipt of the December, 1981 document, the plaintiff visited defendant Rijkaart Machine's factory in Holland where further negotiations concerning the plaintiff's equipment needs took place. Upon his return to the United States, Rijkaart Machine sent to plaintiff a second written document similar to the first document. This document also contained the aforementioned clauses which indicated that the "offer" was subject to FME-conditions. Following receipt of this second document, defendant Rijkaart Machine notified plaintiff that the 15% down payment required by the terms of the offer would then be required to ensure that the plaintiff's order would be placed in the defendant's production schedule. On February 18, 1982 the plaintiff's 15% deposit was received by Rijkaart Machine in

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4 The arbitration clause provided that: Any disputes arising from a contract to which the present Conditions of Delivery apply in full or in part, or arising from further agreements proceeding from such contract, shall be settled to the exclusion of the ordinary courts, by a board of arbitration. The board of arbitration shall be appointed in accordance with the Regulations of the "Stichting Raad van Arbitrage voor Metaalnijverheid en -Handel" at the Hague, and shall make its award with due observance of the Regulations of the said Council.

Holland and credited to the plaintiff's account.

On March 4, 1982, defendant Rijkaart Machine sent a document entitled "Confirmation" to the plaintiff. The confirmation again detailed the equipment to be shipped to the plaintiff along with other terms and conditions of the agreement between the parties, including the proviso that plaintiff's order would be subject to the attached FME Conditions. Thereafter, certain adjustments to the agreement took place including the deletion of certain pieces of equipment which were listed in the March confirmation. The parties then proceeded to perform their respective duties under the contract.[5] Following installation of the equipment, disputes arose over its performance which precipitated the filing of a Complaint in this court.[6] The defendants then moved to stay the proceedings and compel arbitration in accordance with the above agreement.

Under the above facts the parties agree that a contract does exist between them. However, the plaintiff argues that the contract as he perceives it does not contain a provision to arbitrate since he never expressly assented to the proviso by signing the contract or otherwise. This argument is unpersua-

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5 Plaintiff paid the entire balance of the purchase price and Rijkaart Machine shipped the pizza line from its plant in Asperen, Netherlands in August, 1982.

6 In his complaint, plaintiff alleges breach of express warranties, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, breach of contract, misrepresentation and negligent misrepresentation, and violations of the Washington State Consumer Protection Act, R.C.W. 19.86 et. seq.

sive. Chapter 2 of the Arbitration Act does not require that a party sign or otherwise expressly assent to the contract containing the arbitration provision. It only requires that a contract exist and that it contain an arbitration provision in writing.[7]

2. "An agreement in writing is defined to include 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'[8] The plain language of this provision leaves no room for doubt that contracts containing arbitration clauses do not have to be signed to be enforceable. An exchange of correspondence will suffice.

2. "Presumably, the Act also requires some showing that the parties intended a contract to arise by their exchange of correspondence. Whether parties intend to contract is a legal question. The Act does not specify applicable law. ~~The plaintiff~~ argues that federal law is to be applied to determine whether a contract has been formed. I disagree. Article II of the Convention provides for the enforceability of a written arbitration agreement in a "contract" or an "arbitration agreement." By its terms the Convention does not apply until the arbitration clause is determined to be part of a contract. Article II does not displace state law on the general principles governing formation

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7 9 U.S.C. § 201, Art. II(1).

8 9 U.S.C. § 201, Art. II(1).

of the contract itself.[9]

Under applicable principles of state law[10] the terms of a contract are determined by applying an objective standard. Simply stated the rule is that if a party's words or acts, judged by reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established. The subjective intent of the parties is irrelevant. Everett v. Estate of Sunstad, 95 Wn. 2d 853, 631 P.2d 366 (1981).

In the case at bar, all descriptions of the equipment to be purchased and all material terms relating to the purchase are found in the offer and confirmation documents sent to ~~the plaintiff~~ on January 26, 1982 and March 4, 1982 respectively. The only difference in terms between the two documents is the addition of installation charges in the confirmation. This addition was the result of an inquiry by ~~the plaintiff~~ on this matter. Following the March 4 confirmation no other material changes in terms were made and the parties performed according to the confirmation. Both the January offer document and the March confirmation document are expressly made subject to the FME

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[9] This conclusion is not inconsistent with prior case law interpreting Chapter 1 of the Federal Arbitration Act (9 U.S.C. § 1 et seq). See e.g. Supak & Sons Mfg. Co., Inc. v. Pervel Industries, Inc., 593 F.2d 135 (4th Cir. 1979). Chapter 1 is expressly made applicable to actions and proceedings brought under Chapter 2 to the extent that that chapter is not in conflict with Chapter 2 or the Convention. 9 U.S.C § 208.

[10] ~~The defendant~~ has represented that as to contract formation issues, there is no significant difference between the law of the State of Washington and Dutch law.

conditions.

The plaintiff admits that "some contract" existed between the parties but does not point to any other oral negotiations or writings which would evidence any agreement other than one based on the terms of the foregoing documents. Based upon this record, I find that the contract did include an agreement to arbitrate. The fact that the plaintiff did not sign any document does not prevent this finding. Thus, the remaining issue is whether the provision regarding arbitration is valid.

The plaintiff argues that it would be unconscionable to enforce the arbitration provision because it was never the subject of negotiations between the parties nor was it specifically pointed out to him. Plaintiff claims that had he known of it, he would not have agreed to such an onerous clause.

The defendant's position is that the plaintiff is foreclosed from raising this in an enforcement proceeding by the terms of the Convention. Article II(3) governs the enforceability of agreements to arbitrate. It provides as follows:

> The Court of a Contracting State, when seized of an action in a matter of respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

This article is not specifically related to Article V which lists several grounds upon which recognition and enforcement of an

award may be refused.[11] Thus, on its face, the Convention appears to require a court to refer a matter to arbitration irrespective of whether a valid defense exists which would eventually prevent enforcement of any award. To avoid this anomalous result, it has been suggested that enforcement of agreements under Article II(3) should be limited to those agreements which will produce awards not subject to attack under Article V.[6] Scherk v. Alberto-Culver, 417 U.S. 506, 530 (1974) (Douglas, J., dissenting) Although I find this to be the more reasoned approach, I do not need to determine whether it is the correct one. Assuming that the plaintiff can avail himself of the public policy defense contained in Article V(2)(b), and further assuming that unconscionable contracts are contracts which contravene the public policy of this country, the plaintiff has failed to establish that it would be unconscionable to enforce this arbitration clause.

The cornerstone of unconscionability under state law is UCC § 2-306.[12] This provision allows the court to refuse to

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11 Plaintiff impliedly invokes the defense enumerated in Article V(2)(b) which indicates that an award may not be enforced if "recognition or enforcement of the award would be contrary to the public policy" of the country where enforcement is sought.

12 Although federal law is applied to determine the enforceability of agreements to arbitrate, (See Atsa of California Inc. v. Continental Ins. Co., 702 F.2d 172 (9th Cir. 1983)) absent a controlling body of federal common law courts have relied on general contract principles including the UCC. See e.g. Spring Hope Rockwool v. Industrial Clean Air, Inc., 504 F. Supp. 1385 (E.D.N.C. 1981).

enforce oppressive contracts or clauses. Analysis focuses on the challenged terms (substantive unconscionability) and the manner in which the terms became part of the contract. (procedural unconscionability). Schroeder v. Fageol Motors, 86 Wn.2d 256, 544 P.2d 20 (1975). These principles are not to be applied mechanically. The harsher the clause, the lesser the showing of procedural unconscionability required. See generally, Id. When determining whether any particular clause is unconscionable, the court must consider all of the circumstances existing at the time of the making of the contract including the general commercial setting in which the contract was made. Id. at 260.

6. In the instant case, Defendants testified that the FME terms themselves are widely used by manufacturers in the Netherlands. The contract containing the arbitration clause was the product of arms length negotiations by experienced (and to a great extent sophisticated) businessmen. This was not a contract of adhesion offered to the plaintiff on a "take it or leave it basis." In fact, the plaintiff was able to negotiate changes in the contract including a 3% discount on the purchase price. As will be addressed below, this is also not a case involving a provision whereby the plaintiff has been effectively precluded from obtaining any relief for his claimed damages. Although it may be true as ~~the plaintiff~~ contends that he was unaware of the clause at the time he executed the contract, it is equally true that ~~the plaintiff~~ did not read all of the terms of the

contract.[13]

7. "Parties, especially commercial parties, are generally held to their contracts whether they have read them or not. Were this not the law, there would be no certainty in contracts. The Official Comments to the Uniform Commercial Code do not refer merely to surprise but to 'unfair surprise.' The plaintiff should be held to those terms of the contract that he knew of or should have known of in the exercise of reasonable diligence.

8. "It must also be noted that the arbitration clause itself has not been shown to be unreasonable or unconscionable in its terms. No argument has been made concerning the availability of appropriate remedies in Holland. Thus, the plaintiff's argument relating to the burden of having to arbitrate in Holland evolves into an argument that requiring arbitration in Holland is inconvenient. In this regard, the arbitration clause is akin to a forum-selection clause and the principles applied in determining whether such clauses should be upheld offer much guidance here.[14] In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Supreme Court rejected the doctrine that a

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[13] The plaintiff testified tht he did not read any of the documents sent to him except to determine what equipment he was going to order. This is in spite of the fact that a letter accompanying the March 4, 1982 confirmation requested that the plaintiff read it carefully to be sure that it accurately reflected the terms of the parties' agreement.

[14] In Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the Court held that an agreement to arbitrate "is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Id. at 519.

forum-selection clause of a contract which was voluntarily adopted by the parties should be ignored 'unless the selected state would provide a more convenient forum than the state in which suit is brought.' Id. at 7. Rather, the Court held that such clauses should control 'absent a strong showing that it should be set aside.' Id. at 15. Addressing itself to the element of inconvenience, the Court in Bremen held:

> [i]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

407 U.S. at 18.

I find that the plaintiff has failed to make the requisite showing of inconvenience. The matter here in controversy concerns a sizeable sum of money.[15] The plaintiff is unlikely to abandon such a claim because of the cost involved of transporting himself and witnesses to Holland. The plaintiff himself recognizes that it would be equally inconvenient and expensive for the defendant to appear and defend this action in the United States.

In my view the plaintiff has failed to advance any legitimate reason why the arbitration clause should not be enforced. At best, he asks this Court to relieve him of the

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[15] In his complaint plaintiff seeks to revoke his acceptance and recover damages in the amount of $471,281.00.

consequences of his own careless conduct and disregard the defendants' legitimate expectations. Such action is unwarranted.

Accordingly, defendants' Motion to Stay Proceedings and Compel Arbitration is GRANTED.

IT IS THEREFORE ORDERED:

1. This action is stayed until further order.

2. The parties shall proceed with arbitration as provided by the contract.

DONE BY THE COURT this 18th day of June, 1985.

Robert J. McNichols
United States District Judge