1ST CASE of Level 1 printed in FULL format.

DAIHATSU MOTOR CO., INC., Plaintiff, v. TERRAIN VEHICLES, INC., a Delaware corporation, Defendant.

No. 92 C 1589

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

1992 U.S. Dist. LEXIS 7804

May 29, 1992, Decided
June 1, 1992, Docketed

JUDGES: [*1] Hart

OPINIONBY: WILLIAM T. HART

OPINION: MEMORANDUM OPINION AND ORDER

In 1983, plaintiff Daihatsu Motor Co., Ltd. ("Daihatsu") entered into a distributorship agreement with defendant Terrain Vehicles, Inc. ("Terrain"). During a three-year period ending December 31, 1986, Terrain was to distribute in a 15-state region certain off-road vehicles manufactured by Daihatsu. The contract between the parties included the following arbitration provision:

Any dispute, controversy or difference which may arise among the parties hereto, out of or in relation to or in connection with this Agreement or for the breach thereof which cannot be settled amicably shall be finally settled by arbitration. If the defendant in such dispute, controversy or difference is the DISTRIBUTOR [Terrain] and/or IMPORTER, the arbitration shall take place at the American Arbitration Association in New York in accordance with the rules of procedure of the said Association, by which each party hereto shall be bound. If the defendant in such dispute, controversy or difference is the MANUFACTURER [Daihatsu] and/or EXPORTER, the arbitration shall take place at the Japan Commercial Arbitration Association in Osaka in accordance [*2] with the Commercial Arbitration Rules of said Association, by which each party hereto shall be bound.

In 1986, Terrain filed suit against Daihatsu alleging violation of various state motor vehicle franchise acts, violations of the Racketeer Influenced and Corrupt Organizations Act, breach of contract, fraud, and various other claims relating to the distributorship. On December 29, 1986, that case was dismissed and the parties were ordered to proceed to arbitration before the Japan Commercial Arbitration Association in Osaka, Japan, Daihatsu being the defendant against whom the claims were made. See Terrain Vehicles, Inc. v. Daihatsu Motor Co., No. 86 C 8696 (N.D. Ill. Dec. 29, 1986).

On January 23, 1992, the Arbitration Tribunal issued the following award: n1

1. The Claimant's claims shall be dismissed with prejudice.

2. Regarding the arbitration expenses, etc., the arbitration fee shall be borne by the Claimant, and the arbitration expenses and the remuneration [illegible] Arbitrators shall be divided into two equal parts and borne by the Claimant

and the respondent equally.

Arb. Dec. at 4.

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n1 The arbitration decision was issued in Japanese. An English translation is attached to plaintiff's complaint and defendant does not dispute the accuracy of the translation. Any citations to the arbitration decision are to the English translation that is Exhibit 3(B) of plaintiff's complaint and will be cited as "Arb. Dec."

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[*3]

On March 3, Daihatsu filed the present action seeking confirmation of the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") of which the United States is a signatory. See 9 U.S.C. §§ 201-08. n2 This court has jurisdiction over such a claim regardless of the amount in controversy. Id. § 203. Presently pending is plaintiff's motion to confirm the arbitration award and defendant's motion for judgment on the pleadings denying confirmation. Defendant contends the award cannot be confirmed because the distributorship agreement contains no provision for confirming the award.

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n2 The text of the Convention is reproduced as a note to 9 U.S.C.A. § 201.

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Chapter 1 of Title 9 contains the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1-16. The Convention, as incorporated into Chapter 2 of Title 9, 9 U.S.C. §§ 201-08, includes the following provisions:

§ 207. Within three years after an arbitral award falling under the Convention is made, any party [*4] to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C. §§ 207-08. n3

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n3 The grounds for refusing to recognize or enforce an arbitration award that are referred to in § 207 are contained in Article V of the Convention. Defendant does not contend that any of these grounds apply to this case.

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Chapter 1 includes the following provision which, if not in conflict with Chapter 2 or the Convention, applies to the present proceeding under the Convention.

If the parties in their agreement have agreed that a judgment of the court shall be entered [*5] upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . . .

9 U.S.C. § 9.

While the Convention contains a provision regarding certain documents that must be filed in a proceeding to enforce or recognize an arbitration award, it generally incorporates the procedural arbitration law of the locale in which enforcement is sought.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition [*6] or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
(a) The duly authenticated original award or a duly certified copy thereof;
(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for the recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Convention Art. III-IV. Thus, consistent with the Convention, United States courts should apply the same procedural rules for enforcing foreign arbitration awards that it applies in enforcing domestic arbitration awards.

Section 9 is not inconsistent with the Convention. The question is whether it is inconsistent with Chapter [*7] 2. The venue and time provisions of § 9 are inconsistent with § 207 and § 204 respectively. The

pertinent to the present case, however, is whether § 9's requirement that the parties agree to entry of judgment on the award as a prerequisite to obtaining confirmation of the award is inconsistent with § 207 providing: "any party to the arbitration may apply . . . for an order confirming the award."

Section 9 also contains the identical phrase that is quoted from § 207. In § 9, however, it is preceded by the phrase: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award While that is an additional limitation not otherwise included in Chapter 2 (except as incorporated by § 208), it is not contrary to any express provision of Chapter 2. One purpose of this limitation would appear to be to limit enforcement of arbitration awards to situations where the parties have agreed the arbitration will be binding. Cf. Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1272 (7th Cir. 1976). If the § 9 limitation were construed as not being applicable to Chapter 2 proceedings, then any party to a nonbinding [*8] arbitration clause could seek confirmation of an arbitration decision under such a clause because that party would be "any party to the arbitration" as required by § 207. It is held that the § 9 requirement that the parties agree to have an arbitration award confirmed by a court as a prerequisite to confirmation, is incorporated into Chapter 2 by § 208. n4

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n4 Even if this requirement of § 9 is not incorporated into Chapter 2, the result in the present case would be the same since, as discussed below, this requirement of § 9 is satisfied. Cf. Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc., 418 F. Supp. 982, 985 (E.D. Mich. 1976).

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The Seventh Circuit has held that § 9 can be satisfied even if the contract contains no express language authorizing the entry of judgment. Commonwealth Edison, 541 F.2d at 1273; Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 389 (7th Cir.), cert. denied, 454 U.S. 838 (1981). [*9] Language that the decision of the arbitrator "shall be final and binding upon both parties" has been found to be sufficient to imply consent to entry of judgment on an arbitration award. Milwaukee Typographical, 639 F.2d at 389-90. The clause in the present case states that the designated disputes "shall be finally settled by arbitration." Language that a dispute will be "settled" by arbitration is not, by itself, sufficient. See Oklahoma City Associates v. Wal-Mart Stores, Inc., 923 F.2d 791, 794 (10th Cir. 1991); Varley v. Tarrytown Associates, Inc., 477 F.2d 208, 210 (2d Cir. 1973). Use of the word "final," however, is generally sufficient. See I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 426-27 (2d Cir. 1974). "Whatever 'final' means, it at least expresses the intent of the parties that the issues joined and resolved in the arbitration may not be tried de novo in any court, state or federal." Id. at 427. That arbitration in this case was to "finally settle" the parties dispute satisfies the requirement that the parties agree a court can enter judgment [*10] on the arbitral award. n5

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n5 Defendant cites Higgins v. United States Postal Service, 655 F. Supp. 739, 742-44 (D. Me. 1987), in support of its argument that the arbitration language must be more explicit to satisfy § 9. That case, however, declined to follow

Milwaukee Typographical, a Seventh Circuit case, This court is bound to follow the decisions of the Seventh Circuit.

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Defendant's contention that the arbitral award cannot be enforced in this court, because it has already been filed in a court in Japan, is without merit. See Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 518-19 (2d Cir. 1975); Oriental Commercial & Shipping Co. v. Rosseel, N.V., 769 F. Supp. 514, 516-17 (S.D.N.Y. 1991).

IT IS THEREFORE ORDERED that defendant's motion for judgment on the pleadings is denied and plaintiff's motion to confirm arbitral award is granted. The Clerk of the Court is directed to enter judgment in favor of plaintiff Daihatsu Motor Co., Inc. and against defendant [*11] Terrain Vehicles, Inc. confirming the arbitration award dated January 23, 1992 in Japanese Commercial Arbitration Association Case No. 87-001-Osaka Arbitration, thereby dismissing with prejudice all the claims made by Terrain Vehicles, Inc. in that arbitration proceeding.

ENTER:

William T. Hart

UNITED STATES DISTRICT JUDGE

Dated: MAY 29, 1992

INTERNATIONAL ARBITRATION REPORT

July 1992 Vol. 7, #7

Judge A.J. McNamara refused the request, commenting, "The liberal federal policy pointed out in the decision favoring arbitration agreements requires that this matter be arbitrated. The McCarran Ferguson Act does not apply to defeat the application of the Convention enforcing arbitration. Furthermore, McDermott is not entitled to a trial on whether or not there was an agreement between the parties to arbitrate. The arbitration provision is clearly in the policy. There is no genuine issue as to that material fact."

The jurist continued that "the two parties to this contract of insurance are sophisticated players in international commerce. Their agreement clearly and unambiguously contains an arbitration clause. Each party signed the agreement. They must abide by that agreement."

'FINALLY SETTLED' ARBITRAL AWARD CONFIRMED UNDER CONVENTION

CHICAGO — A contractual clause stating that disputes "shall be finally settled by arbitration" suffices to empower a court to enforce an arbitral award, U.S. District Judge William T. Hart has ruled in granting a plaintiff's motion for confirmation (Daihatsu Motor Co. Inc. v. Terrain Vehicles Inc., No. 92 C 1589, N.D. Ill.).

Daihatsu Motor Co. Inc. filed its motion in March 1992 asking the district court to confirm an award issued by the Japan Commercial Arbitration Association (JCAA). The JCAA dismissed claims asserted by Terrain Vehicles Inc. against Daihatsu and directed the claimant to pay the arbitration fee and both parties to divide expenses.

Daihatsu sought confirmation under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Terrain filed its own motion asking the court to deny confirmation on the grounds that, although the distributorship agreement into which the parties entered in 1983 included the arbitration provision exercised by the JCAA, it did not provide for confirmation.

Questions Of Linguistic Construction

In a May 29 opinion, Judge Hart concentrated his inquiry on Chapter 1 of Title 9 U.S.C. at 9, laying out the requirements for a court to enforce an arbitral award, and Chapter 2 of Title 9 U.S.C. at 201-208, incorporating the Convention.

The first question, according to the judge, was whether Chapter 1 at 9 is consistent with Chapter 2. Chapter 2 at 208 stipulates that Chapter 1 applies only if it does not conflict with Chapter 2 or the Convention.

Both Chapter 1 at 9 and Chapter 2 at 207 provide for confirmation procedure. Chapter 2 at 207 reads in part: "Any party to the arbitration may apply . . . for an order confirming the award." Chapter 1 at 9 reiterates this phrase, but limits it with the addition of a preceding conditional, so that it reads: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . , [only then may] any party . . . apply for an order.

Judge Hart found this additional limitation "not contrary to any provision of Chapter 2." He also denied the relevance of differences in time limits and venues provided by the two chapters in question.

Yet unanswered was whether the requirements of Chapter 1 had been satisfied. Judge Hart wrote, "[A] purpose of the limitation would appear to be to limit enforcement of arbitration awards to situations where the parties have agreed the arbitration will be binding." Referring to the opinion of the Seventh Circuit in Milwaukee Typographical Union No. 23 v. Newspapers Inc. (639 F.2d 386, 389 [7th Cir.], cert. denied, 454 U.S. 838 [1981]), the judge noted that "language that the decision of the arbitrator 'shall be final and binding' has been found to be sufficient to imply consent to entry of judgment on an arbitration award."

Observing next that "the clause in the present case states that disputes 'shall be finally settled by arbitration,'" Judge Hart found the phrase "finally settled" sufficient.

Finally, the judge dismissed as "without merit" Terrain's argument that the arbitral award cannot be enforced in his court because it has already been filed in a court in Japan.

Judge Hart directed the court clerk to confirm the JCAA award.

U.S. AND A UNIFIED GERMANY REACH AGREEMENT FOR PROPERTY TAKEN

The Federal Republic of Germany (FRG) has agreed to pay the United States up to $190 million compensation for property claims filed by U.S. citizens against the former German Democratic Republic (GDR).

The May 13 agreement covers claims which were adjudicated by the United States Justice Department's Foreign Claims Settlement Commission (FCSC) under its GDR claims program for property taken before Oct. 18, 1976.

Under the agreement, claimants will receive the full amount claimed plus interest calculated at 3 percent annually since the property was taken.

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In 1986, Terrain filed suit against Daihatsu alleging violation of various state motor vehicle franchise acts, violations of the Racketeer Influenced and Corrupt Organizations Act, breach of contract, fraud, and various other claims relating to the distributorship. On December 29, 1986, that case was dismissed and the parties were ordered to proceed to arbitration before the Japan Commercial Arbitration Association in Osaka, Japan, Daihatsu being the defendant against whom the claims were made. See Terrain Vehicles, Inc. v. Daihatsu Motor Co., No. 86 C 8696 (N.D. Ill. Dec. 29, 1986).

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1. The Claimant's claims shall be dismissed with prejudice.

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and the respondent equally.

Arb. Dec. at 4.

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§ 207. Within three years after an arbitral award falling under the Convention is made, any party [*4] to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C. §§ 207-08. n3

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While the Convention contains a provision regarding certain documents that must be filed in a proceeding to enforce or recognize an arbitration award, it generally incorporates the procedural arbitration law of the locale in which enforcement is sought.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition [*6] or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
(a) The duly authenticated original award or a duly certified copy thereof;
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pertinent to the present case, however, is whether § 9's requirement that the parties agree to entry of judgment on the award as a prerequisite to obtaining confirmation of the award is inconsistent with § 207 providing: "any party to the arbitration may apply . . . for an order confirming the award."

Section 9 also contains the identical phrase that is quoted from § 207. In § 9, however, it is preceded by the phrase: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award While that is an additional limitation not otherwise included in Chapter 2 (except as incorporated by § 208), it is not contrary to any express provision of Chapter 2. One purpose of this limitation would appear to be to limit enforcement of arbitration awards to situations where the parties have agreed the arbitration will be binding. Cf. Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1272 (7th Cir. 1976). If the § 9 limitation were construed as not being applicable to Chapter 2 proceedings, then any party to a nonbinding [*8] arbitration clause could seek confirmation of an arbitration decision under such a clause because that party would be "any party to the arbitration" as required by § 207. It is held that the § 9 requirement, that the parties agree to have an arbitration award confirmed by a court as a prerequisite to confirmation, is incorporated into Chapter 2 by § 208. n4

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UNITED STATES DISTRICT JUDGE

Dated: MAY 29, 1992

INTERNATIONAL
ARBITRATION REPORT

July 1992 Vol. 7, #7

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INTERNATIONAL
ARBITRATION REPORT

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Both Chapter 1 at 9 and Chapter 2 at 207 provide for confirmation procedure. Chapter 2 at 207 reads in part: "Any party to the arbitration may apply . . . for an order confirming the award." Chapter 1 at 9 reiterates this phrase, but limits it with the addition of a preceding conditional, so that it reads: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . , [only then may] any party . . . apply for an order.

Judge Hart found this additional limitation "not contrary to any provision of Chapter 2." He also denied the relevance of differences in time limits and venues provided by the two chapters in question.

Yet unanswered was whether the requirements of Chapter 1 had been satisfied. Judge Hart wrote, "[A] purpose of the limitation would appear to be to limit enforcement of arbitration awards to situations where the parties have agreed the arbitration will be binding." Referring to the opinion of the Seventh Circuit in Milwaukee Typographical Union No. 23 v. Newspapers Inc. (639 F.2d 386, 389 [7th Cir.], cert. denied, 454 U.S. 838 [1981]), the judge noted that "language that the decision of the arbitrator 'shall be final and binding' has been found to be sufficient to imply consent to entry of judgment on an arbitration award."

Observing next that "the clause in the present case states that disputes 'shall be finally settled by arbitration,'" Judge Hart found the phrase "finally settled" sufficient.

Finally, the judge dismissed as "without merit" Terrain's argument that the arbitral award cannot be enforced in his court because it has already been filed in a court in Japan.

Judge Hart directed the court clerk to confirm the JCAA award.

U.S. AND A UNIFIED GERMANY REACH AGREEMENT FOR PROPERTY TAKEN

The Federal Republic of Germany (FRG) has agreed to pay the United States up to $190 million compensation for property claims filed by U.S. citizens against the former German Democratic Republic (GDR).

The May 13 agreement covers claims which were adjudicated by the United States Justice Department's Foreign Claims Settlement Commission (FCSC) under its GDR claims program for property taken before Oct. 18, 1976.

Under the agreement, claimants will receive the full amount claimed plus interest calculated at 3 percent annually since the property was taken.