1ST CASE of Level 1 printed in FULL format.

SMG SWEDISH MACHINE GROUP, INC., and ROBERT W. SCHOOLEY, Plaintiffs, v. SWEDISH MACHINE GROUP, INC.; SMG SWEDISH MACHINE GROUP AB; SMT SAJO AB; INDUSTRIES AB; MUNKSJO AB; MELLANFOND; SYDFONDEN; and PROCORDIA AB, Defendants

No. 90 C 6081

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1991 U.S. Dist. LEXIS 780

January 4, 1991, Decided
January 22, 1991, Docketed

JUDGES: [*1]

Ilana Diamond Rovner, United States District Judge.

OPINIONBY: ROVNER

OPINION: MEMORANDUM OPINION AND ORDER

This is a complex commercial case involving claims of interference with contractual relations and defamation. Plaintiffs are an Illinois corporation and its sole stockholder. Defendants are various American and Swedish subsidiaries of the plaintiff and related entities. The case was originally filed in state court, and defendants removed it to federal court. Various defendants have filed a motion to dismiss and a motion to compel arbitration and to dismiss or stay the case pending arbitration. The parties have agreed that briefing on the motion to dismiss may be postponed pending resolution of the motion to compel arbitration. For the reasons described below, the Court finds that 9 U.S.C. § 4 requires it to hold a hearing on the arbitration issue.

The disputed arbitration clause is found in an Agency Agreement executed on January 25, 1989 between plaintiff n1 and defendant SAJO-SMT AB ("SAJO-SMT"). Pursuant to that Agreement, plaintiff was named the exclusive agent for SAJO-SMT within a specified territory. Section 17.1 of the Agreement provides:

Governing Laws

This agreement shall [*2] be governed in accordance with Swedish Law. The arbitration proceedings shall be conducted in the English Language and shall take place in London in accordance with the Rules of Conciliation and arbitration of the International Chamber of Commerce.

There are two other agreements which may be relevant. The first, a Litigation Agreement executed January 25, 1989, between plaintiff and defendant SMG Swedish Machine Group AB ("SMG AB"), provides for SMG AB to "bear all financial responsibility for legal, court, or other litigation expenses" and that plaintiff might incur, and hold plaintiff "harmless from any claims, judgments[,] settlements or arbitration awards which might be levied against plaintiff, as a result of any SAJO-SMT business activities which occurred prior to December 31, 1988. The Litigation Agreement further provides that it "shall

be governed in accordance with the laws of the state of Illinois."

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n1 Although SMG Swedish Machine Group, Inc. and its stockholder, Robert W. Schooley, are both listed as plaintiffs in the case caption, the complaint itself describes the allegations as being made only by SMG Swedish Machine Group, Inc. For the sake of simplicity, the Court shall treat the case at this time as if only SMG Swedish Machine Group, Inc. is a plaintiff, and will leave for a later date the issue of whether Schooley is a party in this action.

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The second agreement is a Memorandum of Agreement dated May 2, 1990, between plaintiff and SMT-SAJO. The Memorandum of Agreement address pricing and production issues, and it is silent as to choice of law and arbitration.

The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and its provisions have been effected in the United States through Chapter Two of the Federal Arbitration Act, 9 U.S.C. §§ 201 et seq. When faced with an issue of arbitrability pursuant to the Convention, a court must ask five questions:

(1) Is there a written arbitration agreement?

(2) Does the arbitration agreement applicable to the subject of the dispute?

(3) Does the arbitration agreement provide for arbitration in the territory of a Convention signatory?

(4) Does the agreement to arbitrate arise out of a commercial legal relationship?

(5) Is a party to the agreement not an American citizen, or does the commercial relationship have a reasonable relation to a foreign state?

See Sedco v. Petroleos Mexicanos Mexican National Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985); Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982); [*4] Marchetto v. Dekalb Genetics Corp., 711 F.Supp. 936, 939 (N.D. Ill. 1989). n2 Arbitration is compelled when the court reaches an affirmative answer to each of these questions.

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n2 The cited cases refer only to four factors because they combine the first and second questions into a single question.

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In this case, the only issue raised by the motion to compel arbitration is the first one -- whether there is a written arbitration agreement. Before proceeding to examine this particular case, there is the preliminary task of defining what qualifies as an arbitration agreement. Domestic law recognizes two types of arbitration agreements -- permissive and mandatory. A court will

compel arbitration only where the parties have agreed to mandatory arbitration. See, e.g., Local Union 204, IBEW v. Iowa Electric Light and Power Co., 668 F.2d 413, 419 (8th Cir. 1982); Challenger v. Local Union No. 1, 619 F.2d 645 (7th Cir. 1980). See also AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, [*5] 106 S.Ct. 1415, 1418 (1986) (a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"). n3

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n3 See also Groves v. Ring Screw Works, 111 S.Ct. 498, 502 (1990) ("a presumption favoring access to a judicial forum is overcome whenever the parties have agreed upon a different method for the adjustment of their disputes").

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The Convention does not expressly recognize this distinction. Article II.1 of the Convention provides that its signatories shall recognize "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them . . . concerning a subject matter capable of settlement by arbitration." Article II.3 provides for judicial enforcement of such an agreement to arbitrate. The majority of the Convention addresses enforcement of arbitral awards, and in that context it makes sense to consider Article II.1 as describing both mandatory and permissive arbitration. It would not make sense, [*6] however, to interpret Article II.1 in such a way when it is used to define those agreements which are subject to judicial enforcement of the agreement; an order compelling arbitration should logically issue only where the arbitration agreement is mandatory, as is the case in domestic law. See Jamaica Commodity Trading Co. v. Connell Rice & Sugar Co., No. 85 C 1210-CSH, 1985 WL 1423 (S.D.N.Y. May 14, 1985) (party seeking to compel arbitration pursuant to Convention must prove existence of agreement which "obligates" opponent to arbitrate; court would not compel arbitration where agreement was optional rather than mandatory); Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Construction Co., 598 F.Supp. 754, 757 (S.D.N.Y. 1984) (rejecting defense that arbitration agreement was optional; it was mandatory, so court would stay proceedings pending arbitration pursuant to Convention).

In this case, accordingly, the Court must determine whether, pursuant to Swedish law, section 17.1 of the Agency Agreement is a mandatory arbitration agreement. In determining foreign law, the court "may consider any relevant material or source, including testimony, whether or not submitted by a [*7] party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. See also United States v. First National Bank of Chicago, 699 F.2d 341, 344 (7th Cir. 1983).

Written or oral expert testimony accompanied by extracts from foreign legal materials probably will continue to be the basic mode of proving foreign law. An expert witness is not required to meet any special qualifications. Indeed he need not even be admitted to practice in the country whose law is in issue. It is not surprising, therefore, that federal courts have not felt bound by the testimony of experts and upon occasion have placed little or no credence in their opinions. The courts expect adequate expert testimony on foreign law and the failure to produce it may damage a litigant's case.

9 Wright & Miller, Federal Practice and Procedure § 2444 at 406-[illegible]

Unfortunately, the parties in this case have not provided much assistance in determining the effect of the agreement under Swedish law. Defendants filed their motion to compel arbitration on November 8, 1990. In support of their contention that Section 17.1 is a mandatory arbitration provision, defendants submitted the affidavit of Bo Nilsson. [*8] In that affidavit, Nilsson opined that Swedish courts would construe Section 17.1 as a mandatory arbitration provision and would require all disputes pertaining to the Agency Agreement to be submitted to arbitration. Nilsson did not, however, provide any basis for this opinion or attach any extracts from Swedish legal materials.

In their response, plaintiffs correctly pointed out that Nilsson's affidavit provided no support for defendants' argument. Plaintiffs, however, did not provide any authority for a contrary interpretation of Swedish law.

At this point -- before the due date which had been set for defendants' reply brief -- the Court reviewed the briefs and determined that more authority would be necessary on the Swedish law issue. The Court entered the following minute order on November 30, 1990:

Neither brief which the Court has thus far received on the arbitration issue provides any particularized basis for the Court to determine the effect of the arbitration provision under Swedish law. Accordingly, the Court directs defendants to provide such a basis in their reply brief. Plaintiff is allowed to file a surreply by December 7, 1990.

In connection with their reply brief, [*9] defendants then filed a supplemental affidavit by Nilsson. In this affidavit, Nilsson again provides little help in determining why Section 17.1 should be interpreted as a mandatory arbitration agreement, stating simply:

I am quite confident that [the provisions of Section 17.1] would suffice to convince a Swedish court of law that the parties intended to provide for disputes between them to be settled by arbitration in London under the ICC Rules; I am in fact unable to imagine what reasonable meaning could otherwise be given to the second sentence of paragraph 17.1. Also, in my experience the vast majority of commercial contracts concluded by Swedish parties do provide for arbitration as the conflict resolution mechanism. n4

(Nilsson Supplemental Aff. para. 3.) Nilsson then concluded that an agreement to arbitrate constitutes a bar to the jurisdiction of the courts even if the agreement does not expressly state that arbitration is mandatory. In support of this conclusion, Nilsson cites Section 3 of the Swedish Arbitration Act, which he translates as follows:

If, after a request has been made for the application of an arbitration agreement, that request is rejected by a party, [*10] or a party fails in his duty to appoint an arbitrator, and the other party prefers to bring the dispute before a court of law rather than insist on an arbitration award, then the arbitration agreement shall be no bar to the jurisdiction of the court over the dispute.

(Id.) The Court finds nothing in this provision which supports Nilsson's conclusion; indeed, the provision assumes the existence of an arbitration agreement, and it has not yet been determined here that such an agreement exists.

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n4 This last sentence, of course, does not support defendants' argument; if express mandatory arbitration clauses are routinely included in Swedish contracts, the omission of such a clause here may indicate an intent that arbitration was not meant to be mandatory.

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Plaintiffs submitted as their surreply the affidavit of Annette Gustafsson, who opined that Section 17.1 is not a mandatory arbitration agreement. In support of this conclusion, Gustafsson relied on several Swedish principles of contract interpretation, including [*11] the necessity of examining the subjective intent of the parties, that unclear terms are resolved against the interests of the drafter, that unclear terms are resolved against the interests of the party responsible for the lack of clarity, that the court should account for the relative strengths of the parties, and that the court should consider the history of the negotiations. Gustafsson concluded that:

The second sentence of [Section 17.1] does not in a sufficiently clear way, state the intentions of the parties. First of all, it does not specifically state whether all disputes between the parties, and arising under the Agreement, shall be resolved through arbitration. Second, it does not specifically preclude litigation proceedings within the conventional court system, in that it does not state that arbitration shall be the exclusive means of resolving disputes. Further, there is not a specific phrase, stating that disputes are to be submitted to arbitration. It merely says that it shall be conducted in the English language. Based on the unclearness of what actually was intended by both parties, I do not agree with Mr. Nilsson's opinion that, as a matter of law, a Swedish [*12] court would construe paragraph 17.1 of the Agency Agreement as mandatory and as requiring arbitration of all disputes arising under or relating to the Agency Agreement. Rather, it is my opinion, that a court very likely could find the above clause insufficient and unclear and that it therefore could interpret it and the parties' intention, using the, in Swedish law, generally accept interpretation rules . . . .

(Gustafsson Aff. para. 5.) Gustafsson also stated that "the Supreme Court of Sweden has continuously held that parties' intent to submit to arbitration proceedings must be 'unmistakably clear', to be binding upon the parties (NJA p. 573)." (Id. para. 6.) Gustafsson further cited the Swedish court in "Hovratten for Vastra Sverige, malnr o 476/81, 102:82" as finding that in order for a party to be denied its right to have a dispute litigated in court, a contrary intent must be clearly stated. (Id. para. 7.)

Upon receiving plaintiffs' surreply, defendants sought and obtained permission to file yet another brief, which was accompanied by a third affidavit by Nilsson. Nilsson disputed the relevance of the cases cited by Gustafsson, but again offered little support for [*13] his own conclusion other than his opinion that the "most natural way to understand the language" of Section 17.1 is to interpret it as requiring that all disputes be submitted to arbitration. Nilsson also stated that it is standard practice in international trade to treat cursory references to arbitration as mandatory arbitration agreements.

On the whole, the parties' submissions provide little guidance to the Court in determining the effect of Section 17.1 under Swedish law. Neither party has submitted any authoritative source of Swedish law which resolves the issue. Defendants' argument is essentially that a mandatory arbitration agreement must be inferred from the other references to arbitration, because any other interpretation would render those references meaningless. Plaintiffs argue that an agreement to arbitrate must be clear, and that nowhere have they expressly agreed to submit all disputes to arbitration.

In most international cases in which a court has compelled arbitration or dismissed or stayed a case pending arbitration, the agreement for mandatory arbitration has been explicit. See, e.g., In re Hops Antitrust Litigation, 655 F.Supp. 169, 170 (E.D. Mo.) (parties [*14] agreed that "any dispute arising out of or relating to this agreement, including its interpretation, validity, scope and enforcement, shall be resolved exclusively and finally by arbitration, to be held in Munich, Germany), appeal dismissed, 832 F.2d 470 (8th Cir. 1987); Eastern Europe, Inc. v. Transport-maschinen, Export-Import, Inc., 658 F.Supp. 612, 613 (S.D.N.Y. 1987) (parties agreed that "all conflicts in connection with or arising from this contract will be settled by the Arbitration Court in Geneva-Switzerland or by the competent Court an [sic] the main place of business of defendant, according to choice of the complaining party"); Al-Salamah Arabian Agencies Co. v. Reece, 673 F.Supp. 748, 749 (M.D.N.C. 1987) (parties agreed that all disputes arising under contract "shall be referred to arbitration in Riyadh in accordance with the Saudi Arabian Arbitration Regulations"). n5

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n5 Even very broad express mandatory arbitration agreements do not necessarily apply to all disputes which may arise between the parties; the language of even a comprehensive arbitration provision is important in determining which disputes shall be submitted to arbitration. See, e.g., Washburn v. Societe Commerciale de Reassurance, 831 F.2d 149, 150-51 (7th Cir. 1987) (parties agreed that "[s]hould any difference of opinion arise between the Reinsurer and [Reserve] which cannot be resolved in the normal course of business with respect to the interpretation of this Agreement or the performance of the respective obligations of the parties under this Agreement, the difference shall be submitted to arbitration;" court found that this provision did not apply to RICO lawsuit alleging multifaceted scheme to defraud in which conspirators used the agreement along with several other agreements and devices); Phoenix Mutual Life Insurance v. North American Co. for Life and Health Insurance, 661 F.Supp. 751 (N.D. Ill. 1987) (parties agreed that "[a]ll disputes and differences upon which an amicable understanding cannot be reached are to be decided by arbitration;" court determined that arbitration provision did not apply to dispute concerning disqualification of law firm). One difficulty which would arise from finding that an arbitration agreement exists in this case is that there is no language which would allow the court to determine which disputes between the parties are subject to arbitration.

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The Court has found no case, nor have the parties cited one, which addresses the effect of an agreement which includes references to arbitration procedures but provides no guidance as to the circumstances in which arbitration [illegible] proceed. After reviewing the parties' submissions, the Court finds that "the

making of the arbitration agreement . . . [is] in issue," and that the Court must therefore "proceed summarily to the trial thereof." 9 U.S.C. § 4. See Tehran-Berkeley Civil and Environmental Engineers v. Tippetts-Abbett-McCarthy-Stratton, 816 F.2d 864 (2d Cir. 1987). Pursuant to basic principles of contract law, the parties may introduce at the hearing extrinsic evidence concerning the intent of the parties. See LaSalle National Bank v. Service Merchandise Co., 827 F.2d 74, 78 (7th Cir. 1987). n6

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n6 If, after the hearing, evidence concerning Swedish law remains inconclusive, the Court may presume that Swedish law is the same as domestic law on this issue. Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464, 468 n.5 (5th Cir. 1966) ("in the absence of sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied"), cert. denied, 387 U.S. 908, 87 S.Ct. 1690 (1967). See also McNall v. Tatham, 676 F.Supp. 987, 990 (C.D. Cal. 1987).

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