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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HANNEX CORP.,

Plaintiff,

- against -

GMI, Inc. et alia,

Defendants.

----------X

CV-89-0243

MEMORANDUM AND ORDER

SIFTON, District Judge

Plaintiff, Hannex Corp., brings this action against defendants, GMI, Inc.; GMI Photographic., Inc.; Robert Brockway; Joe Gallen, and Sea & Sea Products, Ltd., a Japanese corporation (hereinafter "Sea & Sea"), seeking relief from defendant Sea & Sea's alleged wrongful termination of what is said to be an exclusive distributorship agreement with plaintiff and appointment of defendant GMI as Sea & Sea's new exclusive distributor. Plaintiff also contends that GMI and defendants Joe Gallen and Robert Brockway, the chairman and president of GMI, conspired with plaintiff's former vice president, Lawrence Salvo, while he was employed by plaintiff to induce Sea & Sea to breach plaintiff's distributorship agreement and to induce Salvo to breach a non-competition agreement between Salvo and the plaintiff.

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The matter is before the Court on Sea & Sea's motions to dismiss, to refer the entire dispute to arbitration, and for a protective order pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 26(c) and Title 9 U.S.C. §206. At the same time, defendant GMI has moved for a stay of all proceedings against it pending the arbitration between plaintiff and Sea & Sea, pursuant to 9 U.S.C. §§3, 201 et seq., and a stay of discovery pending determination of the request for a stay of all proceedings. Plaintiff has moved to compel depositions and document production from both GMI and Sea & Sea and has requested sanctions against GMI for the alleged willful failure and refusal to appear for deposition pursuant to plaintiff's notice. At oral argument on April 25, 1989, the Court denied GMI's motion for a stay of discovery in part, ordering that discovery with respect to Salvo go forward. The Court also directed the defendants GMI, Brockway, and Gallen to produce all documents requested relating to the employee agreement between Hannex and Salvo.

Plaintiff previously applied to this Court for a preliminary injunction. The application was denied in a Memorandum and Order dated March 8, 1989. The procedural

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history of this litigation and undisputed facts are set forth therein and will not be repeated here.[1/] Relevant additional factual matters appearing in the papers submitted on behalf of the parties with respect to the current motions are set forth below.

According to plaintiff's president, Martin Hannes, in 1988 plaintiff earned gross revenues totalling approximately $1,300,000 from its sale of Sea & Sea products. He avers that in 1988 the United States sales of Sea & Sea products accounted for more than 50% of Sea & Sea Japan's sales worldwide. Sales of Sea & Sea products in New York during that time grossed approximately $300,000. According to Hannes, plaintiff has over forty customers in New York including 47th Street Photo, Focus, Jems, Camera Land, Tristate Camera and Willoughbys. To demonstrate that Sea & Sea Japan knew that a significant portion of plaintiff's sales were made in New York, Hannes states that on several occasions Masaoki Yamaguchi, president of Sea & Sea Japan, complained to him about the low prices at which some of plaintiff's New York customers advertised and sold Sea & Sea products.

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Hannex has submitted telephone records reflecting calls by Salvo to Gallen, Brockway, GMI and to GMI's travel agency, all of which were allegedly made without plaintiff's approval. Records obtained from Executive Travel, GMI's travel agency, indicate that Gallen traveled to West Palm Beach County on July, 19, 1988. These same records also indicate that Gallen had made travel arrangements and had arranged to pay for Salvo to travel to Tokyo with him in August 1988, although ultimately Salvo did not take the trip. Throughout August and September of 1988, Salvo repeatedly refused Hannes' requests that Salvo convince Yamaguchi to formalize the extended distribution agreement which the parties had been negotiating.

In the application for a preliminary injunction, plaintiff alleged that Salvo had unlawfully taken from plaintiff's business premises documents belonging to the corporation. Hannes states that he recently learned of missing documents in addition to those which he earlier alleged had been unlawfully taken from the Hannex business premises. Just prior to Salvo's termination by plaintiff, Salvo allegedly requested members of plaintiff's staff to give him computer printouts regarding, inter alia,

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customer names and addresses, analysis of sales representatives performance, budgets, forecasts, and expense reports. Hannex has also discovered that records of outgoing and incoming facsimile transmissions during the preceding one to two year period are missing.

Defendant Sea & Sea has submitted the affidavit of its president, Masaoki Yamaguchi stating that Sea & Sea Japan has never maintained an office, employees, agents, bank accounts or property, real or personal, in the State of New York and that it did not realize any revenues from sales to customers located in New York until after this action commenced. Yamaguchi contends that Sea & Sea Japan has no knowledge regarding the customers of Hannex who purchased the products originally sold by Sea & Sea and shipped to Florida.

Sea & Sea entered into an exclusive distribution agreement with GMI as of January 22, 1989. Yamaguchi states that all negotiations in connection with that agreement were accomplished by facsimile transmissions or in person in Japan and that the agreement was executed in Japan. Sales by Sea & Sea Japan under that agreement were sent F.O.B. Japan.

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Motion to Refer to Arbitration

For the following reasons, the Court finds that Hannex is bound to arbitrate the bulk of its disputes with Sea & Sea Japan pursuant to identical arbitration clauses found in the alleged distributorship agreements that form the basis of this litigation. As a consequence, the Court will dismiss the contract action as against the defendant Sea & Sea Japan and refer the dispute to arbitration before the Japan Commercial Arbitration Association. This Court will retain jurisdiction over the first cause of action which charges that all defendants conspired to, and actually did, interfere with Salvo's employment agreement with Hannex and his fiduciary obligations to that company.

Hannex alleges in its amended complaint that it is the assignee of the rights of Sea & Sea USA under a 1985 distribution agreement executed by Sea & Sea USA and Sea & Sea Japan. Article VIII of that agreement is an arbitration clause providing:

> "All disputes, controversies or differences between the parties hereto arising out of, in relation to, or in connection with this Agreement shall be finally resolved by arbitration under the auspices of the Japanese Arbitration Association in Tokyo, Japan, and both parties agree to be bound by the decision

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> or outcome of such arbitration. The purpose of this provision is to provide a vehicle for the binding resolution of any disputes which may arise hereunder at the minimum delay and cost to the parties, and the minimum disruption of business."

In addition, plaintiff contends that the proposed extended distributorship agreement negotiated in 1988, although never executed by the parties, constitutes an enforceable agreement by virtue of Sea & Sea Japan's conduct and written acceptance of all its terms. Article VIII of each draft of the 1988 agreement contains an arbitration clause identical to the one in the 1985 agreement.

In support of the enforcement of the arbitration agreement, the defendant relies upon provisions of the Federal Arbitration Act, 9 U.S.C. §§2 et seq., and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2571, reprinted following 9 U.S.C. §201. Both Japan and the United States are parties to the convention. The amendments to the United States Arbitration Act, 9 U.S.C. §§201 et seq., were enacted to implement and enforce the convention.

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Article II(1) of the convention requires that each "contracting State shall recognize an agreement in writing" to arbitrate differences between parties. Article II(3) provides:

> "The court of a Contracting State, when seized of an action in a matter in 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."

Once the agreement is found to fall within the terms of the convention, the implementing legislation requires a court to refer to arbitration parties who are subject to the convention. 9 U.S.C. §206.

The convention contemplates a very limited inquiry by courts when considering a motion to compel arbitration:

> "(1) Is there an agreement in writing to arbitrate the subject of the dispute? Convention, Articles II(1), II(2).
>
> (2) Does the agreement provide for arbitration in the territory of a signatory of the Convention? Convention, Articles I(1), I(3); 9 U.S.C. §206; Declaration of the United States upon accession, reprinted in 9 U.S.C.A. at 154 n.29 (1982 Supp.)
>
> (3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? Convention, Article I(3); 9 U.S.C. §202.

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(4) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states? 9 U.S.C. §202."

Ledee v. Ceramiche Ragno, 684 F.2d 184, 185-186 (1st Cir. 1982); Sedco v. Petroleos Mexicanos Mexican Nat. Oil, 767 F.2d 1140, 1144-45 (5th Cir. 1985). If these requirements are met, the convention requires district courts to order arbitration. Under the convention any factual inquiry prior to a court's being required to enforce an arbitration clause is strictly limited. See Convention Art. II; Sedco, supra, at 1149; see also Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1982).

Nothing requires a party who is moving to refer a matter to arbitration pursuant to the convention to file a demand for arbitration with an arbitral tribunal prior to making such motion. Article II(3) clearly states that district courts shall, at the request of a party to an arbitration agreement, refer the parties to arbitration. See McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032, 1057 (3d Cir. 1974). There are no preconditions to the court's duty under section 206 other than those outlined in the four-part test set forth in Ledee. When a written arbitration agreement falls under the convention, the

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court is left with no discretion in its obligation to refer the matter to arbitration. It must recognize the arbitration agreement and refer the parties to the forum which they have selected for resolution of their dispute. See Siderius Inc., v. Compania de Acero del Pacifico, S.A., 453 F. Supp. 22, 25 (S.D.N.Y. 1978); McCreary, supra, at 1057. The discretion vested by section 206 relates only to the designation of a place for arbitration and the appointment of arbitrators when the situation necessitates court action. I.T.A.D. Associates, Inc. v. Podar Bros., 636 F.2d 75, 77 (4th Cir. 1981). As the court noted in Siderius, the absence of any provision for the retention of jurisdiction after referral by the court means that dismissal of the complaint for lack of subject matter jurisdiction is the appropriate remedy under the convention. Siderius, supra, at 25; accord, Astor Chocolate Corp. v. Miknoverk Ltd., No. CV-88-3300, slip op. (E.D.N.Y. 1989).

Furthermore, Sea & Sea Japan has done nothing to demonstrate that it has waived its arbitration rights. From the inception of the litigation in this Court, Sea & Sea Japan has raised the matter of arbitration. No answer has yet been filed. Still, its responsive papers to the

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preliminary injunction motion propounded the argument that the entire dispute must be referred to arbitration. Shortly after this Court denied plaintiff's preliminary injunction application, Sea & Sea filed the present motion. There was no appreciable passage of time between plaintiff's institution of the action and defendant's motion to dismiss under Rule 12(b)(1) and refer the matter to arbitration. It cannot be said that Sea & Sea Japan's actions in requesting the referral have prejudiced the plaintiff. Cf. I.T.A.D. Associates, Inc., supra, at 77.

In the present case, both parties admit the existence of the 1985 distribution agreement between Sea & Sea USA and Sea & Sea Japan. They both acknowledge that the agreement contains an arbitration clause. Hannex asserts that it is the assignee of Sea & Sea USA and that it legally possesses contract rights against Sea & Sea Japan. Hannex also claims rights under the unsigned 1988 draft of an agreement that Hannex had been negotiating between itself and Sea & Sea Japan. At no time has Hannex denied the existence of the arbitration clause contained therein. Unlike the situation in Astor Chocolate, supra, the case upon which defendant relies heavily, the issue of whether an arbitration clause was part of the agreement is not now before the Court.

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Sea & Sea also affirms the existence of the 1985 agreement and the incorporated arbitration clause to which it is a party. Accepting all its terms, the defendant recognizes that Article VIII obligates the arbitration of all disputes, controversies or differences "arising out of, in relation to, or in connection with" that agreement. Hannex, on the other hand, although claiming to be an assignee of the 1985 agreement, desires to avoid the obligation of arbitration.

Section 4 of title 9 of the United States Code provides in pertinent part: "If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof...." The Second Circuit Court of Appeals has held that, where it is claimed that at no time has a contract existed, a trial of this issue would be required before an order could be issued directing the parties to proceed to arbitration. In re Kinoshita & Co., 287 F.2d 951, 953 (2d Cir. 1961), cited in Interocean Shipping Co. v. National Shipping & Trad. Corp., 462 F.2d 673, 676 (2d Cir. 1972). To place the making of an arbitration agreement in issue, however, "an unequivocal denial that the agreement had been made [is]

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needed, and some evidence should have been produced to substantiate the denial." Interocean Shipping, supra, at 676, quoting Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d 625, 628 (2d Cir. 1945).

Neither party here denies that the agreements were made. Although defendant does not believe Hannex may assert rights as an assignee of the agreement, it nowhere makes an unequivocal denial that the agreement containing the relevant clause had been made. Consequently, "neither the making of the arbitration agreement" nor the existence of the contract is in issue. The Court is therefore without power to retain within its jurisdiction any claims touching upon the contracts. 9 U.S.C. §§4, 206. All elements of the four-part test of Ledee are clearly satisfied, including the finding that there is an agreement in writing to arbitrate the disputes.

Defendant is supported by Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967), which states that arbitration clauses are "separable" from the contracts in which they are embedded. There, the Supreme Court found that, if a claim of fraud in the inducement of the arbitration clause itself goes to the making of the agreement to arbitrate, a federal court may proceed to

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adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Id. at 403-404. In Prima Paint, the parties, as here, did not deny the existence of a contract containing an arbitration clause; rather, the petitioner attacked its enforceability. Claims relating to the contract, such as fraud, vagueness, or, as here, invalid assignment, do not place in issue the validity of the arbitration clause itself. See id; Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983), cert. denied, 104 S. Ct. 976 (1984). Since plaintiff's claims here relate to the entire contract and not to the "agreement to arbitrate itself," the Court may not proceed to adjudicate them.

The conclusions of Prima Paint depended in large measure upon the large breadth of the applicable arbitration clause. That the disputes between Sea & Sea Japan and Hannex fall within the scope of the arbitration clause contained in the relevant agreements is confirmed by the fact that the language found in Article VIII could not be broader. Its reach covers claims that the contract is invalid or unenforceable. Cf. Sauer-Getriebe KG, supra. The clause embraces the claims against Sea & Sea

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Japan which are reasonably related to the distribution agreement. The breadth of the clause confirms the Court's obligation to refer all matters touching upon the alleged agreements to arbitration.

The mis-naming of the selected tribunal in the arbitration clause itself does not prevent the Court from referring the parties to arbitration. The arbitration clauses in the alleged 1985 and 1988 agreements grant to the Japan Arbitration Association in Tokyo, Japan, the power to administer any arbitration arising under the clauses. Section 206 empowers a district court to "direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." Whether the contract is ambiguous with regard to the choice of forum is a decision governed by standard contract law principles including examining the intent of the parties in selecting a tribunal. See Bauhinia Corp. v. China Nat. Machinery & Equipment, 819 F.2d 247, 249 (9th Cir. 1987); Astra Footwear Industry v. Harwyn International, Inc., 442 F. Supp. 907 (S.D.N.Y. 1978).

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Since, as defendant points out, there are effectively only two institutions in Japan that administer arbitrations - the Japan Commercial Arbitration Association and the Japan Shipping Exchange - the Court determines that the parties to the agreements clearly intended to select the former and that the clause is not at all ambiguous. The language of the document requires the conclusion that it was the parties' intent to choose the Japan Commercial Arbitration Association as the arbitrator in the event disputes arose that were covered by the clause.

The allegations that Sea & Sea conspired with the other defendants to induce Salvo to breach his fiduciary obligations and restrictive covenant and convert corporate records and trade secrets are, however, matters outside the scope of the arbitration clause and will not be referred to arbitration. In Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 846 (2d Cir. 1987), several additional claims incident to conduct alleging that defendants had conspired with an officer of plaintiff to supply plaintiff with overpriced and damaged goods included Rico fraud, common law conspiracy to destroy plaintiff's business, and tortious interference with the

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employment contract between plaintiff and its officer. Under the applicable clause, all were deemed arbitrable except the claim for tortious interference which was found not to arise under or relate to the sales agreements between plaintiff and defendants. Id. at 856. The claim for tortious interference in Genesco is analogous to the claims described above. These claims are sufficiently distinct from the contracts under which Hannex claims rights to warrant a determination that they fall outside the arbitration clauses.

Personal Jurisdiction

Clearly, Sea & Sea Japan has never done business in this state within the meaning of CPLR §301. Plaintiff can validly claim personal jurisdiction over the Japanese defendant, however, under New York's long-arm statute, CPLR §302. In its decision denying plaintiff's motion for preliminary injunction, the Court previously determined that Hannex had alleged sufficient facts to establish personal jurisdiction satisfying §302(a)(1) and (3). Although defendant's burden of proof is greater on the present motion, the Court concludes that there are sufficient undisputed facts to warrant a finding of personal jurisdiction over Sea & Sea Japan.

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Under §302(a)(1), a non-domiciliary may be subject to personal jurisdiction if he transacts any business within the state or contracts anywhere to supply goods or services in the state. This holds true even if the goods are never shipped or the services are never supplied, so long as the cause of action arose, as here, out of the contract. Alan Lupton Associates v. Northeast Plastics; see 1979 Report of the N.Y. Law Revision Commission, 1979 McKinney's Sessions Laws of N.Y., pp.1450, 1453. In Alan Lupton, the court found personal jurisdiction in a dispute concerning contractual agreements, observing that the "clear import of the terms of the contract indicated that performance was contemplated in New York" because New York was clearly within plaintiff's sales territory and plaintiff was acting as a representative of defendant in soliciting sales of defendant's products.

Sea & Sea argues no personal jurisdiction would have been found in Alan Lupton without the added element that defendant had actually made a single shipment of goods to New York. There is, however, no requirement arising from the relevant case law or the plain language of §302(a)(1) that there be an actual shipment of goods to

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the state pursuant to the contract. Rather, jurisdiction may be satisfied if it is demonstrated that defendant actually knew its goods would be shipped to New York. A determination that the 1985 agreement contemplating performance in New York satisfies the requirements of §§302(a)(1) is reinforced by Hannes' assertion that he and Yamaguchi discussed the distribution of products to certain New York retailers.

Hannex may also obtain personal jurisdiction over Sea & Sea Japan under CPLR §302(a)(3). This section provides for jurisdiction over a foreign corporation where a tortious act was committed without the state causing injury within the state if it

> "(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

In locating the situs of a commercial injury, the place where plaintiff lost business is the most apt standard. American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428 (2d Cir. 1971); Sybron

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v. Wetzel, 413 N.Y.S.2d 127 (1978). Plaintiff has offered evidence that the loss of the distributorship and interference with its relationship with Salvo will cause it to lose New York business and New York customers. According to Hannex, New York customers generated approximately $300,000 in revenues for the plaintiff. Allegations of even unspecified amounts of lost revenue generated in New York could constitute sufficient injury. See Cleopatra Kolique, Inc. v. New High Glass, Inc., 652 F. Supp. 1254, 1257 (E.D.N.Y. 1987). While the Yamaguchi affidavit states that defendant did not realize any revenues from sales to customers in New York State, the Court recognizes that plaintiff's sales in New York were of products it purchased from the defendant and thus are directly related to defendant's revenues.

Furthermore, the evidence thus far submitted demonstrates that Sea & Sea derives substantial revenue from interstate or international commerce. Yet, the defendant resists personal jurisdiction, arguing that New York consequences were not foreseeable from the scope of the Sea & Sea distribution agreement in any degree sufficient to satisfy due process. See World Wide VolksWagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102

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(1987). Mindful of the duty enunciated by the Supreme Court in Asahi requiring that jurisdictional determinations be made with sensitivity to the burdens of United States litigation on foreigners, the Court concludes that the present factual situation is substantially different from one in which a defendant's connection with the forum is so thin and remote as to violate due process.

Again, Hannes avers that he and Yamaguchi on several occasions discussed plaintiff's New York customers. This statement contradicts Yamaguchi's assertion that Sea & Sea Japan has no knowledge regarding the customers of Hannex who purchased the products originally sold by Sea & Sea Japan and shipped to Florida. The Court, resolving all differences in plaintiff's favor, as it must when presented with a motion to dismiss, finds that Hannes' statement along with other evidence presented is sufficient to warrant a preliminary finding of personal jurisdiction over Sea & Sea Japan. Defendant should have reasonably expected its actions to have consequences in the state, given the nature of the alleged distributorship agreements and the conduct of business by the parties.

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GMI's Motion for a Stay of Proceedings

GMI, Brockway, and Gallen are not parties to the distribution agreement, and thus the dispute between plaintiff and these defendants is not controlled by an arbitration agreement. The first three causes of action in the amended complaint assert claims against GMI. The first cause of action asserts a claim against all defendants alleging a conspiracy to tortiously interfere with Salvo's employment contract and convert Hannex' corporate records and trade secrets in order to drive Hannex out of business. Since this claim will not be referred to arbitration or stayed pending arbitration, neither the action as against defendants other than Sea & Sea Japan nor discovery will be stayed with respect to it.

The second cause of action asserts a claim against GMI, Brockway, and Gallen for tortious interference with the 1985 and the proposed 1988 agreements. Plaintiff charges that these defendants induced Sea & Sea to breach the existing 1985 agreement and interfered with the proposed 1988 agreement which plaintiff contends would have been executed but for these defendants' conduct. The third cause of action is a claim against all defendants

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alleging conspiracy to drive Hannex out of business by committing acts in violation of NYGBL §340 and unfair competition laws.

The defendants invoke 9 U.S.C. §3 and the Court's inherent powers as authority for the argument that the action against them should be stayed. A stay of an action vis à vis defendants not party to the arbitration proceeding cannot be sustained under 9 U.S.C. §3 because of the lack of identity of the parties to the two proceedings. Nederlandse Erts-Tanker-Smaatsch Apii, N.V. v. Isbrandtsen Co., 339 F.2d 440 (2d Cir. 1964); see Wren Distributors, Inc. v. Phone-Mate, Inc., 600 F. Supp. 1576 (E.D.N.Y. 1985). Therefore, that section cannot serve as a basis for staying the action against the other defendants.

The Court's power to stay proceedings arises from its inherent power to control the disposition of the cases on its docket with economy of time and effort for itself, counsel, and for litigants. Landis v. North American Co., 299 U.S. 248, 254-55 (1936). This power should be exercised with caution, and only in rare circumstances will a litigant be compelled to stand aside. See id. at 255.

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Although the Court may use its equitable powers to stay the two other causes of action against GMI Brockway, and Gallen, the equities presented require the conclusion that the claims against these three defendants should not be stayed. The claims that they conspired to drive plaintiff out of business and violate NYGBL §340 are independent of the claims of breach of contract against Sea & Sea Japan. There is no extensive factual overlap between the proofs of these issues. The claim that these defendants tortiously interfered with the business relationship between Hannex and Sea & Sea may be resolved in this forum. Awaiting the outcome of the arbitral proceedings would offer no advantage to the resolution of these claims. Since the first cause of action alleging that all defendants induced Salvo to breach his fiduciary obligations and its employment agreement with Hannex will be retained, judicial economy would be hindered rather than promoted if discovery and trial of the charges against defendants other than Sea & Sea were stayed.

In order to obtain a stay of an action pending arbitration, defendants must meet the burden of showing that they will not hinder arbitration, that arbitration

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may be expected to conclude within a reasonable period of time, and that delay will not work undue hardship. Nederlandse, supra, at 442. Defendants have not satisfied the Court that these requirements can be met in a sufficiently persuasive manner to overcome the factors weighing in favor of proceeding with the action in this Court.

Discovery

Plaintiff has moved to compel GMI to appear for deposition within ten days of the issuance of an order and compel all defendants to produce documents previously demanded by plaintiff. Sea & Sea has cross-moved for a protective order. GMI has already been instructed by the Court to proceed with the deposition of Lawrence Salvo pursuant to plaintiff's notice of deposition. In view of the Court's decision to retain one of the plaintiff's causes of action against all defendants and all causes of action as against GMI, Gallen, and Brockway, the stay of any discovery sought from those defendants which relates to these matters is denied.

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Absent subject matter jurisdiction, however, discovery procedures are void. The Court's discovery power cannot be more extensive that the Court's subject matter jurisdiction. United States Catholic Conference Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1989). Accordingly, discovery against Sea & Sea will be permitted only in relation to the claims against it retained by this Court.

Sea & Sea requests that, if discovery of a Japanese resident is permitted, it should go forward in Japan, and Hannex should bear the costs. Hannex has noticed the deposition of Yamaguchi to take place in New York. Since Sea & Sea does not have an office in New York, it argues that the deposition should be taken in Japan. The Court, however, denies Sea & Sea's request to order a change in venue for such depositions. While it is generally true that depositions of a corporate party should be taken at the corporation's principal place of business, the rule is not inflexible. Hannex observes without dispute that Yamaguchi has made frequent trips to the United States in the past and has twice been deposed in the United States before. More to the point is plaintiff's argument that it would be far less expensive

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to have the deponent travel to New York than for all counsel to travel to Japan. Furthermore, the fact that this Court is located in New York provides further support for having the deposition here. See Financial General Bankshares Inc. v. Lance, 80 F.R.D. 22 (D.D.C. 1978). Hannex has offered to bear the expenses for Mr. Yamaguchi to attend deposition in New York.

Finally, Hannex requests that it be awarded monetary sanctions from GMI for its conduct regarding the production of Salvo for deposition pursuant to Rule 37. Hannex believes that GMI's representations to it were misleading and its action in filing the motion, dishonest. However, GMI appears to have in fact proceeded in good faith. GMI's request that the deposition take place within twenty days of the issuance of an order by this Court rather than the ten days suggested by Hannex is granted.

If the arbitration proceedings are not commenced within a reasonable period of time from the date of this order or if the Japan Commercial Arbitration Association determines that it cannot entertain the arbitration of these issues, plaintiff may make an application to this Court to have the matters herein declared arbitrable referred to an arbitration tribunal within this district

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pursuant to 9 U.S.C. §§5, 206, 208. Sections 5 and 206 provide a solution to the problem caused when the arbitrator selected by the parties cannot or will not perform. See Astra Footwear, supra; see also Bauhinia Corp., supra.

In sum defendant Sea & Sea Japan's motion to compel arbitration is granted, and its motions to dismiss and for a protective order are denied, except as to matters deemed arbitrable in this opinion. All motions to stay discovery are denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York
June 15, 1989

United States District Judge

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FOOTNOTES

1 The Hannes affidavit corrects earlier representations made to the Court that plaintiff corporation was formed in July 1987. Hannes now states that Hannex was formed June 18, 1987, the date of incorporation on file with the Florida Secretary of State.

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